

**CHALLENGES TO EMPLOYER
EFFORTS TO PRESERVE
RETIREE HEALTH CARE
BENEFITS**

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE
RELATIONS

OF THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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CHALLENGES TO EMPLOYER EFFORTS TO PRESERVE RETIREE HEALTH CARE BENEFITS

Thursday, April 28, 2005
U.S. House of Representatives
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
Washington, DC

The Subcommittee met, pursuant to notice, at 10:30 a.m., in room 2175 Rayburn House Office Building, Hon. Sam Johnson [Chairman of the Subcommittee] presiding.

Present: Representatives Johnson, Kline, McKeon, Tiberi, Marchant, Andrews, Kildee, Payne, McCarthy, Tierney, Wu, and Holt.

Staff present: Kevin Frank, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Aaron Griffin, Professional Staff Member; Richard Hoar, Staff Assistant; Jim Paretti, Workforce Policy Counsel; Steve Perrotta, Professional Staff Member; Molly Salmi, Deputy Director of Workforce Policy; Deborah Samantar, Committee Clerk/Intern Coordinator; Kevin Smith, Senior Communications Advisor; Jody Calemine, Minority Counsel Employer-Employee Relations; Tylease Fitzgerald, Minority Staff Assistant; Margo Hennigan, Minority Legislative Assistant/Labor; and Peter Rutledge, Minority Senior Legislative Associate/Labor.

Chairman JOHNSON. A quorum being present, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce will come to order.

We are holding this hearing today to hear testimony on “Challenges to Employer Efforts to Preserve Retiree Health Care Benefits.” Before we do that, I want to tell you all that this is take your child to work day here in Washington, and we have got some staff over here with their children. And I wonder if you all would all stand up and be recognized, and we thank you for coming.

[Applause.]

Chairman JOHNSON. Thank you so much. Kids are our most important product and the future of America, I think you would all agree with that.

Under Committee Rule 12(b) opening statements are limited to the Chairman and Ranking Minority Member of the Subcommittee. Therefore, if other Members have statements, they will be included in the hearing record. With that, I ask unanimous consent for the hearing record to remain open 14 days to allow Member statements

and other extraneous material referenced during the hearing to be submitted in the official hearing record. Without objection, so ordered.

STATEMENT OF HON. SAM JOHNSON, CHAIRMAN, SUB-COMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

I want to extend a warm welcome to all of you and the Ranking Member, Mr. Andrews, he and I are on the same page on this issue, thank goodness, as we are on most of the issues that this Committee has, by the way, and to my other colleagues.

Over the past 4 years, employers have experienced annual double-digit health care cost increases, an average of just over 11 percent this year alone. Small businesses usually see increases that can double those of larger companies. As we have discussed many times in recent years, these continual health care increases force employers to decide if and how they will continue voluntarily providing the same benefits they have in the past.

In response to these annual increases, many employers are redesigning their health care plans and implementing new options, such as HSAs and other consumer-driven plans, to help employees become more savvy consumers of health care. Some are rethinking their cost sharing arrangements and are considering other approaches to keep the pace of growth in annual costs reasonable.

Many employers currently provide health benefits to their retirees who have not yet become eligible for Medicare. The coverage these early retirees receive is known as "bridge" coverage. When retirees turn age 65 and become eligible for Medicare, this bridge care is generally modified or coordinated to take into account the benefits provided by Medicare. Numerous groups, like unions, employers and employees consider this a fair and reasonable approach. Simply put, the employer often provides the entire benefit to an early retiree, while one over 65 receives Medicare plus a benefit.

Unfortunately, in August 2000, the United States District Court for the Eastern District of Pennsylvania, in the case of Erie County Retirees Association v. County of Erie, ruled that the coordination of employer provided health benefits with Medicare was age discrimination and violated the Age Discrimination in Employment Act. The Court's decision prompted serious concerns from many of us in this room, who feared it would encourage employers to reduce or drop coverage all together for their retirees who are under age 65 rather than enrich coverage for retirees age 65 and older.

Sadly, that is exactly what happened in Erie County. The county pared back health coverage for retirees under age 65 and began charging them a premium equal to the Medicare monthly premium.

Let's think about this, what is the most fair and logical approach that continues to provide peace of mind for seniors when it comes to their health benefits? Do we want to jeopardize a voluntary employer-provided health benefit for some seniors? Does this potentially encourage employers to drop this added luxury for its former employees? With rising costs, common sense says we should make it easier, not harder, for employers to offer retiree health benefits.

My hope is that today's hearing will explore answers to those questions and help educate this Subcommittee on the potential ramifications of this important issue, for both employees and employers.

I welcome our witnesses and look forward to their testimony today. I will now yield to the distinguished Ranking Minority Member of the Subcommittee, Mr. Rob Andrews, for whatever opening statement he wishes to make.

[The prepared statement of Chairman Johnson follows:]

Statement of the Hon. Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce

Good morning. Let me extend a warm welcome to all of you, to the Ranking Member, Mr. Andrews, and to my other colleagues.

Over the past four years, employers have experienced annual double-digit health care cost increases—an average of just over 11% this year alone.

Small businesses usually see increases that can double those of larger companies.

As we have discussed many times in recent years, these continual health cost increases force employers to decide if and how they will continue voluntarily providing the same benefits they have in the past.

In response to these annual increases, many employers are redesigning their health plans and implementing new options, such as HSAs and other consumer driven plans, to help employees become more savvy consumers of health care.

Some are rethinking their cost sharing arrangements and are considering other approaches to keep the pace of growth in annual costs reasonable.

Many employers currently provide health benefits to their retirees who have not yet become eligible for Medicare.

The coverage these early retirees receive is known as “bridge” coverage.

When retirees turn age 65 and become eligible for Medicare, this “bridge” coverage is generally modified or “coordinated” to take into account the benefits provided by Medicare.

Numerous groups, like unions, employees, and employers consider this a fair and reasonable approach.

Simply put, the employer often provides the entire benefit to an early retiree, while one over 65 receives Medicare plus a benefit.

Unfortunately, in August 2000, the U.S. District Court for the Eastern District of Pennsylvania, in the case of Erie County Retirees Association v. County of Erie, ruled that the coordination of employer provided health benefits with Medicare was “age discrimination” and violated the Age Discrimination in Employment Act.

The court's decision prompted serious concerns from many of us in this room, who feared it would encourage employers to reduce or drop coverage altogether for their retirees who were under age 65 rather than enrich coverage for retirees aged 65 and older.

Sadly, that is exactly what happened in Erie County. The county pared back health coverage for retirees under age 65 and began charging them a premium equal to the Medicare monthly premium.

Let's think about this. What is the most fair and logical approach that continues to provide peace of mind for seniors when it comes to their health benefits?

Do we want to jeopardize a voluntary employer-provided health benefit for some seniors? Does this potentially encourage employers to drop this added luxury for its former employees?

With rising costs, common sense says we should make it easier—not harder—for employers to offer retiree health benefits.

My hope is that today's hearing will explore answers to those questions and help educate this Subcommittee on the potential ramifications of this important issue—for both employees and employers.

I welcome our witnesses and look forward to their testimony today.

STATEMENT OF HON. ROBERT E. ANDREWS, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. ANDREWS. Good morning, Mr. Chairman, thank you for your kind greeting this morning. I would like to welcome the sons and daughters of the Members and staff that are here. My daughters are with their mother today for take your children to work day; they made a much wiser choice than coming to work with me. See, at an early age they are developing good judgment. We are happy that you are with us, and we appreciate your participation. I also thank the witnesses for their time this morning.

There is not a person on the panel, I am sure, and not a person in the room who does not share the view that we want the law to ensure fairness for retirees. We never want any person to be deprived of health benefits, or any other benefit, because of his or her age. I think that is a starting point for this discussion. We do understand that in the pursuit of that goal we have a court decision in front of us that I think produces precisely the opposite result, and in fact is likely to reduce health benefits for retirees across the country. The EEOC has attempted to grapple with this problem. And today the Committee is joining with the EEOC and the other witnesses to try to confront how to solve the problem.

Here is how I see it. After the Erie County decision was handed down in 2000, and especially after the United States Supreme Court declined to review the decision, employers were put in a situation where they had three very difficult options when confronting the question as to what to do with respect to retiree health benefits. And in this discussion the world of retiree health benefits now falls into two categories. There are retiree health benefits for those employees who have not yet reached the age of Medicare, and then retiree health benefits for those who have. The Erie County decision suggests that an employer needs to look very, very carefully at how he or she distinguished between those two categories when making a decision.

And as I see it, that case misunderstands the legislative history that led to enactment of this law. But, more importantly, creates a three-way choice for employers that is very difficult indeed.

The first choice, at least in theory, is to make sure that you provide equivalent benefits for the pre-Medicare retiree and the post-Medicare retiree. That is, that you produce what we might call a wrap-around policy that gives the post-Medicare retiree the same benefits that he or she would have had prior to attaining the age of Medicare at 65. That sounds achievable in theory. It is very, very difficult to achieve in practice. And I think it puts the employer into an ambiguity that no employer would welcome. For example, if the plan that a person was in before attaining 65 is a PPO plan, where you can choose whichever provider you want but have to pay different levels out of your own pocket, depending upon to whom you go, and then the wrap-around coverage that a company's Medicare is based upon is an HMO instead of a PPO, is that equivalent coverage? Does it matter if they cover exactly the same benefits or not? What if the PPO coverage didn't cover eyeglass coverage but the HMO does or vice versa, does that make it equivalent or not?

My experience is that when you confront employers with ambiguity, they choose the course of certainty. And there are two decisions an employer could make that would certainly put them within the ambit of legality under the Age Discrimination Act, as interpreted by the Erie County decision. The first choice that they could make is to give a flat dollar amount to every retiree. Say, all right, here is how we are going to resolve this problem. We are going to spend "X" number of dollars per year for each retiree, whether they are pre-Medicare or post-Medicare.

Well, if you do that, my sense is the result will be catastrophic for retirees younger than 65, because the amount of money that the employer would have to spend on a retiree who is in Medicare would be far smaller than the amount of money that the employer would have to spend on the pre-65 retiree. What that means would be a huge increase in health care costs for retirees younger than 65. That is not a desirable outcome for anyone.

The third option, the worst option, would be to spend zero. Remove yourself from the world of ambiguity by saying fine, if we have to worry about being sued for invidious discrimination against our retirees if there is any daylight between what we do for our pre-65 people and our post-65 people, let's end the ambiguity altogether and not cover either one.

Now, I don't know that there is data that suggests that that is happening yet. I don't believe the data do suggest that, and I am glad that the evidence does not suggest that. But I am concerned that that is the direction in which we will be heading.

So I see our objective here, Mr. Chairman, as removing that ambiguity from employers while preserving the principle of fairness so that you can't be discriminated against because of your age. And I think the unfortunate consequence of the Erie County decision is it may in fact promote age discrimination by reducing health care benefits for retirees younger than 65.

So I look forward to hearing from the witnesses this morning and thank you for this opportunity.

Chairman JOHNSON. Thank you. I do, too. And it looks like it already happened up there, they are charging them for insurance where they were providing as part of their benefit.

We have got a very distinguished panel of witnesses before us today, and I want to thank you all for coming. First, we are going to hear from the Honorable Leslie Silverman. Ms. Silverman is a commissioner at the Equal Employment Opportunity Commission. Thank you for being here.

Next will be Mr. Douglas Greenfield. Mr. Greenfield is an attorney with Bredhoff & Kaiser, located here in Washington, D.C. He will be testifying on behalf of the National Education Association today.

And following him, Mr. Fred Dochat. Did I say that correctly? Dochat. Mr. Dochat is a member of the AARP in Lancaster, Pennsylvania.

And finally, we will hear from Mr. Steven Spencer. Mr. Spencer is a partner with Morgan, Lewis & Bockius in Philadelphia. He will be testifying on behalf of the U.S. Chamber of Commerce.

Thank you all for being here. We appreciate your presence. We are going to be split by a vote here very shortly, and I intend to continue with the hearing during the vote.

Before the witnesses begin their testimony, I would like to remind Members we will be asking questions after the entire panel has testified. In addition, Committee Rule 2 imposes a 5-minute limit on all questions. And we would ask you all to adhere to the same restriction. There is a series of lights down there, you may have seen them. Green means you are in good shape. Yellow means you have got a minute. And the red says please turn it off if you can.

With that, I recognize the first witness, Ms. Silverman.

**STATEMENT OF LESLIE E. SILVERMAN, ESQ., COMMISSIONER,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASH-
INGTON, DC**

Ms. SILVERMAN. Good morning, Mr. Chairman and Members of the Committee. I am Leslie Silverman, commissioner of the Equal Employment Opportunity Commission. Our Chair, Cari Dominguez, could not be here today and asked that I come in her stead. Although I knew it was bring your child to work day, I couldn't quite see my three- and 1-year-old daughters sitting quietly while mom testified.

Chairman JOHNSON. I don't know, we would have enjoyed them walking up and down in front of us here.

Ms. SILVERMAN. On behalf of the Commission, I appreciate the opportunity to discuss our decision to create an exemption to the Age Discrimination in Employment Act. The exemption would allow employers to do what they have done for a long time, coordinate retiree health benefits with Medicare eligibility. This decision is best understood by remembering that employers are under no legal obligation to provide health benefits to retirees, even when they provide them to their employees. As you know, the rule is currently the subject of litigation, which I will also address briefly.

In *Erie County Retirees Association v. County of Erie*, the Third Circuit Court of Appeals became the first appellate court to rule that coordinating retiree health benefits with Medicare eligibility violates the ADEA. Directed to come into compliance with the equal benefit/equal cost test, Erie County did so, not by improving the benefits of its Medicare-eligible retirees, but by curtailing the benefits for its younger retirees.

Now the Commission initially adopted the Erie County ruling as its national enforcement policy. But our decision was widely condemned. Critics maintained that the Erie County rule would cause a reduction in retiree health benefits, just as it had for Erie County retirees.

In May 2001, GAO issued a report on the status of retiree health benefits. The report confirmed that many employers were eliminating these benefits and suggested the Erie County ruling was a potential contributing factor. In light of the criticisms and the GAO report, in August 2001 a bipartisan unanimous consent rescinded the Erie County policy and agreed to study this issue. We then began a painstaking 3 year process to develop a new policy that

would not deter employers from providing retiree health benefits but would still protect the integrity of the ADEA.

Commission staff met with any stakeholders, including employers, labor unions, human resource and benefit consultants, actuaries, and state and local government representatives, to discuss the Erie County rule and potential alternatives. All agreed that many retiree health benefit plans do not comply with the Erie County rule.

The Commission explored every viable alternative that we could think of or that was brought to our attention. Most focused on modifying the equal benefit/equal cost test to ensure that the majority of existing retiree health plans would pass muster. Ultimately, we found these alternatives unworkable.

The ADEA provides the Commission with the authority to establish reasonable exemptions from the law when necessary and proper in the public interest. We concluded that a narrow exemption from the ADEA was the most effective way to assure that the Act did not cause further erosion of the retiree health benefits and that its protections otherwise remained intact.

In July 2003, the Commission issued a Notice of Proposed Rulemaking. After reviewing the comments, the Commission decided to finalize the proposed exemption. The proposed rule supporters had produced evidence that the Erie County rule would diminish employer-provided retiree health benefits. Opponents produced no contrary evidence. Accordingly, the Commission approved a proposed final rule by a vote of three to one in April 2004.

On February 4, 2005, while the rule was still awaiting final clearance at OMB, AARP filed suit to stop the rules publication, asserting statutory constitutional and procedural arguments. On March 30th, the Court enjoined the Commission from publishing the proposed exemption. The judge found that the Commission had argued persuasively that "without the exemption employers will reduce or eliminate health benefits for all retirees, no matter what their age." But she ruled that we lacked the authority to create the exemption. The Commission disagrees with the judge's ruling and has requested that the Department of Justice appeal this decision.

When the Commission initially adopted the Erie County rule, it expected that the rule would protect health benefits for retirees. In practice, however, that rule threatens to have the opposite effect. It encourages employers to curtail retiree health benefits or not to provide them at all. This is contrary to the public policy of encouraging health benefits for retirees and contrary to the spirit of the ADEA. In fact, the Commission believes that if the Erie County rule is left to stand, it will jeopardize the health benefits of all retirees.

Mr. Chairman, the EEOC is proud of our efforts to protect the rights of older Americans against age discrimination in employment. And we remain committed to the vigorous enforcement of the ADEA and to the protection of older workers and retirees.

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

[The prepared statement of Ms. Silverman follows:]

**Statement of Hon. Leslie E. Silverman, Esq., Commissioner, Equal
Employment Opportunity Commission, Washington, DC**

Good morning Mr. Chairman and members of the Committee. I am Leslie Silverman, Commissioner of the Equal Employment Opportunity Commission (EEOC or Commission). Our Chair, Cari M. Dominguez, could not be here today and asked that I come in her stead. I am here to discuss the Commission's decision to create an exemption that would allow employers to continue coordinating the retiree health benefits they provide with Medicare eligibility without violating the Age Discrimination in Employment Act (the ADEA).

On behalf of the Commission, I appreciate the opportunity to discuss this important issue. As you know, our proposed rule would provide a narrow exemption from ADEA prohibitions for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable state health plan. Our rule, and the events that gave rise to it, can only be understood against the backdrop of the fact that employers have no legal obligation to provide any health benefits to retirees—even when they choose to provide health benefits to their employees.

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

A PYRRHIC VICTORY—THE ERIE COUNTY DECISION

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

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

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

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

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

IMMEDIATE CRITICISM OF ERIE COUNTY

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

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

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

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

COMMISSION RESCINDS ERIE COUNTY RULE

In light of the stakeholder criticisms and the GAO report, in August 2001, with a bipartisan and unanimous vote, the Commission decided to rescind its enforcement of the Erie County ruling and study the relationship between the ADEA and retiree health benefits. Explaining the rescission, then-EEOC Vice Chair Paul M. Igasaki observed that the agency "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."

For the next several months, Commission staff met with a wide range of stakeholders to discuss the impact of the Erie County rule. The stakeholders, including employers, labor unions, human resource consultants, benefit consultants, actuaries and state and local government representatives, agreed that many existing employer-provided retiree health benefit plans did not comply with the Erie County rule. Most predicted that, if the Erie County rule was left to stand, employers would respond just as Erie County had—by curtailing existing coverage for retirees not yet eligible for Medicare, or by eliminating coverage for retirees entirely, not by improving health benefits for Medicare-eligible retirees.

Though it was clear that retiree health benefits had been declining before the Erie County decision, the Erie County rule appeared to exacerbate the problem.

ALTERNATIVES EXPLORED

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

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

on an annual basis. Such calculations, the Commission concluded, would be extraordinarily burdensome for employers, unions and municipal governments that wished to provide their retirees with health benefits.

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

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

Given all of these difficult problems and concerns, the Commission rejected the idea of attempting to redefine the equal benefit/equal cost defense. It concluded that a narrow exemption from the prohibitions of the ADEA was the most effective way to assure that the Act did not cause further erosion of retiree health benefits and that its protections otherwise remained intact.

PROPOSED RULE

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

EXEMPTION AUTHORITY

The exemption was promulgated under the Commission’s broad authority in Section 9 of the ADEA, 29 U.S.C. § 628, which provides that EEOC “may . . . establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.” On its face, the exemption language makes clear that Congress believed that there would be instances in which applying the ADEA’s prohibition against age discrimination would have unintended results that would be contrary to the public interest. Accordingly, it vested the enforcement agency with authority to correct such problems.

Section 9 exemption authority has been used rarely, but is not without precedent. For example, the Department of Labor, which originally held enforcement authority over the ADEA, exempted certain programs designed to provide employment for youth from the Act’s prohibitions. This exemption, which allowed distinctions based on age, was deemed necessary and in the public interest to promote the employment of groups with “special employment problems.”

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

The Commission also determined that an exemption was consistent with the purposes of the ADEA. As the Commission stated in the preamble to the proposed rule, one of the Act’s stated purposes is to “find ways of meeting problems arising from the impact of age on employment.” Given the continuing decline in the availability

of employer-provided retiree health benefits and the additional disincentive to provide such benefits created by the Erie County rule, the exemption reasonably addresses a serious problem confronting older Americans.

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

COMMENTS TO PROPOSED RULE

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

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

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

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

THE PROPOSED FINAL RULE

After considering the public comments, the Commission concluded that the evidence they presented supported the exemption. The rule's supporters produced evidence that the Erie County rule has had, and would continue to have, the unintended consequence of diminishing employer-provided retiree health benefits. The rule's opponents, however, produced no contrary evidence. Thus, the majority of the Commissioners feared that, if the Commission failed to act, many more retirees would lose their benefits as a result of the Erie County policy. Accordingly, with only minor clarifications to the NPRM, the Commission approved the proposed final rule, by a vote of 3-1, at a public meeting on April 22, 2004. A complete transcript of the meeting proceedings are set forth on the Commission's web site at www.eeoc.gov.

COURT ACTION

On February 4, 2005, while the rule was awaiting final clearance at OMB, AARP filed suit in federal district court to stop the rule's publication. AARP challenged the exemption on statutory, constitutional, and procedural grounds.

Two amicus briefs were filed, both in support of the Commission. One was filed on behalf of the National Education Association, the American Federation of Teach-

ers, and the UAW. The other was filed on behalf of the Equal Employment Advisory Council, HR Policy Association, America's Health Insurance Plans, American Benefits Council, The Chamber of Commerce, The ERISA Industry Committee, The Society for Human Resource Management, and NRECA.

The court issued a decision enjoining the Commission from publishing the proposed exemption on March 30, 2005. The judge found that the Commission had argued persuasively "that without the exemption, employers will reduce or eliminate health benefits for all retirees, no matter what their age." She ruled, however, that we lacked the authority to create the exemption.

The Commission disagrees with the district court's ruling and has formally requested that the Department of Justice appeal the decision.

CONCLUSION

When the Commission initially adopted the Erie County rule back in 2000, it expected that the rule would protect health benefits for retirees. In practice, however, the Erie County rule threatens to have the opposite effect—it encourages employers to curtail or eliminate retiree health benefits. The Commission views such a consequence as contrary to the public policy of encouraging health benefits for retirees, and contrary to the spirit of the ADEA. In fact, the Commission believes that if the Erie County rule is left to stand it will jeopardize the health benefits of all retirees.

After studying the issue for three years, the Commission concluded that there was only one way it could end the negative incentive created by the Erie County decision. Accordingly, the Commission created the proposed rule to provide a narrow exemption from ADEA prohibitions for the coordination of health benefits with Medicare. The Commission is not acting to establish a new retiree health benefit system that takes into account Medicare eligibility. That system already exists.

Mr. Chairman, the EEOC is proud of our efforts to protect the rights of older Americans against age discrimination in employment. We remain committed to the vigorous enforcement of the ADEA and to the protection of older workers and retirees.

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

Chairman JOHNSON. Thank you, ma'am. Thank you for your testimony. We agree. You all are doing a great job. Thank you.

Mr. Greenfield, you may begin.

STATEMENT OF DOUGLAS GREENFIELD, ESQ., ATTORNEY, BREDHOFF & KAISER, P.L.L.C., WASHINGTON, DC, ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION

Mr. GREENFIELD. Thank you, Mr. Chairman. Good morning. My name is Doug Greenfield. I am a lawyer with the Washington, D.C. firm of Bredhoff & Kaiser. I am testifying today on behalf of the National Education Association. NEA advocates on behalf of our nation's public school children, teachers, and education support personnel. In that capacity, they deal with public school districts and other employers throughout the country on behalf of teachers and other education employees over the terms and conditions of employment, including the provision of retiree health benefits.

For several years, I have represented the NEA, its state affiliates, and several other unions regarding employee benefit matters, particularly matters involving retiree health benefits. I am grateful to have the opportunity to provide a union side perspective on the topic of this hearing. That perspective is based on NEA's long experience negotiating to obtain and maintain employer-provided health benefits for its retired members.

As the Committee is aware, the climate for employer-provided retiree health benefits has been bad for several years and it continues to get worse. There are a number of reasons for this. One is the fact that in the private sector and in most states there is no

statutory requirement forcing employers to provide health benefits to its retirees. By and large, these benefits are only enforceable by retirees if the employer has made a contractual commitment to provide them. Sadly, such commitments are becoming rarer and the enforcement of those commitments is becoming more onerous.

Another reason for the decline in employer-provided retiree health benefits is that employers have little incentive to make economic commitments to their retirees because the employers do not perceive that they receive a commensurate economic return for doing so. Whatever value employers derive from providing retiree health benefits increasingly is being overshadowed by employers' concerns over such economic factors as volatile medical inflation rates, shifts in demographics as baby boomers reach retirement, and accounting rules that require them to front-load long-term benefit liabilities on their balance sheets. These legal and economic factors are the big drivers of the continuing downward trend with respect to the prevalence of employer provided health benefits, and I believe all the panelists will agree with that proposition.

Today, though, we are here to talk about the effect of the Erie County rule on this decline in the prevalence of health benefits. NEA, and all of the unions that I am aware of, believe that the Third Circuit's decision in this case was incorrect as a matter of law. But it is not NEA's disagreement with the legal rule that resulted from the Erie County case that causes NEA to advocate so vigorously for its reversal. Rather, it is the practical effect of that rule that creates such concern among NEA and so many other unions. And that practical effect is caused in large part by the legal and economic context in which the Erie County rule would be applied if it were ever adopted as the law of the land.

The legal conclusion in Erie County shocked employers and unions alike because they had a long history of providing and negotiating retiree health plans that could not comply with the new Erie rule, such as bridges and supplements. Under the Erie County rule, only wraps planned to provide full benefits to all retirees regardless of their eligibility for Medicare could avoid exposure to claims of age discrimination. Unfortunately, very few employers provide wraps.

Faced with complying with the Erie rule, employers maintaining bridges and supplements have three basic choices: upgrade their plan to a wrap; reduce the health benefits provided to the retirees who are not eligible for Medicare; or terminate the entire retiree health medical plan. There is practically no chance that an employer would choose to upgrade its plan as a compliance measure unless it were stuck with an iron-clad contractual commitment to maintain the status quo benefits, which unfortunately, from the union's perspective, is a lot less frequently the case than we would hope. Of course, this is exactly what happened to the victorious retirees in the Erie County case itself.

Now in forums such as this hearing our description of these choices is often challenged. It is typically suggested that employees could adopt some fixed number of years as a trigger for the termination or the change in benefits provided to the retirees. This solution is both impractical and does not promote the goals of the retir-

ees to provide more benefits or to preserve the benefits for the Medicare-eligible retirees.

NEA is a strong supporter of the civil rights laws and we do not take an exemption from those laws lightly, but we believe in this context equity in the promotion of the goals of the Act requires it.

Thank you.

[The prepared statement of Mr. Greenfield follows:]

Statement of Douglas Greenfield, Esq., Attorney, Bredhoff & Kaiser, P.L.L.C, Washington, DC, on behalf of the National Education Association

Chairman Johnson and Ranking Member Andrews:

Thank you for the opportunity to testify on the challenges that unions face in preserving employer-provided health benefits for our retired members, and obtaining such benefits for future retirees. As discussed below, these challenges are rooted in the long-standing legal, economic and practical factors that influence employers' decisions regarding the provision of health benefits to retirees. Further, the impact of a 2000 decision of the United States Court of Appeals for the Third Circuit, *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), threatens to exacerbate those challenges.¹ Consequently, NEA has advocated, since the publication of the *Erie County* decision, the legislative or judicial reversal of the *Erie County* rule, or an exemption of the practices proscribed therein by the Equal Employment Opportunity Commission ("EEOC"),² lest the loss of employer-provided retiree health benefits become even more pronounced.

The National Education Association ("NEA") is a nationwide employee organization with over 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. The NEA operates through a network of affiliated organizations, including some 13,000 local affiliates. Through collective bargaining where allowable, and through other means of bilateral decision-making in jurisdictions that do not allow collective bargaining for public sector employees, these local affiliates represent NEA members and other education employees in dealing with their employers regarding terms and conditions of employment, including the provision of retiree health benefits.

Many of NEA's members are eligible to retire with pension benefits prior to becoming eligible for Medicare. Most members would not be able to retire when first eligible, however, absent employer-provided retiree health benefits to cover them until they become eligible for Medicare. As a result, NEA's affiliates have long negotiated for employer-provided health benefits for retired members who are not eligible for Medicare, as well as for Medicare-eligible retirees.

Legal, Economic and Practical Challenges to Employer-Provided Retiree Health Benefits

As a threshold point, it is important to emphasize that there is no federal law that requires employers to provide retirees with health benefits. In the private sector, employers are generally free under the Employee Retirement Income Security Act ("ERISA") for any reason, at any time, to adopt, modify, or terminate welfare plans such as retiree health benefit plans. Therefore, under ERISA, only a private sector employer that affirmatively promises to provide retiree health benefits is bound to continue the benefits. Because ERISA does not apply to public sector em-

¹In *Erie County*, the court held that an employer violates the Age Discrimination in Employment Act ("ADEA") by providing different health benefits to retirees who are Medicare-eligible than provided to retirees who are not Medicare-eligible, unless such benefits are equal in value or cost.

²The EEOC issued a final rule exempting from the prohibitions of the ADEA the coordination of employer-sponsored retiree health benefits with the benefits for which those retirees are eligible under Medicare (or a counterpart state-sponsored health benefits plan). 29 C.F.R. §§ 1625 and 1627 (RIN 3046-AA72). The final rule—a product of the EEOC's exercise of its exemption authority under Section 9 of the ADEA—states that an employer does not violate the ADEA by providing different health benefits to retirees who are not Medicare-eligible than are provided to Medicare-eligible retirees. Last month, although noting that "without [the] exemption, employers will reduce or eliminate health benefits for all retirees, no matter what their age," the United States District Court for the Eastern District of Pennsylvania permanently enjoined the EEOC's exemption regulation on the ground that the Third Circuit's *Erie County* decision precluded the EEOC's action. *AARP v. EEOC*, No. 05-CV-509 (E.D. Pa. March 30, 2005). The EEOC's Chair has stated publicly that the EEOC would seek an appeal. See *EEOC Seeks to Appeal Court Order on Retiree Health Benefits Rule*, available at <http://www.eeoc.gov/press/3-30-05.html>.

employers, the law governing retiree health benefit commitments made by public sector employers is more varied, including state contract law and, in some cases, state or local statutes, ordinances and regulations. As in the private sector, unless the employer has made a contractual commitment, retiree health benefits in many states are not guaranteed by statute.

Nor can it be said that practical pressures routinely fill that legal void and require employers to provide retirees with such benefits. A retiree has provided the employer with all of the services that she is going to provide, and the employer is no longer under the pressure that drives employers to compensate their employees—namely, the pressure to provide a compensation package to employees that is adequate to retain the best possible employees. Consequently, only a minority of employers have determined to bear the cost of providing any health benefits to any of their retirees. See *Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion*, GAO-01-374, at 6, 8 (May 2001) (citing studies indicating that “just over one-third of large employers, and [approximately 9 percent] of small employers, offered health coverage to some of their retirees in 2000”).

Of equal importance, the number of employers providing retiree health benefits has declined sharply over the last decade. See *id.* at 6–7, 9–10. And, among those employers that continue to provide retiree health benefits, many have taken such cost reduction steps as: limiting the class of eligible retirees; reducing benefits to retirees; or increasing the share of costs that the retirees bear. *Id.* As the foregoing demonstrates, a large and growing number of employers are re-evaluating the viability of continuing to maintain retiree health benefit plans as a component of their employee compensation packages. Employers are making these decisions in reaction to such factors as the high and unpredictable rate of inflation for medical costs; the increasing cost of providing retiree benefits as the baby boomers reach retirement; and changes in the accounting rules that require employers to front-load long-term benefit liabilities on their balance sheets.³

Against this background, the basic element of the retiree health benefit plans offered by the minority of employers that determine to provide such benefits—or that are convinced by unions to do so through collective bargaining—is a “bridge” program that covers retirees until they reach Medicare eligibility. Indeed, the aforementioned GAO survey, *id.* at 6, indicated that, of the large employers that provide some form of retiree health coverage, approximately 25% provide only a bridge for retirees who are not Medicare-eligible. See *id.* (stating that 92% of such employers provide benefits for retirees who are not Medicare-eligible, but only 67% provide some form of coverage for Medicare-eligible retirees).

There are numerous reasons why an employer may only go so far as to provide a bridge program for retirees who are not Medicare-eligible: bridge programs make it feasible for employees to take advantage of the employer’s early retirement programs; cover individuals for an ascertainable, limited time period (only until they are eligible for Medicare); provide coverage for individuals who might otherwise lack any health benefit coverage at all; and entail little, if any, administrative cost or complexity, as the retirees who are not Medicare-eligible typically may be placed in the same group plan as the active employees, given that both groups receive their primary insurance coverage through the employer.

In contrast, from the employer’s perspective, going further and providing health benefits to Medicare-eligible retirees entails a different—and more substantial—range of costs and complications:

- First, when considering Medicare-eligible retirees, there is no longer any need to provide health benefits to make it feasible for retirees who are pension-eligible, but not Medicare-eligible, to retire.
- Second, a health benefit commitment to Medicare-eligible retirees is open-ended (as opposed to the time-limited commitment of a bridge program for the retirees who are not Medicare-eligible), rendering this class of retirees much more numerous.
- Third, the fact that Medicare-eligible retirees already receive health benefit coverage through a government-sponsored program undercuts the concern that, absent employer action, the retirees would be left without coverage.
- Fourth and finally, in contrast to retirees who are not eligible for Medicare, Medicare-eligible retirees cannot simply be placed under the group plan covering active employees. When retirees become Medicare-eligible, Medicare be-

³See Financial Accounting Standards Board, *Financial Accounting Foundation, Statement of Financial Accounting Standards No. 106: Employers Accounting for Postretirement Benefits Other Than Pensions* (Dec. 1990); Government Accounting Standards Board, *Financial Accounting Foundation, Statement No. 43: Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans* (Apr. 2004).

comes their primary insurer; the employer, if it provides any coverage at all, provides only secondary coverage, and an employer providing secondary coverage is confronted with an entirely different set of questions regarding plan design than when the employer is providing primary coverage. Secondary coverage provided to Medicare-eligible retirees must be coordinated with Medicare coverage, requiring changes in the design of the health benefits plan itself (and the insurance policy that may underwrite it). And, because Medicare itself contains very distinctive benefits and requirements which differ substantially from most primary insurance policies on the market today, a secondary plan that is designed to supplement Medicare is apt to differ in form and substance from a primary plan covering active employees and retirees who are not eligible for Medicare.

As a result, employers that provide retiree health benefits always treat Medicare-eligible retirees as a discrete group. And employers that have been willing on their own, or as a result of collective bargaining, to extend coverage to this group, have often gone only so far as to provide a limited “supplement,” such as reimbursement of Medicare Part B premiums, or a prescription drug benefit. Only a small number of employers provide what is termed “wrap” coverage, under which Medicare-eligible retirees receive the same benefits as retirees who are not Medicare-eligible—albeit from two sources, rather than one.

The Impact of the Erie County Rule

NEA does not believe that the practice of providing different benefits to Medicare-eligible retirees than to those retirees who are not Medicare-eligible constitutes a violation of the ADEA. And, it has long been the general practice of employers to proceed on the pre-Erie County understanding that distinguishing between retirees based on their eligibility for Medicare is permissible under the ADEA. There are two reasons for this understanding:

First, such a differentiation is not based on the recipient’s age, but rather on the receipt of a government benefit. Indeed, Medicare eligibility is not always even correlated with age; retirees under age 65 are Medicare-eligible if they are receiving Social Security disability or have end-stage renal disease. 42 U.S.C. § 1395c.

Second, the legislative history of the Older Workers Benefit Protection Act of 1990 (“OWBPA”), amending the ADEA, clearly states that the ADEA as amended by OWBPA is not meant to prohibit such differentiation. See Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990), 136 Cong. Rec. H27062 (Oct. 2, 1990) (“In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree’s Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by the substitute.”)

For these reasons, NEA believes that Erie County wrongly decided that this practice constitutes a violation of the ADEA. However, even if one accepts the Erie County conclusion that this constitutes a technical violation of the ADEA, the effect of the Erie County rule is contrary to the overarching purpose of the ADEA, in that it is harmful to the interests of older individuals. If the Third Circuit’s view of the law prevails, the very likely impact would be a significant reduction in the number of retirees who would continue to be covered by employer-provided health benefits at their pre-Erie County levels. The employers that provide bridge program retiree health benefits and those that provide Medicare supplement programs—the greatest number of the minority of employers providing retiree health benefits—would, under the Erie County rule, have the following compliance options:

- 1) augmenting the employer’s retiree health benefit plan by providing Medicare-eligible retirees wrap coverage equal in value or cost to the bridge program benefits being provided to retirees who are not Medicare-eligible;
- 2) reducing the benefits available to retirees not eligible for Medicare so that these benefits do not exceed the value or cost of those benefits provided to Medicare-eligible retirees;⁴ or
- 3) terminating the entire retiree health plan so as not to incur the inevitable and substantial administrative cost of restructuring the plan, and the inevitable increase in cost resulting from an open-ended obligation to Medicare-eligible retirees.

⁴This can be accomplished either by restructuring the plan to provide Medicare-eligible retirees wrap coverage equal in value or cost to reduced bridge program benefits that will henceforth be provided to retirees who are not Medicare-eligible, or, for those employers providing only a bridge program, by eliminating the bridge program altogether.

For the reasons explained above—which include the absence of any affirmative federal statutory requirement to provide retiree health benefits, the financial and practical pressures on employers that militate against providing such benefits, and the demonstrated disinclination of employers to provide such benefits—employers are unlikely to choose to comply with the Erie County rule by augmenting their retiree health benefit plans (thereby increasing the employer’s costs and open-ended obligations). They would rather: (1) restructure their plans in a way that reduces benefits to the retirees who are not Medicare-eligible (who have no alternative source of benefits) and that provides little if anything in benefits over and above Medicare for Medicare eligible retirees; or (2) terminate the plan altogether to the detriment of both groups of employees.

The best evidence in this regard is the result “won” by the Erie County plaintiffs following the Third Circuit’s remand to the district court. The parties there settled for a one-time cash payment to the Medicare-eligible retirees, a reduction in the health benefits provided to retirees not eligible for Medicare, and no increase in the health benefits provided to the Medicare-eligible retirees. See J. Colberg & J. Muehl, *Erie County Settlement Unsettling*, *J. of Pension Planning & Compl.* (Jan. 1, 2003), 2003 WL 8730627. In short, Erie County made the choice to bring down the health benefits provided to retirees who are not Medicare-eligible, rather than to bring up the health benefits provided to the Medicare-eligible retirees. If this is the best settlement that the plaintiff class could obtain from Erie County, despite its “complete victory” in the Third Circuit and the necessity for federal court approval of the class action settlement, it is wholly unlikely that the employers that face no legal constraint on their ability to reduce or to terminate retiree health benefits will take the higher cost option of augmenting their plans.

Thus, it is NEA’s considered judgment, based on its extensive experience in negotiating and otherwise advocating for retiree health benefits, that—absent the reversal or exemption of the Erie County rule—employee organizations will have substantial difficulty in maintaining the employer-provided retiree health benefits that they previously have achieved, and even greater difficulty in securing retiree health benefits from employers that do not presently provide such benefits. NEA, like other labor organizations, seeks to achieve the maximum in health benefits coverage for all retirees. But in the real world that goal has not proved to be consistently obtainable given the severe constraints on the finances of many of the employers with whom unions negotiate, including local governments and school districts. Indeed, health care coverage has become one of the most, if not the most, contentious issues in collective bargaining. Most employers are strongly committed to reducing their costs in this area, and are unwilling to take any steps that would increase these costs.

In this context, in order to bring themselves into compliance with the Erie County rule, the employers that have agreed in bargaining to provide bridge programs or Medicare supplement programs are likely to insist on reducing those program benefits or on terminating the retiree health benefit plans. Even the employers that have agreed to provide comparable benefits for retirees who are not Medicare-eligible and for Medicare-eligible retirees, but that use different plan designs for the two groups, will press to scale down or eliminate benefits, rather than face the prospect of litigating complex factual issues regarding plan comparability if the equality of the benefits is subject to challenge.

Equally important, where the employer is one of the majority of employers that has not yet instituted a retiree health benefit plan, often the best that a collective bargaining representative can achieve, even through the most determined effort, is a bridge program to ensure that no retiree is left completely uninsured, or a supplement program for Medicare-eligible retirees. The Erie County rule will deprive parties to collective bargaining of this option of agreeing to provide a limited health benefit plan, even if that would be an improvement over what the employer previously provided retirees. In other words, the “perfect” ideal of a wrap program benefit design is made the enemy of the possible—bridge programs and supplements that may be the only benefit designs achievable.

The counter argument—that exempting or overturning the Erie County rule will be detrimental to the interests of Medicare-eligible retirees who are covered by wrap programs because it will put them at increased risk of having their health benefits reduced or eliminated—rests on a false premise as to the legal status quo prior to the Erie County ruling. To begin with, as explained above, employers that have not made affirmative contractual commitments to maintain their retiree health benefits are generally free to reduce or eliminate those benefits at any time. No action to overturn the Erie County rule, either through legislative amendment or through exercise of the EEOC exemption authority, would diminish an employer’s contractual obligations or increase an employer’s right to reduce or terminate such benefits.

Moreover, there is no evidence that any employer, as a compliance response to Erie County, has improved the health benefits provided to its Medicare-eligible retirees or has indicated that it would reduce such benefits to their prior level if the Erie County rule were overturned or if the EEOC exempted this practice.

Given those two points, all that remains of the argument in support of the Erie County rule is the suggestion that the employers that have provided Medicare-eligible retirees with a wrap program have done so because they believed that the ADEA so required, and that those employers are poised to eliminate these benefits should the Erie County rule be overturned. But, as explained above, prior to Erie County, employers had been operating on the understanding that the ADEA allowed them to provide different health benefits to retirees who are not eligible for Medicare than to those that are eligible for Medicare. See, e.g., Hearing on Retirement Security for the American Worker: Opportunities and Challenges Before the House Comm. on Educ. & the Workforce Subcommittee on Employer–Employee Relations (Nov. 1, 2001) (testimony of Charles K. Kerby, III, William M. Mercer, Inc.) (testifying that the Erie County “decision came as a surprise to many employers who assumed, based on ADEA’s legislative history, it was permissible to offer different benefits to Medicare-eligible retirees [and] caused great consternation among retiree health plan sponsors”).

Thus, the suggestion that employers will reduce or eliminate benefits to Medicare-eligible retirees if the EEOC’s exemption regulation is implemented is without any basis in fact or in reason. The employers that have made a unilateral determination to provide wrap programs to cover Medicare-eligible retirees have done so on compensation policy grounds, not on ADEA compliance grounds. And, the employers that have agreed in collective bargaining to provide wrap coverage have done so under the pressure of collective bargaining, not under the pressure of the ADEA. There is nothing to support the claim that the exemption or reversal of the Erie County rule will cause any employer providing Medicare-eligible retirees wrap coverage to reduce or eliminate those benefits.

Up until this point, the Erie County ruling has not led to additional lawsuits by Medicare-eligible retirees raising ADEA challenges to the medical benefits provided them as compared with non-Medicare-eligible retirees, even though it continues to be common practice—even in those states governed by the Third Circuit’s ruling—for employers to distinguish between these two groups of retirees. Perhaps this is because such potential plaintiffs recognize that winning the lawsuit would not provide them with greater medical benefits. But notwithstanding the lack of litigation, the Erie County rule creates a chilling effect which affects employers’ decisions regarding plan design and unions’ approach to collective bargaining. As a result of Erie County, employers and unions are now considering a host of inferior and administratively complex retiree medical benefit plan designs that incorporate crude approximations for Medicare-eligibility as targets for benefit termination or triggers for Medicare supplements.

Moreover, the new Medicare Part D program further complicates the process of negotiating retiree health benefits, and, when the Medicare Part D rules are combined with the Erie County rule, the challenges facing unions in obtaining prescription drug benefits for their retirees only increase. Under the Medicare Prescription Drug, Improvement and Modernization Act (“MMA”), every employer must decide the basis upon which it will coordinate its retiree prescription drug benefit with the Medicare Part D program. Any option an employer chooses, other than fully substituting its own coverage in lieu of Medicare Part D coverage, is likely to make the prescription drug benefits provided for Medicare-eligible retirees at least different than, and usually inferior to, the prescription drug benefits provided to retirees who are not eligible for Medicare. And because every employer sponsor of retiree benefits is now focusing on this coordination issue, the employers are also focusing—many for the first time—on their exposure to ADEA claims resulting from the Erie County rule.

Finally, the equal benefit/equal cost test that the Erie County court viewed as a safe harbor to such ADEA is not workable in practice. Plan design considerations are very different for primary coverage plans covering retirees who are not Medicare-eligible and secondary coverage plans covering Medicare-eligible retirees. See J. Colberg & J. Muehl, *Erie County Settlement Unsettling*, J. of Pension Planning & Compl. (Jan. 1, 2003), 2003 WL 8730627 (attempting to give guidance in applying test and concluding that comparing benefits provided under different policies “is an onerous task at best, an impossible one at worst.”). Again, in considering the utility of the equal benefit/equal cost test for complying with the Erie County rule, it is important to remember that no federal statute requires employers to provide retiree health benefits. If the test is merely expensive to apply, or poses a not-insignificant risk that a retiree would bring suit challenging the calculations, it is unlikely that

employers would choose that expense and risk, when much simpler and cost efficient options—reducing benefits for retirees who are not Medicare-eligible or terminating the retiree health plan altogether—are available.

Conclusion: the Erie County Rule Should be Overturned or Exempted

As a practical matter, the Erie County rule constitutes only one new, and for the time being, relatively small barrier to the maintenance of employer-sponsored retiree health benefits plans—the fear that this novel interpretation of the ADEA will take hold and lead to the invalidation of many commonly designed retiree health benefits plans that coordinate employer-provided benefits with Medicare. As described above, there already exist other formidable barriers to the maintenance of employer-sponsored retiree health benefits plans. However, if the Erie County rule were to become widely accepted as the law of the land, a barrier of similar magnitude would soon emerge.

Even though the EEOC advocated the legal result reached by the Third Circuit in the Erie County case, it later recognized the counter-productive practical results that would occur if the Erie County rule were permitted to prevail. Consequently, the EEOC concluded that an exemption was necessary in the public interest and, in particular, in the interests of retirees. The EEOC based that conclusion on its determination that, if left in place, the Erie County rule “may cause a class of people—retirees [over 40 but] not yet 65—to be left without any health insurance,” and “may contribute to the loss of valuable employer-sponsored coverage that supplements Medicare for retirees age 65 and over.” Notice of Proposed Rulemaking, 68 Fed. Reg. 41542, 41546 (July 14, 2003). NEA believes that the EEOC’s practical judgment that this exemption is necessary in the public interest and to protect the interests of retirees is entirely sound.

Further, the exercise of the EEOC’s exemption power in this context would be consistent with the Congressional purpose in providing the EEOC with such powers in the first instance. While recognizing that discrimination on the basis of age is no less pernicious than discrimination based on other arbitrary criteria, such as race, gender, national origin, or religion, Congress did not want the prohibition on age discrimination to have any unintended consequences on older Americans. See, e.g., 113 Cong. Rec. at 31251 (“Administration of this law must place emphasis on a case-by-case basis, with unusual working conditions weighed on their own merits.”); H.R. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 USCCAN 2213, 2220 (“Too many different types of employment occur for the strict application of general prohibitions and provisions.”). For this reason, Congress empowered the EEOC to exempt certain facially age discriminatory practices from the ADEA’s prohibitions where doing so would serve the public interest. Here, the EEOC exemption regulation is born out of the reality that an interpretation of the ADEA that would result in a net loss of employer-sponsored retiree health benefits cannot promote the purposes of the ADEA and cannot be in the public interest.

NEA has long supported the vigorous enforcement of all civil rights laws, and has worked to protect the civil rights of its members through collective bargaining, litigation, and legislative advocacy. NEA would not lightly endorse any exemption to the reach of these laws. However, in this particular and narrow instance, NEA believes that the ADEA was not meant to encompass this practice, and that applying the ADEA to this situation is harmful, not helpful, to the class of individuals that the law seeks to protect.

Therefore, whether by the implementation of the EEOC exemption regulation or an act of Congress to overturn the Erie County rule, the legal landscape for employer-sponsored retiree health plans should be returned to the status quo before Erie County, so that employers, unions, employees, and retirees can make rational economic choices based on the availability of health benefits from all sources and other factors unrelated to age, and without the specter of potential ADEA claims reducing the ability of all of the interested parties to optimize the retiree health benefits made available. In that environment, unions will have a better chance of preserving employer-sponsored retiree health benefits for a greater number of retirees.

For all of these reasons, NEA supports the implementation of the EEOC’s exemption regulation, or any other means by which the Erie County rule would be overturned as a matter of law. Thank you for considering this testimony.

Chairman JOHNSON. Thank you, sir. We appreciate your testimony.

Mr. Dochat, you may begin.

**STATEMENT OF FRED DOCHAT, MEMBER, AARP, LANCASTER,
PA**

Mr. DOCHAT. Good morning, Mr. Chairman and Members of the Committee. My name is Fred Dochat. I live in Lancaster, Pennsylvania. I am here today with my wife, Barbara Ann. I am 77 years old and she is 72. I am one of the plaintiffs who successfully prevented the EEOC from issuing its regulation that would have given my former employer the green light to cancel my health care benefits.

I spent my entire career working for Armstrong World Industries. When I retired, I was a technical specialist in their research center, earning \$36,000 a year. After 45 years of continuous employment with Armstrong, I was forced to retire in 1989 as a result of corporate downsizing. In exchange for almost five decades of dedicated service to Armstrong, I received my pension and health care benefits, that included prescription drugs and coverage and dental benefits. My wife and I live on my pension, which is \$1,465 a month, and my Social Security, \$1,110 a month. We are able to survive because of the health care benefits that I have earned in exchange for my faithful service to the company.

Since the time I became 65, we have relied on Medicare and my health care benefits from Armstrong to address our health care needs. While we don't think we are in poor health, I guess like many Americans in their 70's we have experienced some health care problems along the way. Six years ago, I had a quadruple bypass surgery so I have got an ongoing issue with my heart and my cholesterol. Barbara Ann fought a battle with cancer, and we continue to hope that her recovery is complete. We both rely on prescription medications to control glaucoma, osteoporosis, and other chronic ailments.

As you can imagine, the health benefits that I earned from Armstrong have played an essential role in defraying our health care expenses. These benefits don't come free. We pay our contribution to the premium. In January of 2004, the company doubled my premium contribution. In January 2005, the company increased our co-payments and our deductibles, taking another chunk out of our fixed income.

I understand the cost of health care continues to climb, and while I don't like paying more and getting less, I find some consolation in the fact that the company's retirees are sharing the burden together. Sharing the burden means that at least all of us are getting something, which is exactly why I became involved in the lawsuit in Philadelphia. Older retirees like me have nothing to protect us but the law, the Age Discrimination Act. It would be a financial catastrophe for me to lose my health care benefits from Armstrong, which is exactly what could happen if the EEOC rule is published or if Congress passes a law just like it. Our struggles with cancer and my heart bypass will make it very difficult to find insurance if I would lose access to my former employer's plan. And even if I could find it, there is no way I could afford it on my fixed income.

I know there is a health care crisis, and I am willing to shoulder my part of the load. Every year Armstrong asks me to pay more, and I am not here complaining about that. But I am not going to sit here and be told that because I am old I am not entitled to the

same health care benefits somebody younger is getting. It is just ridiculous.

I don't think you have to be a health care expert to understand that the EEOC's rule just doesn't make sense. Even if my employer paid all the premium costs, and let me assure you it doesn't, I am so much cheaper to insure than a younger retiree because Medicare covers a lot of my health care. My employer only has to provide a wrap-around plan that mostly covers our deductibles and co-pays and prescription drugs. I know for a fact that my wrap-around plan is a lot cheaper than the plan the younger retirees get.

The EEOC never bothered to look at what people like me would do if our employees just dropped us from their plans. There are about 12 million of us who are not planning for this. How are we going to afford the more expensive private insurance plans? Where are we going to find them? And what if we can't find one that offers all the benefits we get from our employer plan?

And most frightening for people like Barbara and me who have been sick, who is going to be willing to sell us a policy or sell us a policy we can afford? I need the answers to these questions and so do you. It is really a matter of life and death for us.

I just don't get it. The EEOC is supposed to be protecting me, not my employer, not younger people than me. Instead I stand to be badly hurt just because I am getting older. I thought that is what the age discrimination law is supposed to prevent.

I worked long and hard for my health care benefits and I just can't believe that Congress is even considering telling my employer that it is OK to cut me out of that plan so younger retirees can get a better benefit, that it is OK for my employer to go back on his promise to me. I urge you and all Congressmen and Senators in the Congress to please listen to the tens of thousands of us who have already told you that we can't just lose these benefits so that younger people can get better benefits. Simple fairness requires that you come up with a better answer.

I know firsthand that health care is a real problem. We all need to pitch in together to address the health care issues. I am prepared to do my part, but I am hoping you are not going to tell me that older Americans are the only ones expected to sacrifice.

Thank you.

[The prepared statement of Mr. Dochat follows:]

Statement of Fred G. Dochat, Member, AARP, Lancaster, PA

Good Morning Mr. Chairman and members of the Committee. My name is Fred Dochat. I live in Lancaster, Pennsylvania. I'm here today with my wife, Barbara Ann. I'm 77 years old, and Barbara Ann is 72. I am one of the plaintiffs who successfully prevented the EEOC from issuing its regulation that would have given my former employer the green light to cancel my health care benefits.

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in poor health, I guess, like many Americans in their seventies, we have experienced some health care problems along the way. Six years ago I had quadruple bypass surgery, so I've got ongoing issues with my heart and my cholesterol. Barbara Ann recently fought a battle with cancer and we continue to hope that her recovery is complete. We both rely on prescription medications to control glaucoma, osteoporosis, and other chronic ailments.

As you can imagine, the health benefits that I earned from Armstrong have played an essential role in defraying our health care expenses. These benefits don't come free—we pay a contribution to the premium. In January 2004, the company doubled our premium contribution. In January 2005, the company increased our co-payments and our deductibles, taking another chunk out of our fixed income. I understand that the cost of health care continues to climb, and while I don't like paying more and getting less, I find some consolation in the fact that all of the company's retirees are sharing the burden together. Sharing the burden means that at least all of us are getting something. Which is exactly why I became involved in the lawsuit in Philadelphia.

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I need the answers to these questions—and so do you. It's really a matter of life and death for us.

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I worked long and hard for my health care benefits, and I just can't believe that congress is even considering telling my employer that it's ok to cut me out of that plan so younger retirees can get a better benefit; that it's ok for my employer to go back on his promise to me. I urge you, and all the congressmen and senators in the congress, to please listen to the tens of thousands of us who have already told you that we can't just lose these benefits so that younger people can get better benefits. Simple fairness requires that you come up with a better answer.

I know first hand that health care costs are a real problem. We all need to pitch in together to address the health care issue; I'm prepared to do my part, but I'm hoping you're not going to tell me that older Americans are the only ones expected to sacrifice.

Thank you.

Chairman JOHNSON. Thank you, sir. Thank you for your testimony.

Mr. Spencer.

STATEMENT OF STEVEN D. SPENCER, ESQ., PARTNER, MORGAN, LEWIS & BOCKIUS LLP, PHILADELPHIA, PA, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. SPENCER. Mr. Chairman, Members of the Committee, thank you for having me here. I appreciate it. My name is Steve Spencer. I am a partner in the law firm of Morgan, Lewis & Bockius. I practice in Philadelphia, Pennsylvania, which is the home of the Third Circuit, the circuit that gave us the Erie County decision.

In my practice, I represent single employer plans, multi-employer plans, and various plan sponsors. For those of you who may not be familiar with the terminology, multi-employer plans are those plans that are jointly administered by labor and by management. I have practiced in this area since 1978. And in my spare time, I teach courses in employee benefit law at the University of Pennsylvania and at the Villanova School of Law.

Today, I am testifying on behalf of the Chamber of Commerce. And I am here to testify in favor of, and as the Chairman so eloquently stated, in favor of preserving retiree health benefits. But I fear if the present state of the law continues, there will be an accelerated decline in retiree health benefits.

The problems confronting labor, employers, and all plan sponsors are threefold. First, you are well aware of the rising health care costs. Second, you are aware of the changing accounting rules. And third, while all of this is going on there are now rising pension costs. These three forces are creating competitive problems in the local and global markets for plan sponsors.

The facts of the Erie County case are actually illustrative of this. Faced with changing accounting rules and rising health care costs, in 1992 Erie County decided that employees hired after January 22 of 1992 would no longer receive retiree health benefits. So the entire case focused on a grandfathered group of employees because new employees, like me, will never get benefits if I were working for Erie County.

Now in 1997, Erie County took another look at their plan and they decided to divide their retirees into two groups, those who are Medicare eligible, who would be covered by a Medicare HMO, and those who were not Medicare-eligible, who would be covered by a PPO or point of service plan. As Representative Andrews and the Chairman have already noted, the Third Circuit found this plan design to violate the Age Discrimination in Employment Act. And as all the other speakers have noted today, Erie County reacted by not increasing the benefits for those who are Medicare-eligible but by reducing the benefits for those who are Medicare-eligible.

Now following the Erie County decision, a lot of plan sponsors called me and said, "What should we do? Should we terminate our benefits? Should we reduce the benefits? What should we do?" And many of them were panicking over this. But once the EEOC came out and noted that they were going to issue an exemption in this area or were considering issuing an exemption in this area, plan sponsors decided to take a wait and see attitude. But everything changed on March 30th of 2005. The status quo changed when Judge Brody enjoined the EEOC from issuing its proposed regulations. Once again, plan sponsors are considering their alternatives.

The best hope for preserving retiree benefits lies in either an EEOC exemption or in a similar legislative exemption. Now when I think about retiree health benefits, I think of them in two types: Medicare bridge benefits and Medicare carve-out or supplemental benefits, which you have already heard about this morning.

Absent a regulatory or legislative solution, Medicare bridge benefits will disappear because faced with rising health care costs, changes in accounting rules, and rising pension costs, few, if any, plan sponsors will create new plans.

Now let me be clear about this. We are not talking about taking away benefits from anyone who currently has been promised post-65 Medicare supplemental or carve-out benefits. What we are talking about today, though, is maybe coming up with something where there is already ample precedent in the Age Discrimination in Employment Act. For example, under Section 4L of the Age Discrimination in Employment Act we see Social Security bridge benefits. Absent relief, those who lose their job in a reduction in force, like Mr. Dochat, will be without medical benefits.

Now in the city of Philadelphia, to get an HMO, it costs a couple, a husband and wife, \$840 a month. And at the current rate of inflation of 13 percent in the medical area, you can imagine over 10 years, from age 55 to 65, an early retiree will have to shell out \$175,000 if we don't permit Medicare bridge benefits to continue.

The EEOC's exemption recognizes this reality and it attempts to preserve the Medicare bridge benefit. Absent an exemption, I think we will see an elimination of these benefits and all employees will be losers.

Thank you for your time and attention.

[The prepared statement of Mr. Spencer follows:]

Statement of Steven D. Spencer, Esq., Partner, Morgan, Lewis & Bockius LLP, Philadelphia, PA on behalf of the U.S. Chamber of Commerce

Chairman Johnson and members of the subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I am a partner at the law firm of Morgan, Lewis & Bockius LLP. I work in Philadelphia, Pennsylvania, where the United States Court of Appeals for the Third Circuit—the court that issued the Erie County decision in 2000—resides. My practice focuses on advising single-employer and multi-employer benefit plans, i.e., those managed jointly by employers and unions, regarding employee benefit matters. I have been practicing in this area of law since 1978. In my spare time, I am a lecturer at the University of Pennsylvania Law School and an adjunct professor of law at the Villanova University Law School where I teach courses on employee benefit law. I am testifying today on behalf of the U.S. Chamber of Commerce.

I am sure that you are aware of the spiraling cost of health care coverage in this country. A nationwide survey of large employers found that the cost of providing retiree health benefits increased by an estimated 12.7 percent on average between 2003 and 2004 alone. The Henry J. Kaiser Family Found. & Hewitt Assocs. LLC, *Current Trends and Future Outlook for Retiree Health Benefits* (Dec. 2004), at 9. The experiences of our clients bear out the conclusions of the many studies that have found that the steadily rising costs of health care, changes in the accounting rules and rising pension costs have placed employers and organized labor under ever-increasing pressure to reduce expenditures on all benefit programs—including retiree health benefits. For example, a recent study suggests that if current trends continue, the employer-share of health benefit costs could increase by more than 236 percent between 2002 to 2010. Employment Policy Foundation, *Employer's Share of Health Benefit Costs Could Top \$10,000 per Employee by Decade's End* (May 1, 2003). This pressure has forced plan sponsors to constantly reexamine the coverage provided to employees and retirees in order to remain competitive in local and global markets. Today, plan sponsors face the same pressures that led Erie County to

restructure its plans and to the Third Circuit decision that has resulted in today's important hearing. To fully understand the impact of the Erie County decision on future retiree health benefits, it is important to understand the history of retiree health coverage in this country.

Background on Retiree Health Care

For decades, employers and unions have taken Medicare eligibility into account when designing and implementing retiree health benefit plans. These plans have generally provided one of two forms of benefits, or both: (1) "Medicare Bridge" benefits for early retirees, which typically continue the same health benefits as are provided for active employees until the retiree becomes eligible for Medicare; and (2) Medicare supplement or carve out plans for retirees who are eligible for Medicare. Like many plan sponsors, Erie County provided its retirees who were not Medicare-eligible with "Medicare Bridge" benefits and its Medicare-eligible retirees with a Medicare supplemental plan. This plan design was widely regarded as legal under the Age Discrimination in Employment Act (ADEA) the federal statute that bars employment discrimination based on age until 2000 when the Third Circuit Court of Appeals changed the status quo with its decision in Erie County.

Background of Erie County Case

Faced with increasing health insurance costs, the Erie County Employees' Retirement Board (the Board), which administered the medical coverage, decided that employees hired after January 23, 1992, would not be eligible for continued health insurance benefits upon retirement. On December 12, 1995, the Board further restricted eligibility by declaring that persons the county hired prior to January 23, 1992, would remain eligible only if they fell into one of four groups: (1) employees unable to continue their employment due to a disability, who otherwise were eligible for a disability retirement pension; (2) employees who retired from the county government with at least 20 years of service and 55 years of age; (3) employees involuntarily terminated from county government employment with at least eight years of service; and (4) employees who retired from the county with at least eight years of service and 60 years of age. Prior to 1998, all county employees and retirees were covered by traditional indemnity plans. With health care costs still increasing and a change in financial accounting standards, the county announced late in 1997 that going forward Medicare-eligible retirees would be covered by an HMO Medicare supplement that required coordination of all health care by a primary care physician, while early retirees would be covered by a point-of-service plan. A group of Medicare-eligible retirees sued their former employer, alleging that Erie County discriminated against its older retirees in violation of the ADEA because the HMO Medicare Supplement required retirees to coordinate their medical care through a primary care physician, while younger retirees under the point-of-service plan were not required to coordinate their benefits through a primary care physician. The Third Circuit Court of Appeals found that this plan design violated the ADEA unless Erie County could show that it could satisfy the ADEA's "equal cost/equal benefit" defense. Directed to come into compliance, Erie County ultimately equalized the retiree health benefits it offered the only way that it could afford to not by improving the benefits for its Medicare-eligible retirees—but by reducing the level of health care benefits offered to early retirees.

Impact of Erie County Decision

Following the Erie County decision, many clients asked whether they should terminate their retiree health plans that were at risk. Until recently, we have advised that while they are at risk, rather than terminate their plans, they should consider a "wait and see" approach to see how the other Circuits and the EEOC would react, particularly because the EEOC had announced that it would promulgate a narrow exemption to the ADEA, which would recognize that plans could continue offering Medicare-coordinated retiree health benefits. However the legal landscape changed on March 30, 2005, when Judge Brody of the Eastern District of Pennsylvania permanently enjoined the EEOC from issuing the exemption. Once again plan sponsors have asked whether they should terminate their plans.

According to the Third Circuit, the only way that a plan sponsor can justify providing different benefits to Medicare-eligible retirees as compared to younger retirees would be to meet the "equal benefit or equal cost" test established in Section 4(f)(2) of the ADEA and EEOC regulations. To do so, the plan sponsor would have to show either (1) that the benefits provided to Medicare-eligible retirees (factoring in Medicare) were equal or better than those offered to early retirees or (2) that it spent the same amount buying health insurance for each retiree, without considering the value of the Medicare benefit. As illustrated by the Erie County case, subtle differences in the benefits provided to pre- and post-Medicare-eligible retirees

may be found by a court to violate the equal benefit test. Moreover, plan sponsors may be unable to demonstrate that they satisfy the equal cost test where they provide a Medicare carve-out or Medicare supplement plan, because Medicare will bear a substantial portion of the cost.

The problem with the Erie County decision is that, given the rapidly escalating costs of health care, it leaves plan sponsors with few options other than to restructure and reduce the health benefits provided to retirees. Plan sponsors can comply with the Erie County decision only by: (1) increasing health benefits for retirees over the age of 65; (2) reducing health benefits for retirees under the age of 65 to match those provided by Medicare; (3) limiting the duration of health benefits to a specified number of years regardless of age; or (4) terminating health benefits for all retirees. In light of the ever-increasing cost pressures on plan sponsors, few would choose to raise the benefit levels for post-65 retirees, opting instead to reduce or eliminate retiree health benefits.

It is estimated that more than 3 million retirees between the ages of 55 and 64 rely on employer-sponsored plans for their health insurance coverage, while about 11 million people over the age of 65 have supplemental coverage from an employer-sponsored plan. See Statement of Patricia Neuman to the U.S. Senate Special Committee on Aging, May 17, 2004 (Exhibits 1 and 2). For early retirees, employer-sponsored plans generally provide access to relatively affordable and comprehensive coverage. Without this coverage, many retirees who are pre-65 and too young for Medicare would be hardpressed to find comparable, affordable coverage on their own. While Medicare-eligible retirees, unlike early retirees, have Medicare as their primary source of health insurance, many rely on employer-sponsored retiree plans to provide needed assistance in supplementing Medicare's benefits.

Why the EEOC Exemption Is Appropriate

Retiree benefits are not like other forms of compensation for employees, and therefore should be approached differently when evaluating age discrimination concerns. First, our society has in place certain protections for retirees age 65 or older that are not available to younger retirees, e.g., Social Security and Medicare. Second, we are talking only about retirees, not employees. No one is suggesting that employees should be treated differently based on their age. With regard to retirees, however, the law, recognizing the existence of protections such as Social Security and Medicare, already permits distinctions that favor younger retirees. For example, Section 4(l) of the ADEA and Section 204(b)(1)(G) of the Employee Retiree Income Security Act (ERISA) both explicitly permit employers to pay subsidized early retirement benefits to retirees until they are eligible to receive Social Security. See 29 U.S.C. §1054. These bridge benefits permit employees to retire early and receive a subsidized benefit that disappears when the employee becomes eligible for Social Security. These "Social Security Bridge" benefits are particularly important when employees are terminated, as businesses downsize and restructure. But early retirees will face severe hardships if the law prohibits "Medicare Bridge" benefits. The fact is that most employees cannot retire before age 65 unless they have medical insurance to cover them until Medicare is available. For most retirees, buying individual coverage is cost prohibitive. For a couple age 55, one year's health care insurance this year could easily reach or exceed \$8,400,¹ rising at 13 percent per year. The cost for that couple to purchase coverage until they qualify for Medicare at age 65 would total more than \$175,000 if medical costs continue to increase at only percent per year.

Plan sponsors want to ensure that adequate health benefits are available to their employees upon retirement. That's why labor and management support the EEOC exemption, which would remove a significant obstacle to achieving that goal. The EEOC exemption, if implemented, would preserve Medicare Bridge benefits. In the absence of the proposed exemption, plan sponsors will either terminate their retiree health plans or structure them in a way that reduces the level of benefits to early retirees while producing no additional benefits to Medicare-eligible retirees. The EEOC exemption merely recognizes the reality that an interpretation of the ADEA that would result in a net loss of employer-sponsored retiree health benefits does not promote the purposes of the ADEA and is not in the public interest.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to testify today and for your attention to this very important issue. I would be happy to answer any questions that you might have.

¹Quote obtained from www.ehealthinsurance.com.

Chairman JOHNSON. Thank you, sir. We have got a vote on, and Mr. Andrews and I are going to go vote here in a few minutes, but we will continue with the meeting during the vote, because we only have one vote.

I would like to ask Ms. Silverman, the ADEA has been around since about 1967. Why was the coordination of retiree health benefits with Medicare not an issue until the Erie County decision in 2000?

Ms. SILVERMAN. Well, until the Erie County decision employers never really had a reason to believe that coordinating the retiree health benefits they offer with Medicare eligibility was unlawful. And I understand that they have been doing this for quite a long time. In fact, when Congress enacted the Older Worker Benefit Protection Act, which amended the ADEA in 1990, the joint statement of managers, which accompanied the final bill, included a clear statement that the coordination of retiree health benefits with Medicare eligibility was permissible.

So, frankly, before this they just didn't even realize that it would be problematic. They didn't think it was legal.

Chairman JOHNSON. Thank you. Mr. Greenfield, I understand from your testimony in many cases retiree health benefits for teachers cease once the retiree reaches 65. So, in other words, the typical teacher is only eligible for retiree health benefits up until the time the person becomes eligible for Medicare. Is this a typical retiree health benefit designed for teachers? And if school districts were not allowed to provide these benefits only to retired teachers prior to age 65 are teachers likely to lose their health benefits entirely?

Mr. GREENFIELD. It is, Mr. Chairman, a typical design. There are a full panoply of designs in the various school districts across the country but bridge payments like the one you just described where benefits are only provided until someone is eligible for Medicare and then stopped is a typical design and it is done for a number of reasons. One, it makes it possible for the person to retire when the pension is eligible at that time, when they are eligible for a pension but they are not eligible for Medicare yet.

And, second, that it is practical because you can keep those people on your primary plan the same inactive where you couldn't if they were already eligible for Medicare. In terms of what will happen if that is no longer available, we do fear that it will assuredly cause a number of people to lose benefits or have reduced benefits.

Chairman JOHNSON. Thank you, sir. Mr. Spencer, can you tell us based on your experience what you would expect your clients to do if the Erie County decision was allowed to stand?

Mr. SPENCER. Sure. Right now employers are really considering four options: they are considering terminating retiree health benefits entirely, offering benefits for a limited duration, making the benefits for the pre-65 group of employees equal to those who are older than 65 by basically giving them just Medicare-type benefits, or improving the benefits to provide benefits that go beyond Medicare, providing Medicare supplement. And what we are seeing, though, is since the design that Mr. Greenfield is very typical, where benefits stop at age 65. We are not seeing employers and

plan sponsors or labor unions advocating to provide additional benefits beyond 65.

And so I think the general approach is that most plan sponsors are thinking about terminating their benefits or reducing them.

Chairman JOHNSON. Thank you, sir. That is not a good deal, is it?

Mr. Andrews, you are recognized.

Mr. ANDREWS. Thank you. I would like to thank all the witnesses for their testimony, especially Mr. Dochat, is that how you pronounce your name?

Mr. DOCHAT. Yes.

Mr. ANDREWS. Thank you for being here today, and I hope that your wife continues to be recovering. I heard your story, and it rang a bell for me. If I got this correctly, when you were 61 your company down-sized—

Mr. DOCHAT. When I retired.

Mr. ANDREWS. You were 61 when you retired?

Mr. DOCHAT. Yes.

Mr. ANDREWS. So that meant you had 4 years to go before you got to Medicare. The reason it rang a bell was I know a 61-year-old man who had worked at a place, a shipyard, for 40 years and the shipyard closed and let everybody go. And he did not have health insurance at all for the 4 years until he got to Medicare.

It was my dad. When I was 14 years old that is what happened to my father. And a lot of employers don't do what your employer did, but that doesn't mean we should change the law to let them discriminate against anyone on the basis of age. And I understand that.

I wanted to ask Mr. Greenfield how this is affecting people in the education field. My understanding is a lot of teachers retire at around age 55, is that correct?

Mr. GREENFIELD. They typically retire—or a wave of teachers retire when they are first eligible to retire under the state retirement system, and those can go as early as 55, and some 60.

Mr. ANDREWS. So there is maybe a 5-year or 10 year time for teachers before they hit Medicare where they are totally dependent upon whatever benefit the school board is contractually obligated to pay or willing to pay.

Mr. GREENFIELD. That is right, and it would not be feasible for most teachers to be able to take advantage of the earlier pension availability if they didn't have health care benefits.

Mr. ANDREWS. In listening to what Mr. Spencer has to say and Ms. Silverman has to say, I am concerned that what a lot of school boards are going to look at is the exposure that they are subjecting themselves to with respect to liability. You could make a claim, as happened in the Erie County case, that a school district that provides a comprehensive plan at a cost of \$15,000 a year for a 56-year-old retiree and her spouse/his spouse is violating a law if they only spend \$3,500, \$4,000 a year on a Medicare retiree.

If either of you, Mr. Spencer or Mr. Greenfield, were representing that school board and they came to you and said, "We want your opinion letter, we want your assurances, or better yet, we want you to tell us how we can design a plan that will immunize from liability under the Age Discrimination statute. We are going to hire a

great Philadelphia law firm like yours, Mr. Spencer, or a great Washington law firm like yours, Mr. Greenfield, to write a plan for us that will assure us that we are going to be OK if we get sued for age discrimination," could you do it?

Mr. GREENFIELD. I am going to let Mr. Spencer talk for the employer.

Mr. SPENCER. Well, that is what we get paid for doing, so I guess I would. Let me tell you how we would design the plan, and I don't think these choices are particularly good results. We could say for the younger pre-65 retirees, let's duplicate what Medicare provides, exactly the same thing. So the 65 and older do not get anything more, they just stay where they are.

The second choice would be let's provide it for a limited duration. Let's provide people with retiree health benefits for 5 years. It is going to cost us more, but that is not going to help if we have a reduction in force and somebody is let go at 55.

Mr. ANDREWS. It also says to someone you better not retire before you are 60.

Mr. SPENCER. Absolutely. And it could be 3 years, the costs are phenomenal. So at the end of the day, unfortunately, you come back to the conclusion that maybe the safest alternative is just to terminate retiree health benefits entirely, and clearly that is not a satisfactory result.

Mr. ANDREWS. What is your opinion, Mr. Spencer, I know it is in your written testimony, the practicality of designing a standard for equivalent benefits. If we said as long as the benefits of the wrap-around plus Medicare are equivalent to the pre-65 health care plan, you are OK. How precise and accurate do you think we could be in writing such a definition?

Mr. SPENCER. I think you summed it up at the beginning of the hearing very well; this is a very complicated area, and to try to have complete parallelism in the two different plans is virtually impossible. I think it is an extremely difficult task. And quite frankly, as Congress tinkers with Medicare, it causes ripple effects and you would have to constantly keep changing. Plus the other problem is that health benefits are not like pension benefits, it is not static. Treatments that we have today are going to be very different from treatments in the future. And we are going to have to constantly look at the plans and redesign them.

Mr. ANDREWS. The other point I would close on—I see my time is up—I also think that the new prescription drug benefits under Medicare further complicate the matter, because it is hard to understand in and of itself, but then if you have to compare it to a plan that existed before '65, it even further increases the complexity.

Thank you, Mr. Chairman.

Mr. KLINE [presiding]. Thank you, and I know that the Chairman indicated at the start of this hearing that we were going to be disrupted by votes; that is, of course, in fact what is happening. We are sort of trading; Mr. Kildee and I went over to allow Mr. Andrews and Mr. Johnson a chance to vote. That is the explanation. The result of that is that we missed some testimony, and we do have your written statements. But this is my preamble to explain that we may have some disconnects sometimes in questions

we are asking and cover some ground that was covered earlier, so I apologize for that. That is by way of explanation.

It seems to me that in this case we had two fairly clear laws that the Congress had enacted and the President had signed, we are dealing with a couple of laws, the Age Discrimination and the secondary law in the 1990's. And in the Erie court decision my looking at it is that the court clearly, clearly avoided the congressional intent in the law. Another way of putting that is they overreached and created new policy that was never intended by the crafters of the legislation or the President who signed it.

But now we have got that decision and so we are grappling with it. And I would like to turn to Ms. Silverman, Commissioner Silverman, and look at that, sort of following up on what Mr. Andrews said earlier. When the EEOC started to craft the narrow Erie County exception, I understand that the EEOC looked at alternative means, some of which you alluded to in your testimony, of addressing this issue, in particular whether some variable of the equal cost/equal benefit test would suffice. The EEOC chose not to go that route. Can you explain, expand on that and explain why those alternatives were insufficient?

Ms. SILVERMAN. I can try to. The equal cost/equal benefit rule we simply found it unworkable in this situation. We first tried to apply it in a way that would make most of the existing plans out there fit in some variable so that we wouldn't have the problem with the schoolteachers and many of the bridge plans, and that was simply impossible.

And then we tried to see what else we could do. Well, it is impossible to do it with equal cost because it is never going to be equal cost because Medicare exists for the post-65 population. So you can't expend the same amount of money. The equal benefit is the area that we really spent the most time on, but because of the many nuances and variables, health plans contain incredibly complex calculations, and that would often be required to establish the equal benefit defense. And we feared that with such calculations and the ADEA liability, if an employer got it wrong, they would simply cut or eliminate the benefits just as they did in Erie County.

So what we found is there was just no way to get the benefit just right. We don't think that they could have possibly duplicated Medicare, we just don't think it could have been done. So that is why we came to the conclusion that there wasn't some variable of the equal cost/equal benefit rule that we could interpret and use in this. And that is why we went with the full exemption.

Mr. KLINE. Thank you. It is enormously frustrating for many of us, if not all of us, sitting up here as we look at legislation that we craft and it looks like the law that my predecessors, me being a relatively new Member of Congress, put together is pretty clear, and yet we are now trying to work around that or find some solution. And I am wondering myself if we are going to have a legislative solution, again picking up on what Mr. Andrews said, what could we possibly say that would restore the situation we had where we had employers willingly providing that health coverage until the retiree reached Medicare age. And then working together to try to ensure the highest level of benefits? I am just having dif-

faculty imagining what possible language that we could put in legislation that would make it sufficiently clear to the courts that we mean what we say and this is the public policy.

I see my time is about to expire. I had a question for Mr. Spencer but I am going to hold on that and see if my colleague, Mr. Kildee, would like to inquire.

Mr. KILDEE. Thank you very much, Mr. Chairman. Mr. Spencer, you used the word “complicated,” as I think Mr. Andrews used the word “complicated.” And it certainly is complicated both legislatively but it is complicated also in our desire to support traditional allies that are very often at odds with one another now because I have great respect for the various groups not having the same position, have worked with them through the years. So it is complicated in various ways.

I would like to ask you a question. What guarantee do we have that cuts to retiree health benefits won’t continue to be made for a whole variety of reasons if the EEOC rule takes effect? And what is stopping those cuts from being made in the following manner, perhaps first only to just the oldest retirees but perhaps sooner than would have otherwise been the case if the EEOC hadn’t paved the way?

Mr. SPENCER. I think that is an excellent question, and one I tried to address in my opening statement. The ADEA does not protect or prevent a company like Armstrong, for instance, as an example, from terminating retiree health benefits. It doesn’t prevent that. The statute that prevents that is the Employee Retirement Income Security Act. Under that statute, participants have brought lawsuits to enforce the terms of the plan, to enforce the promises that were made to them. And if those promises said that those participants were going to get benefits for the rest of their life, then they would get benefits for the rest of their life. If those promises contained conditions, then they would be subject to those conditions.

Nothing in the proposed ADEA exemption changes those rules. That is the protection. That is the source of protection. The exemption that we are talking about today doesn’t change that one iota.

Mr. KILDEE. I appreciate your answer on that. And Congress will have to come up with some—the courts basically said Congress can do this because they are citing not constitutional questions, they are citing statutory questions. So we certainly want to work with all the groups involved. And as I said, traditional allies take contrary positions on this and so it is not that easy but we look forward—and the gentleman from the AARP, do you have any comment on that at this time?

Mr. DOCHAT. No, I was just listening.

Mr. KILDEE. OK, all right. Thank you very much.

Mr. KLINE. I thank the gentleman. Mrs. McCarthy, would you care to inquire?

Mrs. MCCARTHY. Thank you, Mr. Chairman. Thank you for having this hearing. It is very hard for us to sit up here, because I think all of us want to the right thing for our seniors, but it always seems our seniors are getting the short end of it. The rules change. You worked 45 years for a company. You gave the loyalty to your company, and then the rules change. It is going to be our job to

try and find some solution that is going to protect you, to protect all those seniors that have worked so hard, and thinking especially with your fixed income.

I come from Long Island. We have many, many seniors that are being forced to move, mainly because they can't afford the health care in the New York market. They have to leave their families, their grandchildren, and they can't get their medications—which doesn't matter, anywhere you go in the country, you are going to have that problem.

I guess the thing, Mr. Dochat, what would happen to you and your wife if you lost everything as far as your health care, would you be forced to move from Pennsylvania, where your home has been all your life? Forty-five years, I would consider that most of your life, that you have been there. I know with the EEOC rule, you are facing a difficult decision on what is going to happen. But the problem is going to be, we are going to end up hurting probably a vast majority of our seniors one way or the other because somebody is going to get hurt to fit into the rule and to the money. I think the problem with this nation is the health care system in whole. And that is a problem, and we have to face that.

When we go over to Europe, and I know everybody talks about Europe not having good health care, Tony Blair changed it three or 4 years ago. Everybody gets good health care over there now. You don't have the long lines. And we have to start seriously looking at how we are going to service our seniors, how we are going to service everyone, because to me that is a basic right. I spent my life as a nurse, and I spend a lot of time in hospitals today, and the care is so stretched for the United States of America, to even be thinking about the health care that we are giving to our citizens to me is really a shame. Not without everybody trying their best, but it is just not working.

I hope this Committee can come up with some sort of answer, but knowing how we work and we are going to have to compromise, someone is going to get hurt and that is a shame, it really, really is, because it always comes down to money. Loyalty, the care about working for a company, those things are going out the window and everybody is me first, whether it is the teachers, and you have every right to certainly protect the teachers, the businesses, you have every right to protect the businesses, but it's someone like Mr. Dochat that is going to get hurt and we are going to have millions of them. And that is really, really too bad. And I am sorry that I missed because we had to go down to vote on any solutions. But anyone who wants to try and offer a solution that we can work on, because that is what this Committee is here for, I would appreciate hearing it.

Mr. KLINE. I don't think there is a ready solution forthcoming, despite our best efforts.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman. Mr. Spencer, I want to say this without getting into an argument with you, but I want to make a point. You made a comment that the companies are doing this but they are not taking away promised benefits to people like Mr. Dochat. The fact of the matter is that more and more companies are taking away the retiree benefits of people—first, they are

increasing the cost, as Mr. Dochat said, and they are taking the deductibles and all of that. And then some are just losing it entirely. So this is a serious, serious issue. In fact, we have legislation on this, H.R. 1322. We have had some hearings in this Committee on it where basically, if it is a profitable company, they ought not to be able to break that promise.

I think Mr. Dochat makes an incredibly good point. These are promises made. People took home less pay when they were working over a period of 40 years, 50 years, 35 years, because they had the promise of the health care on retirement. And I think these are promises being broken. And I think what disturbs me most of all, besides the promise being broken, is that we can't get private industry to get serious about a debate about universal health care, about how we are going to take care of this.

This system is falling apart at all edges. And I would hope that the United States Chamber of Commerce and others would find a way to try and get beyond where we are right now and cover everybody on that. I simply think it is wrong to put people like Mr. Dochat in the situation that he is in, whether you are in a private company, but particularly if you are in a profitable private company.

Can you tell me the why—if a company feels it is having some financial pressure but it is profitable, why it is they feel they have to protect themselves by going after one of those vulnerable parts of our society? Is there no place in their corporate structure that they can look for cost savings other than to pick on people that are the most vulnerable and the least likely to be able to afford to get back the coverage that they are losing?

Mr. SPENCER. Mr. Tierney, your question is actually an excellent one. In my testimony, I didn't say in answer to Mr. Kildee's question, what I said was that the Employee Retirement Income Security Act provides the vehicle to protect benefits. Let's take Mr. Dochat, for an example. He is being provided those retiree health benefits. He is getting those benefits. Erie County hasn't changed that at all.

So the issue before us today is are we going to require employers, labor unions, plan sponsors, to create new plans, plans for people who have no expectation of having post-age 65 Medicare benefits. And what we see in the Erie County case is illustrative. It shows us that the way the companies are reacting to this are by saying new employees are not going to get these benefits, OK, they are too expensive. We are not going to give these benefits. With respect to these grandfathered groups of people, we are going to give those benefits.

In Mr. Dochat's case, which is an excellent example, he is getting those benefits today. And what is protecting it? Not the Age Discrimination in Employment Act, not what you are being asked to look at today, it is the Employee Retirement Income Security Act.

And you are correct, Mr. Tierney, that there are numerous lawsuits that have challenged this and have tested this and the courts are deciding those, whether or not an employer promised something and to enforce those promises when they have to do it. But what we are considering here today really doesn't change the rules of the game on that. What we have is a lot of people, like in the

NEA, who have a lot of plans that are designed to provide retiree health benefits until somebody becomes Medicare-eligible.

And so what we would be doing here is requiring those employers—if they want to continue to do that, we would be requiring them to establish new benefits, new plans for people who had no such expectations.

Mr. TIERNEY. I appreciate what you are saying, but what seems clear to me, we had at one point in our society a pretty clear view of where we were going. And I think Roosevelt used to talk about the vagaries and the vicissitudes of life, and when people came up against the wall, the corporations didn't provide for, we tried to do something, whether it is Social Security or whatever else we put in place. And, in fact, corporations got involved in that and they gave us health care for employees, they gave us retirement plans.

That is sort of falling apart right now. What you are talking about here doing is going forward is you are now saying there is going to be one vulnerable part of our society that is no longer going to get the good health care that they got through their employment. They are going to go to what unfortunately is a lesser health care, probably without prescription drug benefits and some other benefits on that by being kicked off of the corporate responsibility into the public realm. We are going to put them into Medicare and they already had that, I understand that, but Medicare is not going to be doing the things for them that we all would like them to do.

Yet nobody is stepping forward saying what is government's role in this? If corporations decided they are not going to participate and do that anymore, and individuals can't afford it, the debate in this country I think ought to be, and I would hope that the Chamber of Commerce and others, the debate ought to be what are we going to do as a public group, a society to cover health care? We should be talking about universal health care, I don't care if it is single, pair, or any of the other three major things that are out there, we ought to be talking about how we are going to do it.

The Institute of Medicine came out with a report a couple of years back, one of the recommendations they have that is in legislative form that we have here, let states experiment, let them find ways to cover everybody in their state with a form of health care. They can take the debate out of Congress, where we can't seem to settle on what type we are going to do, whether it is going to be a tax credit, whether it is going to be a single pair, or whatever. Let states decide how they are going to do it and use the ones that work as models. And the Federal Government perhaps ought to step forward and make sure the funding is there to do those experiments.

But we are not even talking about that. And I guess I don't mean to rail at the witnesses that are down here, but the fact of this matter is this is a societal issue that we should be talking about as a Congress. And I appreciate your role here today. It is frustration that we are talking about, because we can't seem to get this debate talking, but people don't want to hear about a lot of the stuff that is being debated down here. What they want to talk about is these people that are now going to fall between the cracks,

what are we going to do about them. And there is an increasing number.

And I thank you for your testimony today.

Mr. KLINE. The gentleman's time has expired. Mr. Marchant.

Mr. MARCHANT. This is a question to Mr. Spencer. Mr. Dochat testified that he is a lot cheaper to insure than a younger retiree because Medicare covers a lot of his costs. His employer only has to pay for the deductibles, co-pays, and the prescription drugs. Am I correct to understand that under the Erie County decision his employer can only provide exactly those same benefits to someone else who doesn't have Medicare covering the bulk of the cost? And what happens to a 58-year-old retiree who doesn't have the Medicare picking up much of the tab?

Mr. SPENCER. OK, under the Equal Pay Act—I am sorry, under the Age Discrimination in Employment Act—there is a safe harbor and that safe harbor is found in Section 4F of the Act. That section provides that if an employer abides by the terms of a bonafide employee benefit plan, that they either provide equal benefits or expend equal dollars. That plan will be in compliance with the law.

There is a recognition in the Age Discrimination in Employment Act, unlike Title VII, for instance, that older workers are going to be more costly when it comes to providing benefits. For example, if I took 1,000 65-year-olds and 1,000 29-year-olds, we know that at the end of 1 year there are going to be far fewer 65-year-olds who are then 66 alive.

So life insurance is going to be more costly for that older group of employees. And the Age Act recognizes that. And they say instead of requiring the exact same benefits for employees regardless of age, you can show and comply with the law by spending the same dollar amounts to provide those benefits.

Now Mr. Dochat, I think, is correct. He has said that it is cheaper to insure older employees on Medicare than younger employees, and the reason for that is because Medicare is going to pick up some of the cost.

But the problem with that analysis is as follows. Right now most of these plans are designed not to provide any benefits after age 65. And because they are designed not to provide any benefits after age 65, any time we extend benefits to a new group of employees, there is going to be additional and substantial costs.

And in response to Mr. Tierney's question before, the group that I am concerned about, the ones that I think are truly the most vulnerable, are those who are, like Mr. Dochat, at the age of 61 was forced to leave his job as a result of a reduction in force. He didn't have Medicare to fall back upon. Fortunately, his employer provided him with early retirement benefits. And so it is that pre-65 group that I think are the most vulnerable here because if they are forced out in a reduction in force, they are not going to have the money to pay for benefits.

Mr. MARCHANT. Thank you. Mr. Greenfield, as a representative of a large teacher's union, how do you respond to the claims by AARP that your support of EEOC's proposed retiree health will open the floodgates and give employers permission to drop retiree health benefits?

Mr. GREENFIELD. Thank you, Congressman. The claim is often made, it was in Mr. Dochat's testimony as well, that if the exemption were to be implemented or if the Erie rule were otherwise overturned, that it would give the "green light" to employers to cut back benefits provided to post-Medicare eligible retirees. The supposition of that question or the premise of it is that currently employers are only providing wraps and supplements to Medicare-eligible retirees because they think they have to under the age discrimination laws. That is not actually true, nobody actually thought that was the law before the Erie case came down. And, second, there is no evidence that anybody has—that any employer has complied with the Erie rule by enhancing their benefits. So there is really no logic to that analysis.

The problem is worse than that, though, because in addition to not having a cause and effect, it might have the opposite cause and effect, because if you force an employer to provide equal benefits to everybody, it makes it more likely that they will provide no benefits or reduced benefits to everybody.

Mr. MARCHANT. That is all I have, Mr. Chairman.

Chairman JOHNSON. Thank you for your comments. I think that you all have been informative, and obviously we have heard both sides of the issue. I just hope that employers don't drop health care totally across the board, and that is what could happen. We were worried about that with pension plans, with Medicare and Medicaid, and all the other forms of government support, that companies that are having a harder time making the ends meet and one of the first things they consider is reducing or eliminating health care. And we don't want that to happen. Whatever we can do to help, we would appreciate your input.

I want to thank you for being here, all of you, for your time and testimony. And both the witnesses and Members for their participation. And if there is no further business—yes, you are recognized.

Mr. ANDREWS. Thank you, Mr. Chairman. I also appreciate the contribution of the witnesses this morning. I do think this is a hearing that has to have a next step and has to have a consequence. I assume that the EEOC—I read that the EEOC is appealing Judge Brody's decision in Philadelphia, is that correct, Ms. Silverman?

Ms. SILVERMAN. We asked the Department of Justice to appeal on our behalf. It is their decision, ultimately.

Mr. ANDREWS. Well, we need to see what the Department of Justice does and if there is an appeal, see what the appeal is. But the present situation, I think, is untenable, where we have Erie as the controlling law. Again, I put great significance in the fact that the Supreme Court declined to review the Erie decision. And I think that we need to see what the Justice Department does but then consider some action on our part, because the present ambiguity, I think, is going to lead to trouble. And I would just extend my hand of cooperation to the Chairman to see what we can do to fix the problem.

Chairman JOHNSON. Yes, we will work together on it. What length of time do you anticipate the Justice Department taking on this thing, does anybody know?

Ms. SILVERMAN. They have until the end of May to file an appeal.

Chairman JOHNSON. OK, there is a time limit, isn't there? OK. Mr. Payne, you can be recognized.

Mr. PAYNE. Right, I won't belabor the meeting. Conflicts prevented me from being here, but my name is Congressman Payne. [Laughter.]

Chairman JOHNSON. He is from New Jersey, by the way.

Mr. PAYNE. In New Jersey we are a special breed. I'm here to support my colleague from New Jersey, Mr. Andrews, but this is an issue that we certainly are very concerned about, the whole question about retirees' health benefits. It is something that I think is—health care in general to me is the most important issue facing this country right now. There is talk about a crisis in Social Security; health care is where the crisis is, whether it is for retirees, whether it is for newborns, whether it is for middle-aged, whether it is for children.

And I hope that we will put in general the attention necessary to talk about what is broken in the health care system in general, because there is too much finger-pointing. Some say it is the lawyers, others say the doctors get too much. Others say that malpractice insurance is too high. Others claim that Medicaid benefits are too low. Others say the pharmaceuticals are the problem. Others say the lack of research is the problem. Others say that there is too much labor-intensive care needed. Others say there is too much infections in hospitals and you can't contain it and people who go in well get sick.

That is where the real issue is. And I would hope that our Committee would at some point just deal with health care in general, where the crisis is. We can fix Social Security. If we don't do something with health care in general, we are going to find that it is going to be an albatross around our neck.

But thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Mr. Payne. We are glad you came. No further business, we thank you again for being here, all of you. And the Committee stands adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

**Statement of the Hon. John A. Boehner, Chairman, Committee on
Education and the Workforce**

Thank you all for being here. Over the last 10–15 years, there has been a continuing erosion of employer-sponsored retiree health benefits, benefits that employers provide on a voluntary basis. A number of important factors have contributed to this erosion, including skyrocketing health care costs as well as significant demographic challenges as more baby boomers move into retirement age. A 2000 federal court ruling in *Erie County Retirees Association v. County of Erie* is also contributing to this erosion, according to the Government Accountability Office (GAO).

The Erie County decision says employers may not “coordinate” health benefits for retirees who turn age 65 and take into account the additional benefits they receive from Medicare, citing concerns about potential age discrimination. Until this ruling, coordinating retiree health benefits with Medicare had been standard practice among employers for years as a way for them to continue to offer generous benefits to their retired workers.

The court's decision has prompted serious concerns from labor unions, employer groups, and lawmakers who rightly fear it would encourage employers to reduce or drop altogether coverage for their retirees who were under age 65 rather than enrich coverage for retirees aged 65 and older. Indeed, that is precisely what happened

in Erie County. The county pared back health coverage for retirees under age 65 and began charging them a premium equal to the Medicare monthly premium.

In a move strongly supported by organized labor, workers, and employers, the Equal Employment Opportunity Commission (EEOC) last year voted to move forward with a regulation to reverse the Erie County decision. The agency's action was consistent with a letter sent to the EEOC by several of us in December 2003 expressing bipartisan support for the regulation. The letter was signed not only by myself, but also Chairman Johnson and Mr. Andrews, our ranking Democrat on the Subcommittee as well.

The EEOC regulation is supported by a wide variety of organized labor and employer groups, including the AFL-CIO, the American Federation of State, County and Municipal Employees, the International Association of Fire Fighters, the American Federation of Teachers, the American Benefits Council, and the U.S. Chamber of Commerce.

I'm disappointed by the recent court decision halting implementation of the EEOC regulation at the behest of an AARP lawsuit. This court ruling is clearly not in the best interests of retirees. It's also clear that the courts are ignoring the intent of Congress on this issue. I'm expecting the ruling to be appealed, and it's my hope the regulation will be upheld.

The AARP has made a fundamental miscalculation about how the Erie County decision affects the millions of American seniors it claims to represent. It's quite clear to me that the AARP's misguided position would actually endanger the retiree health benefits of millions of American seniors—the very Americans AARP claims to be protecting—by encouraging employers to drop health benefits they currently provide voluntarily.

I'm pleased we're holding this hearing today, because it's critically important that we examine the Erie County decision and its consequences on retiree health care for retirees, workers, and employers. With that, I yield back to my friend Mr. Johnson.

Statement of the HR Policy Association, Washington, DC, Submitted for the Record

Mr. Chairman and Members of the Subcommittee:

The HR Policy Association (HR Policy) is pleased to present our views to the Committee on challenges to employer efforts to preserve retiree health care benefits, specifically the impact of the Erie County court decision on retirees. HR Policy was a strong supporter of the Equal Employment Opportunity Commission (EEOC) rule to exempt from all prohibitions of the Age Discrimination in Employment Act of 1967 (ADEA) the practice of altering, reducing, or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a comparable state-sponsored retiree health benefits program. We are concerned that the recent decision by the U.S. District Court for the Eastern District of Pennsylvania to enjoin the EEOC's rule creating the exemption will have severe consequences for early retirees. The exemption is urgently needed to remove a threat to employers' ability to continue to provide health benefits to retirees both before and after they reach the age of eligibility for Medicare.

HR Policy is an organization of the senior human resource executives of more than 250 of the nation's largest private sector employers, collectively employing nearly 13 million Americans, more than 12 percent of the private sector workforce. HR Policy's principal mission is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace. All of HR Policy's members provide health care benefits to employees, and a substantial number provide benefits to retirees.

The exemption is necessary to remove the threat to retiree health plans posed by the 2000 decision by the U.S. Court of Appeals for the Third Circuit in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193. In Erie County, the court ruled that the county violated the ADEA by coordinating its retiree health plan with Medicare so that Medicare-eligible retirees received coverage that differed from that of non-Medicare-eligible retirees. The court found Medicare eligibility to be a proxy for age 65, and thus the benefits change constituted discrimination "because of" a retiree's age.

This ruling contradicted the legislative intent behind the Older Workers Benefit Protection Act (OWBPA), which added benefit protection to the ADEA in 1990. The legislative history of OWBPA clearly states that it was intended to allow employers to continue to provide bridge coverage to pre-Medicare retirees at a different level than that provided after the age of 65. Final Substitute: Statement of Managers,

136 Cong. Rec. S25353 (Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990) (“Many employer-sponsored retiree medical plans provide medical 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.”).

Because the Erie County retiree medical plan drew distinctions among retirees based on Medicare eligibility and not “because of” their age, we believe the Erie County decision is a fundamental misinterpretation of the ADEA. In any event, regardless of the correct statutory interpretation, the EEOC clearly has authority under Section 9 of the ADEA to “establish such reasonable exemptions to and from any and all provisions of [the Act] as it may find necessary and proper in the public interest.” 29 U.S.C. §628. The sole limitation on this delegation of authority is that such exemptions must be “reasonable.”

Clearly, the interests of those to be protected by the statute individuals over the age of 40” justify the exemption proposed by the EEOC. Rather than enhancing protections for workers over the age of 65, the perverse result of the Erie County decision is to encourage employers to either reduce health insurance coverage for pre-Medicare retirees, as was the response of Erie County following the ruling, or drop retiree health care coverage altogether.

To appreciate the dilemma Erie County poses for employers, it is critical to understand the role played by so-called bridge coverage in assisting those who take early retirement. Because Congress has chosen to limit eligibility for Medicare to those over the age of 65, many employers provide bridge coverage to early retirees so that they are ensured coverage until they reach the age of 65 and become eligible for Medicare. For example, one of our member companies, pursuant to its collective bargaining agreement, provides early retirees with medical coverage equal to the coverage they have as active employees at no cost until they attain Medicare eligibility, at which point they are covered exclusively by Medicare. If Erie County is allowed to stand, the company will have little choice but to declare this provision illegal and drop the coverage for early retirees.

Yet, because it has been uncertain as to whether Erie County is the law of the land, this and myriad other companies have maintained bridge coverage for early retirees and coordination with Medicare after the age of 65. However, in the absence of an administrative or statutory correction of the Erie County problem, these companies may have to choose between expanding benefits for those eligible for Medicare—thus substantially increasing their health care costs—or diminishing or eliminating benefits for those who are not yet eligible for Medicare.

The economic realities of health care today virtually dictate that the companies will choose the latter approach. A recent survey by the Henry J. Kaiser Family Foundation and Hewitt Associates found that costs for retiree health care increased 16 percent between 2001 and 2002. The study also found that 13 percent of large employers have terminated benefits for future retirees over the past two years, and an additional 22 percent are considering doing so within the next three years. (See “The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey,” (Dec. 2002), available online at <http://www.kff.org/content/2002/20021205a/>.)

To avoid putting companies in the position of having to reduce retiree health benefits in order to comply with the ADEA, it is critical that employers receive the clarity that would have been provided by the EEOC’s rule creating the exemption. Despite its injunction of the rule, the Eastern District opinion acknowledged that the EEOC and amici HR Policy, other business organizations, and organized labor persuasively” argued that, without the rule, employers would likely reduce or eliminate benefits for early retirees rather than increasing benefits for Medicare-eligible retirees. We are pleased that the EEOC has asked the Justice Department to appeal, and we plan to file an amicus curiae brief as we did in the lower court.

Conclusion

Congress did not intend to create a disincentive for employers to continue offering retiree health benefits when it enacted the ADEA in 1967 and amended it in 1990 via OWBPA. Yet, this has been the practical effect of the Erie County decision, which treats the coordination of employer-sponsored retiree health care benefits with Medicare as a violation of the ADEA. Rising costs of health care, together with increases in longevity and changes in accounting rules, have placed employers under ever increasing pressure to reduce expenditures for benefits such as retiree health, and by tying the hands of employers with respect to their ability to control those costs, Erie County has only added to the pressure to reduce costs by cutting or

eliminating benefits. This could lead to a greater number of uninsured pre-65 retirees. When employers coordinate retiree health benefits with Medicare, they are motivated not by the age of the individual retirees, but by the fact that those retirees are now eligible for government sponsored health benefits. Accordingly, the coordination of retiree health benefits with Medicare is in keeping with the law.

Thank you for consideration of our views.

