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WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides much of its core content.

Articles in this Edition

RECENT REGULATORY ACTIVITY

PBGC Executive Director Resigns

Bradley D. Belt, executive director of the Pension Benefit Guaranty Corporation (PBGC), has announced his resignation from the agency, effective at the end of May. Belt has served in this position for just over two years, a period Belt described in his resignation letter as "a particularly tumultuous period for the PBGC, which has had to confront unprecedented operational, financial, and policy challenges," including a record level of pension plan terminations. For the past two fiscal years, the PBGC reported long-term deficits of approximately $23 billion. However, the American Benefits Council has commissioned independent research seriously questioning the validity of the PBGC's estimates.

No successor to Belt has been announced. The position does not require confirmation by the U.S. Senate.

Prior to being appointed as head of the PBGC, Belt held executive positions in financial services and public affairs. He previously served in senior staff positions at the U.S. Senate Committee on Banking, Housing, and Urban Affairs, and at the Securities and Exchange Commission. He did not announce specific plans following his departure.

Final Relative Value Regulations Published

On March 24, the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) published final regulations on disclosure of the relative values of optional forms of benefit that revise the prior final regulations released in December 2003.

For all defined benefit plans and some defined contribution plans, a participant receives his or her benefit in the form of a qualified joint and survivor annuity (QJSA) unless the participant (with spousal consent) elects to receive benefits in another form after receiving certain disclosures. The relative value regulations apply to this written explanation that must be provided to each participant 30 to 90 days before his or her annuity starting date. Generally, the regulations require specific disclosures comparing the relative value of optional forms of benefit that may be elected by the participant. Under the final regulations, the 2003 regulations (as amended by the new final regulations) generally apply to disclosures made for any distribution with an annuity starting date that is on or after February 1, 2006. However, a reasonable good faith effort to comply with the regulations will generally be deemed to satisfy the requirements of these regulations for explanations provided before January 1, 2007.

Employer plan sponsor concerns that were addressed in the final regulations include allowing representative samplings of optional forms when illustration of the number of optional forms available would be overwhelming rather than helpful to participants. Also addressed was the concern that a plan be permitted to separately describe the relative value of the optional forms of benefit available for two or more portions of a participant's benefit (that are subject to different benefit distribution options).

Another major concern, however, was addressed, but not in a manner that will be helpful to plan sponsors. The proposed regulations had retained the original effective date of October 1, 2004, for payment of benefits that are subject to the assumption requirements under Code Section 417(e)(3) and then gave a parenthetical list of such optional forms which included single sum payments, social security level income options

(SSLI), and distributions in the form of partial single sums in combination with annuities or installment payment options. The SSLI was included in the parenthetical reference in the proposed regulations but had not been included in the same parenthetical in the final regulations.

The March 24 regulations retained the special October 1, 2004, effective date for certain benefit forms but omitted the parenthetical list that included SSLI because they are in "agreement with commentators that this is not the appropriate placement for guidance regarding the minimum present value requirements of section 417(e)(3)." This was an argument that the Council and others made, expecting Treasury and the IRS might open a regulatory project under Code Section 417, allowing additional time for input and comment. However, Treasury and IRS indicate that current 417 regulations already subject SSLI to 417(e): "Section 1.417(e)-1(d)(6) identifies the types of payments that are not subject to the minimum present value requirements of section 417(e)(3)" and continue "no such exemption applies to social security level income options."

The final regulations also addressed a concern that any optional form of benefit that is at least 95 percent as valuable as the QJSA for a married participant could be described as approximately equal in value to the QJSA by limiting the "approximately equal" description to optional forms with a value no greater than 105 percent of the actuarial present value of the QJSA.

The final regulations, like the proposed regulations, also clarify that a plan does not fail the requirement that the QJSA be the most valuable benefit for a married participant simply because calculation of another optional form of benefit (such as a single sum payment, etc.) must be made using the assumptions required under Code Section 417(e)(3). This requirement is effective as if included in regulations published in 1988.

Treasury, IRS Release Guidance on Foreign-Situs Trusts

On March 21, the U.S. Treasury Department and Internal Revenue Service (collectively referred to as Treasury) released Notice 2006-33, which provides guidance required by technical corrections to tax code Section 409A, the rules regarding nonqualified deferred compensation. The statutory technical correction eliminated the grandfather rule under 409A for deferred compensation payable by (1) non-U.S. trusts that provide deferred compensation to U.S. persons and (2) trusts that restrict assets to the payment of deferred compensation upon an employer "financial health" trigger. Without administrative relief, vested deferred compensation that violated these rules would be taxable under 409A and subject to penalties as of January 1, 2005.

Under Notice 2006-33, Treasury has provided an extended grace period until December 31, 2007, for trusts that would otherwise violate code Section 409A(b). The grace period is provided only with respect to any assets set aside or restricted as of March 21, 2006 (including subsequent earnings on such assets). This means that employers have until December 31, 2007 to either pay out or reverse arrangements that violate Section 409A(b) of the tax code. Furthermore, employers should have ceased making contributions to a foreign-situs trust that would be covered by code Section 409A as of March 21, 2006, since assets contributed subsequently (or subject to a subsequent financial health restriction) will not be eligible for the grace period.

Treasury is expected to address these arrangements further in future rules, but the guidance notes that code Section 409A(b) will not be violated merely because

distributions from affected trusts are made to participants under the terms of an older deferred compensation plan.

SEC Proposes Amendments to Redemption Fee Rule

On February 28, the Securities and Exchange Commission (SEC) proposed amendments to the final redemption fee rule it adopted in March 2005 that relates to the information-sharing agreement that most open-end investment companies (funds) must enter into with financial intermediaries, such as plan administrators. Under these agreements, the intermediaries must agree to provide, at the fund's request, shareholder identity and transaction information and carry out fund instructions to restrict or prohibit further purchases or exchanges by a shareholder that has engaged in trading that violates the fund's market timing policies.

The proposed rule seeks to (1) limit the types of intermediaries with which funds must negotiate information-sharing agreements, (2) address application of the agreement requirement when there are chains of intermediaries, and (3) clarify the effect of a fund's failure to obtain an agreement with any of its intermediaries.

The proposed amendment to the rule would not mandate uniform redemption fee standards. The SEC noted that "[w]hile most commenters asserted that funds and intermediaries would likely achieve certain benefits or cost savings if the [SEC] mandated uniform redemption fee standards, others disagreed, asserting that the best way to serve funds, intermediaries, and investors was by allowing each fund to adopt redemption fee policies that best fit its particular circumstances." The proposed rule indicated the SEC is taking the commenters' views under advisement but is not proposing uniform redemption fee standards at this time.

Under the proposed rule, the fund is only required to enter into a written agreement with those financial intermediaries that submit orders to purchase or redeem shares directly to the fund, its principal underwriter or transfer agent, or a registered clearing agency (first-tier intermediaries). A fund that fails to obtain an agreement with a first-tier intermediary cannot permit the intermediary to trade in the fund. Therefore, plan administrators without information-sharing agreements with the fund would not be able to purchase or redeem shares of the fund.

In addition, the agreement must obligate the first-tier intermediary to provide shareholder identity and transaction information from intermediaries further down the chain (indirect intermediaries) and, if the indirect intermediary refuses to honor a request for that information, the first-tier intermediary must prohibit the indirect intermediary from purchasing additional shares of the fund through the first-tier intermediary. Although not required under the proposal, many first-tier intermediaries will find it necessary to enter into information-sharing agreements with indirect intermediaries in order to provide the information required under their agreement with the fund.

The proposed rule defines a financial intermediary in the benefit plan arena as "a retirement plan's administrator under section 3(16)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(16)(A)) or any entity that maintains the plan's participant records." The fund is not required to enter into information-sharing agreements with entities, including plans, which it treats as one shareholder.

Commenters also expressed concern about the ability of financial intermediaries to provide information to funds in light of applicable privacy laws. The proposed rule amendment dismissed these arguments by citing exceptions to privacy rules (such as disclosure required to carry out a transaction, or disclosure as permitted by law), indicating the SEC believes "that the disclosure of information under the shareholder information agreements, and the fund's request and receipt of information under those agreements, are covered by these exceptions." The SEC also indicated that the shareholder information received under exceptions to the consumer notice and opt-out requirements may not be disclosed by the fund for other purposes, such as marketing.

CMS Issues Medicare Secondary Payer Regulation

An interim final regulation implementing the Medicare Secondary Payer (MSP) provisions of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) was issued by the Centers for Medicare and Medicaid Services (CMS) on February 24, 2005. The MMA amendments clarified the obligations of primary plans and primary payers, the nature of the insurance arrangements subject to the MSP rules, the circumstances under which Medicare may make conditional payments, and the obligations of primary payers to reimburse Medicare. In particular, the regulations make clear that a primary payer does not extinguish its obligation under MSP requirements by paying the "wrong party." This means that if the primary payer pays the Medicare beneficiary or the provider when it should have reimbursed the Medicare program, the primary payer is expected to reimburse CMS when it is demonstrated that the primary payer has or had payment responsibility. The effective date of the regulations and the deadline for submitting comments to CMS is April 25, 2006.

DOL Releases Opinion Letter Regarding Cafeteria Health Plan Payments During Unpaid FMLA Leave

Cafeteria health plan payments for employees taking unpaid leave pursuant to the Family and Medical Leave Act of 1993 (FMLA) must be paid in the same amount as paid prior to the FMLA leave, according to an Opinion Letter released by the U.S. Department of Labor's (DOL) Wage and Hour Division. The letter responded to a request from a city and a union as to whether the FMLA required the city to continue cafeteria plan health payments for an employee on unpaid FMLA leave if the city's policy required the exhaustion of all accrued leave prior to taking unpaid FMLA leave and required all employees on unpaid leave of any kind to make their own group health plan coverage payments. The city contended that it was in compliance with the FMLA and that if it paid the cafeteria plan allotment for an employee on unpaid FMLA leave, it would be discriminating against other employees on other types of unpaid leave for whom cafeteria allotments were not paid. The union disagreed, arguing that the FMLA required that such cafeteria plan payments continue during unpaid FMLA-qualified leave.

DOL Extends Katrina Relief Deadline for Additional Counties and Parishes

On February 28, the DOL's Employee Benefits Security Administration (EBSA) extended the deadline for filing the Form 5500 series annual returns/reports from February 28, 2006, to August 28, 2006, for 31 parishes in Louisiana, 46 counties in Mississippi and 11 counties in Alabama. The applicable parishes and counties are listed in IRS Notice IR-2006-30, published February 17. As previously reported in prior editions of Benefits Insider, the Pension Benefit Guaranty Corporation (PBGC) announced an extension of Hurricane Katrina disaster relief until August 28, 2006, for certain Louisiana parishes and Mississippi counties. The previous deadline had been February 28, 2006.

RECENT LEGISLATIVE ACTIVITY

Pension Bill Conference Continues

The conference to resolve the differences between the House of Representatives-passed Pension Protection Act (H.R. 2830) and the Senate-passed Pension Security and Transparency Act (S. 1783) is now underway. The Senate named conferees on March 3 and the House named conferees on March 8.

The senators named are members of either the Finance or the Health, Education, Labor, and Pensions (HELP) committees, the two panels of jurisdiction over this legislation. Republican conferees are: Mike DeWine (OH); HELP Chairman Michael Enzi (WY); Finance Chairman Charles Grassley (IA); Judd Gregg (NH); Orrin Hatch (UT); Johnny Isakson (GA); Trent Lott (MS); Rick Santorum (PA); and Olympia Snowe (ME). Democrats include: Finance Ranking Member Max Baucus (MT); Jeff Bingaman (NM); Kent Conrad (ND); Tom Harkin (IA); HELP Ranking Member Edward Kennedy (MA); Barbara Mikulski (MD); and John Rockefeller (WV).

The House of Representatives, in addition to naming conferees, approved a set of instructions for their appointed members to follow. Representatives named to the conference are connected either to the Ways and Means or Education and the Workforce committees, which are the two panels of jurisdiction over this legislation: Republican members selected are: Majority Leader John Boehner (OH), Education and the Workforce Committee Chairman Howard P. "Buck" McKeon (CA), Sam Johnson (TX), Patrick Tiberi (OH), Ways and Means Chairman William Thomas (CA), Dave Camp (MI), and John Kline (MN). Democratic members include: Ways and Means Ranking Member Charles Rangel (NY), Education and the Workforce Ranking Member George Miller (CA), Robert Andrews (NJ), and Donald Payne (NJ).

The instructions direct the House conferees to: (1) agree to the provisions contained in sections 403 (special funding rules for airlines) and 413 (modified PBGC guarantee rules for pilots) of the Senate bill; (2) insist on the provisions contained in section 907 (allows direct payment of tax refunds to IRAs) of the bill as passed by the House; (3) insist on the provisions contained in section 902 (Saver's Credit permanence) of the bill as passed by the House; and (4) insist on a final agreement that imposes the smallest additional funding requirements (permitted within the scope of conference) on companies that sponsor pension plans if there is no reasonable likelihood the termination of the plan would impose additional liabilities to the Pension Benefit Guaranty Corporation or there is no reasonable likelihood the plan sponsor would terminate the company's plan in bankruptcy.

In related news on the pension reform bills, Vice President Dick Cheney reiterated the Administration's concerns about the legislation "weakening pension funding requirements." In his keynote address on March 2 to the National Summit on Retirement Savings, Cheney said, "Congress will soon finalize pension legislation, and that legislation must be improved before it goes to the President for his signature. Our experts have studied the congressional proposals carefully and they are convinced that unless the bills are strengthened, there will be an even greater risk that workers will lose benefits, and that taxpayers will be asked to bail out the pension insurance system. The President has made clear that he will not sign a bill that weakens pension funding for American workers."

The major issues facing defined benefit plans to be discussed in the congressional conference are the issues of credit rating as a basis for liability, pre-funding and the use of credit balances, smoothing/averaging of liabilities and plan assets and transition time. Further, more detailed problems could dramatically increase costs for plan sponsors such as the structure of the yield curve, the bond quality level and the amortization rules.

Issues pertaining to defined contribution plans include improving the proposed automatic enrollment and default investment rules to make them usable by more plan sponsors, the rules applicable when investment options are changed in a plan (so-called "mapping" provisions), and improvements to the excess contribution provisions. Also at issue is the inclusion of provisions from the House bill that would permanently institute the retirement savings portions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).

Due to cost considerations and concerns about the relationship of the retirement provisions to the larger EGTRRA package, which included some more controversial measures unrelated to retirement, inclusion of these retirement provisions in the final bill will be challenging.

Numerous 'Dear Colleague' Letters for Pension Conferees Circulating

With the start of the conference to resolve differences between the House of Representatives-passed Pension Protection Act (H.R. 2830) and the Senate-passed Pension Security and Transparency Act (S. 1783), a number of senators and representatives are also circulating a number of "Dear Colleague" letters to be addressed to the conferees.

Senator Carl Levin (D-MI) and Representative George Voinovich (R-OH) are urging fellow members of Congress to sign on to their letter, which asks conferees to reject the use of a company's credit rating to determine how much money must be put into the pension plan and allow a smoothing of assets and liabilities over three years rather than one year.

Senator Richard Burr (R-NC) is urging Senators – Republicans, specifically – to sign on in support of a comprehensive, design-based provision to confirm the legal validity of hybrid plans.

Representative Phil English (R-PA) is collecting support for the inclusion of adequate transition time for employers to implement any new funding rules.

A number of other lawmakers are submitting their own letters to conferees without soliciting other signatures, such as Senator Gordon Smith (R-OR), who is asking conferees to consider refinements of the bill's positions on automatic enrollment, the safest available annuity provision and the treatment of excess contributions. He also strongly supports the Senate bill provision calling for the Secretary of Labor to establish a federal interagency task force on older workers.

Current hopes are that the conference committee may finish its work by Memorial Day weekend.

Baucus Introduces Retirement Bill Expanding Defined Contribution Opportunities
Senator Max Baucus (D-MT), ranking minority member of the Senate Finance Committee, introduced a bill on March 16 that would expand the availability of defined contribution retirement plans by, among other things, requiring employers who do not sponsor retirement plans that allow employee deferrals (such as 401(k) plans) to provide payroll deductions for individual retirement accounts (IRAs). Bill text and an official summary of the bill are currently available.

The "Savings Competitiveness Act" contains provisions to encourage the use of salary-deduction retirement savings and automatic enrollment programs and seeks to establish "Secure Retirement Accounts" — IRAs with limited investment options and fees to simplify investment decisions and educational efforts. The legislation also:

- offers a small employer tax credit for employer contributions to new retirement plans;
- allows small businesses to make a 50 percent matching contribution for lower income taxpayers;
- allows individuals with aggregate savings of less than $200,000 in all of their IRAs, retirement plans or health savings accounts to exempt $50,000 for purposes of calculating their minimum required distribution;
- simplifies distribution rules for IRAs and 401(k) plans; and
- makes the Saver's Credit a refundable matching credit, with the match equal to 50 percent of the first $2,000 contributed by an employee to an IRA or retirement plan.

The "competitiveness" elements of the bill represent numerous provisions for controlling government spending, including rules requiring Congress to "pay as it goes" or offset any increases in entitlement spending and tax cuts.

Senate Finance Committee Considers Tax Preferences for Employer-Sponsored Health Coverage
In its first hearing on health tax policy since 1994, the Senate Finance Committee heard from witnesses in a hearing entitled: "Taking a checkup on the nation's health care tax policy: a prognosis." Finance Chairman Charles Grassley (R-IA) opened the hearing by calling attention to the fact that the $177 billion in federal tax preferences for health care coverage are already the largest tax expenditure in the federal budget and that over the next ten years this amount is expected to total nearly $2 trillion, an amount he termed "staggering." Chairman Grassley said it was time for the Finance Committee to examine questions such as "Are we getting our money's worth?" and "Do our current tax incentives make sense?" Ranking Democratic member Max Baucus (D-MT) also pointed to the size of the tax expenditures made by the federal government to support health coverage and questioned whether there might be better ways to encourage health coverage and achieve better performance from the health care system.

Witnesses at the March 8 hearing included former Alcoa CEO and U.S. Treasury Secretary Paul O'Neill, who called for the complete elimination of all tax preferences for health care coverage, replaced with a requirement that individuals obtain catastrophic insurance coverage on their own. O'Neill says that health coverage should be a personal responsibility, not a benefit of employment, and that government's responsibility should only be to collect sufficient tax revenue to provide health coverage for low-income

individuals who could not afford health coverage on their own. O'Neill also supported much greater transparency of information on health care providers' performance, including greater disclosure of their medical error or adverse outcome rates, so that consumers would know more about where to go for the health care services they need.

Robert Lane, Chairman and CEO of Deere & Company, testified on behalf of the Business Roundtable and called for improvements in current tax policy to improve health savings accounts (HSAs) and flexible spending arrangements (FSAs). Specifically, Lane supported allowing participants in HSAs to also be enrolled in FSAs so that individuals could better budget for their unreimbursed health care expenses. He also advocated allowing increased contributions to HSAs, permitting up to $500 in unspent FSA funds to carry forward within an FSA or be rolled over to an HSA, and giving greater employer flexibility to contribute more to the HSAs of lower-paid employees and those with chronic health conditions. Lane testified that HSAs, FSAs, health reimbursement arrangements (HRAs) and other forms of consumer-directed health plans combine some of the best features of managed health care with the added feature of getting individuals more engaged in health care decision-making and hold great promise for improving the health care system.

Urban Institute senior fellow, Leonard Burman, also testified before the committee and said that current tax law has many advantages and disadvantages. Among the advantages, he claimed, are that it encourages employers to provide health coverage and provides a natural pooling mechanism that tends to disperse the costs of the few individuals with relatively high health costs among many other employees who have much lower health expenses. However, Burman also criticized the current system for insulating individuals from the real costs of health care, causing them to over-utilize health care and driving up costs for the system as a whole. Burman called for limiting the value of health coverage that employees could receive tax-free from their employer to a benchmark level such as a Blue Cross and Blue Shield standard option plan offered to federal employees. This "tax cap" concept is similar to the proposal also supported in November 2005 by the President's Advisory Panel on Federal Tax Reform, a recommendation that Treasury Secretary John Snow said the Department needed to examine more closely before taking a position on it.

Further hearings on health tax policy are likely this year in the Senate Finance Committee, including at least one that may focus on the President's proposals to improve HSAs as well as other HSA reform recommendations.

Senate HELP Committee Passes Health Insurance Reform Bill

In a party line vote on March 16, the Senate Health, Education, Labor and Pensions (HELP) Committee passed the Health Insurance Marketplace Modernization and Affordability Act (S.1955) introduced by Committee Chairman Mike Enzi (R-WY), and co-sponsored by Senator Ben Nelson (D-NE) and Senator Conrad Burns (R-MT). The bill, which continues Congress' long-time efforts to craft association health plan legislation, is intended to provide more affordable health insurance options by permitting small business and trade associations (and their members) to band together and offer fully insured group health coverage, known as Small Business Health Plans (SBHPs), on a national or statewide basis. An SBHP could offer lower-cost coverage that does not comply with state benefit, service, or provider mandates if it also offers a more comprehensive coverage option modeled on benefits provided by state government

employee health plans in at least one of the five most populous states (California, Texas, New York, Florida, and Illinois). Although the bill preserves the primary role of the states in regulating insurance, it would streamline such regulation by harmonizing certain rules and regulations across states.

The Committee began work on this legislation on March 8, with debate among members regarding the affordability of health care coverage by small business, the impact of the bill on access to certain state-mandated benefits (such as mental health care or cancer screening) and whether the bill would result in adverse selection if younger, healthier individuals gravitated to lower-cost SBHPs exempt from state mandates. The committee considered more than 60 amendments before voting on the bill. Democratic committee member amendments at the March 16 mark-up, all of which failed, included those precluding federal preemption of certain state mandates (for example, autism intervention, mammography screening, direct access to obstetric and gynecology care, and preventive care) or permitting states to impose the National Association of Insurance Commissioners' most recent rating rules, community rating or certain rating band ratios. Amendments for a Government Accountability Office study of the bill's impact and a sunset provision were also defeated.

This legislation faces an uncertain future in the Senate where a possible filibuster could be initiated to prevent passage of the legislation.

RECENT JUDICIAL ACTIVITY

Supreme Court Hears Oral Arguments in *Sereboff v. MAMSI* Case
On March 28, the United States Supreme Court heard oral arguments in the case of *Sereboff v. Mid Atlantic Medical Services (MAMSI)*. This case concerns a company's subrogation rights under ERISA, in which an employer plan or insurer is entitled to recover amounts it paid for the cost of benefits it provided for a claimant, and for which a third party has been found liable. The underlying question is whether enforcement of plan reimbursement or subrogation provisions constitutes appropriate equitable relief under ERISA.

The Court's decision, which is expected later this year, will resolve a 4-2 split in federal circuit courts where the majority of courts have concluded that enforcement of plan reimbursement provisions constitutes equitable relief permissible under ERISA. A minority of the circuits have held such enforcement is for monetary damages, a form of legal relief not allowed under ERISA. The American Benefits Council joined with the National Association of Manufacturers (NAM) and America's Health Insurance Plans (AHIP) in February in filing an amicus curiae brief with the U.S. Supreme Court in this case. The brief highlighted the important role reimbursement provisions play in reducing health care expenses to plans and participants, allocating liability to responsible third parties and preventing double recovery by participants injured by third parties.

As part of the ongoing pension bill conference, Congress is considering a clarification of ERISA's civil enforcement scheme with respect to reimbursement or subrogation rights. Section 307 of the House-passed Pension Protection Act of 2005 (H.R. 2830) includes a technical clarification of ERISA with respect to a right of recovery by employers and plans for medical expenses paid by the plan if the participant recovers damages for

injuries caused by a third party. In a recent letter to Senators and conference members Mike Enzi (R-WY) and Charles Grassley (R-IA) supporting Section 307, the Council explained that while the Supreme Court could resolve the conflicting courts decisions later this year, the House bill provision is necessary because it will ensure that employers are able to uniformly administer their benefit plans – a principal aim of ERISA – and clarify the common plan practice of reimbursement.

Employer Groups File Amicus Curiae Brief in *AARP v. EEOC Retiree Health* Case

On March 1, several employer organizations joined together in filing an amicus curiae brief with the Third Circuit Court of Appeals in *AARP v. Equal Employment Opportunity Commission* (EEOC). This case centers on the authority of the EEOC to issue regulations on retiree health benefits that would clarify that an employer-sponsored retiree health plan would not violate the Age Discrimination in Employment Act (ADEA) if it does not provide the same level of benefits to early retirees and to older retirees who are eligible for coverage under Medicare. The Third Circuit initially ruled in favor of AARP, then reversed its decision. AARP then appealed the case to the Third Circuit Appeals Court.

The amicus curiae brief asserts that EEOC had discretion granted by Congress to issue its retiree health rule. The brief also makes it clear that most retiree health plans currently provide differing levels of benefits to early retirees than to those who are eligible for Medicare. If the EEOC rule is not permitted to clarify that this practice is in compliance with ADEA, it is likely that retirees could lose valuable benefits because it is not economically feasible for most employers to spend more to increase benefits for Medicare eligible retirees to meet the result AARP has sought in this case.

Groups included on this brief were America's Health Insurance Plans, the American Benefits Council, the American Council on Education, the College and University Professional Association for Human Resources, the Equal Employment Advisory Council, The ERISA Industry Committee, HR Policy Association, National Rural Electric Cooperative Association, the Society for Human Resource Management and WorldatWork.