



EEOC Explains Application of ADEA to ICHRAs

On January 7, 2021 the Equal Employment Opportunity Commission (“EEOC”) issued an opinion letter explaining the application of the Age Discrimination in Employment Act (“ADEA”) to individual coverage health reimbursement arrangements (“ICHRAs”).

Law

ICHRAs can reimburse employees and their dependents for their health care expenses (including individual health insurance premiums), up to the maximum dollar or percentage amount that the employer makes available each year. Employees are neither required nor permitted to contribute to an ICHRA.

Under the ADEA, it is “unlawful for an employer... [to] discriminate against any individual [at least 40 years of age] with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s age.” Generally, an older employee cannot be required, as a condition of employment, to make greater contributions to an employee benefit plan than younger employees. However, the EEOC has previously ruled that older workers may be required as a condition of participating in a voluntary employee benefit plan to make a greater contribution than younger employees if they are not required to contribute a greater proportion of the total premium costs than younger employees.

Opinion Letter

In the first scenario presented, the employer provides a defined contribution, meaning each employee receives the same employer contribution to his ICHRA account. For example, the employer contributes \$300 per month for each eligible employee. However, as the EEOC notes, in the individual market, that \$300 may cover a much smaller portion of a 55-year-old’s health insurance premium costs as compared to a 22-year-old who has elected the same plan.

Under the second scenario, the employer provides a specified percentage of premium costs to all employees (e.g., the employer contributes 30% of each employee’s individually selected health insurance premium costs). So, for example, if the cost for an individual health insurance policy for a 55-year-old is \$1,000, then a 30% contribution to that employee’s ICHRA is \$300 and if the cost of the same policy for a 22-year-old is \$250, then a 30% contribution to that employee’s ICHRA is \$75.

EEOC ruled in the first scenario that, because the contribution amount provided to each employee through the ICHRA is the same, the ICHRA does not violate the ADEA prohibition against providing lesser compensation to older employees on the basis of age.

Further, because ICHRAs (as opposed to the employee-selected individual insurance) are funded completely by the employer, the ICHRA does not meet the definition of a contributory fringe benefit plan subject to the ADEA,

where both the employer and employee share in the benefit's cost. Such plans therefore are not subject to the ADEA's prohibition against requiring older workers to bear a greater proportion of the cost of a fringe benefit than younger workers.

The ADEA's prohibition against less favorable health insurance plans for older employees only applies to plans that are offered or provided by the employer. Individual health insurance plans that are purchased by the employee from independent third parties, with no involvement from the employer in the selection of the plan, do not fall into this category. "Where the employer has no control over the plans and plays no role in making them available to employees, the individual health insurance plan is not an ADEA-covered employee benefit plan."

As for the second scenario, when an employer provides a fixed percentage to its employees' ICHRA, rather than a defined contribution, this will likely result in employers providing larger amounts to older workers. Providing a greater level of compensation to older employees because of their age does not violate the ADEA. Therefore, employers that choose to increase the contributions to an older employee's ICHRA to partially offset age-based increases to his or her health insurance costs will not violate the ADEA, even when the older employee has to pay more for his insurance because the premiums for his selected individual health insurance increase with an employee's age.

The Opinion Letter can be found at: https://www.eeoc.gov/commission-opinion-letter-individual-coverage-health-reimbursement-arrangements-ichra-under-adea?utm_content=&utm_medium=email&utm_name=

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