

THE INVOLUNTARY SCRAPPING OF EARLY RETIREMENT PLANS IN WISCONSIN SCHOOL DISTRICTS

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Exclaiming that early retirement incentive plans discriminate against persons on the basis of age is a waste of breath. The proposition is painfully obvious. Such plans exist for the explicit purpose of offering special benefits to employees at a certain age to induce them to retire now rather than when they are older.

Despite this reality, a recent major court decision has taken the federal Age Discrimination in Employment Act (ADEA) and turned it squarely against sensible early retirement plans. In 1999, the Seventh Circuit of the U.S. Court of Appeals, which covers the State of Wisconsin, ruled that school districts cannot cut off benefits extended to induce early retirement once a teacher reaches a certain age.¹ In other words, benefits offered for early retirement must be of the same amount and duration for all employees, whether they retire when first eligible for early retirement benefits or at any age thereafter.

In the wake of this decision, the Equal Employment Opportunities Commission (EEOC) has begun warning school districts in the affected jurisdictions to stop such practices, and also that they must reimburse retirees who



were previously "discriminated" against. The issuance of these retroactive benefits to recently retired teachers will cost some districts millions of dollars. While the EEOC continues investigating potential age discrimination violations among school districts, Wisconsin Congressmen from both major political parties have expressed concerns to the agency over

this process, suggesting Congressional intervention if necessary.²

Furthermore, as this seemingly uneasy assault on early retirement incentive plans (ERIPs) begins, it is prudent to note that there is nothing inherently special about school districts that would cause the logic of these decisions to remain limited to only those types of employers. Therefore, if such ERIPs are unlawful for school districts, then they will be unlawful for nearly *all* employers, public or private. Needless to say, the overall cost of such a policy change would be enormous and terribly wasteful.

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The World Of Early Retirement (As We Knew It)

In many Wisconsin school districts, teachers become eligible for annual early retirement stipends once they reach their mid-50s. This is also about the time when they can access full pension payouts from the Wisconsin Retirement System. Along with health benefits, these yearly stipends generally continue until the retired teacher reaches age 65 and becomes eligible for federal benefits under Medicare and Social Security.

While the amount of these annual stipends generally does not decrease based on the teacher's retirement age, the total amount collected varies because the stipends end when the retiree turns 65. Naturally then, if the value of stipends and benefits is, for example, \$10,000 a year, then a teacher retiring at age 55 receives a total of \$100,000 over ten years, while a person who retires at age 60 receives half that amount in benefits. Yet that same person who retires at 60 will also earn full salary and benefits while working during those five additional years.

The preceding type of scheme, common among school district teacher contracts, now constitutes a violation of the ADEA. More accurately, it would be characterized as a violation "light" when it comes to ERIPs. More serious violations are found in those systems offering teachers decreasing interim benefits the closer an employee gets to age 65. In other words, a 55 year-old employee would get offered \$10,000 in benefits per year until age 65 to retire at age 55, while a 60 year-old employee would be offered less or no extra benefits to retire.

Both these types of ERIPs have existed for years, and have become more common in the last decade. In 1990, in response to a U.S. Supreme Court ruling that had placed bona fide retiree benefit plans outside the purview of the ADEA, Congress passed the Older Workers Benefit Protection Act. This Act modified the ADEA to make clear that it did affect benefit plans, along with other employment factors, such as work rules, hiring and firing, and wages. Yet there is evidence that

Congress, in making these changes, still did not intend to disallow truly voluntary early retirement plans nor to eliminate the ability of private employers to coordinate their retirement plans around government-sponsored programs.

Nevertheless, some courts have since looked to the statutory language and concluded that there is nothing in the law to suggest that the ADEA should not apply equally to early retirement incentive plans. In *Solon v. Gary Community School Corp.*, the Seventh Circuit abrogated previous legal interpretations that appeared to allow age-based incentive systems, provided they were truly voluntary. In its place, the court established that ERIPs that determine benefits directly based on one's age are facially unlawful. While there still exist some narrow "safe harbors" allowing employers to offer different benefits to employees based on age (see Figure 1), early retirement plans rarely fit into these exceptions, and many of the most popular and common types of ERIPs fail to qualify for these exceptions.

School districts considered in noncompliance with this new ruling are presently being informed by the EEOC that they will face federal lawsuits unless they renegotiate a settlement with recent retirees who had not taken advantage of early retirement offers. According to lawyers at the Wisconsin Education Association Council, between one-third and one-half of all districts in Wisconsin have early retirement plans that would fail to pass muster under this new interpretation of relevant age discrimination laws. As a result, many of the state's school systems could owe upwards of several million dollars in recompensation to former teachers.

Common Sense, Fairness, And Life's Simple Choices

So what is the evil being committed? What evil that would justify such a dramatic shift in the ability of employers to offer viable early retirement incentives to willing employees under contracts that have been collectively bargained between districts and teachers?

Figure 1 Guidelines for EEOC Inspections of Early Retirement Plans

Where a charge involves an Early Retirement Incentive Plan, investigators at the EEOC ask the following questions:

- Is the ERIP voluntary? If not, find cause for discrimination.

If the ERIP is voluntary, then:

- Does it provide equal benefits to older and younger workers?

If not, find cause *unless*:

- The ERIP meets the equal cost standard, which states that employers are spending equal amounts on benefits for all employees, or
- The plan provides the "subsidized portion of an early retirement benefit," or
- The plan is a Social Security supplement plan, or
- The plan provides supplemental benefits to tenured faculty members, or
- The plan is "consistent with the relevant purpose or purposes of the ADEA."

Within a voluntary ERIP an employer may also:

- Set a minimum age, or a minimum number of years of service, at which employees will be eligible to participate;
- Offer the ERIP for only a limited period of time, such as those who retire between January 1 and April 30 of any given year;
- Offer the ERIP to only a subset of a company, such as to only managers, a particular department, or only employees at a certain facility.

Source: *EEOC Compliance Manual, Chapter 3: Benefits*

Quite simply, the alleged evil is that teachers are being offered an attractive incentive to, *if they wish*, retire early, leave the daily grind behind, and maybe move to sunny California. As for those employees who would rather continue working, gaining satisfaction from teaching today's youth and earning their full wages and benefits, they are free do so without fear of reprisal.

If one has a difficult time finding an actionable harm within this situation, they are not alone. This is not some kind of Hobson's choice, where in choosing either of the options teachers will be harmed or be forced to put themselves into a compromising position that may eventually harm any rights they possess.

Nevertheless, early retirement incentive plans of the type disallowed in these rulings are being viewed in two very different ways. They can be seen as a mutually agreed upon option, which is offered by employers to their employees, that allows both parties to improve

their situation and benefit accordingly. Or one can view them as plans that are unlawfully discriminatory because employees find their potential benefits reduced solely because of their age, and that the decision facing these employees is unfair by "coercing" them into retirement.³ For a variety of prudential reasons, the former interpretation is fairer, more sensible, and realistic than the latter.

While there is a notable degree of legalese involved with this issue, there remains an apparent avenue of common sense to look at when deciding the merits of these competing claims. This avenue requires only a simple review of the basic tenets underlying the issue, which in this case are employment, retirement, discrimination, and all that falls in-between.

First, despite what some fringe socialists may say, individuals do not have a public right or obligation to retire at any given age. Certainly, there is an age at which many people perceive a natural retirement level — age

65 — because that is when people become eligible to receive Social Security and Medicare benefits. Yet since mandatory retirement provisions are not permissible for most employees,⁴ the choice between retirement and continued employment at any age largely resides within the worker.

Naturally, most people view this situation as a good thing, as able-bodied people who decide to continue working have that option, while others can decide to walk the path of retirement. Employees determine their retirement age by considering factors such as their own tastes, the type of job and work they perform, their accumulation of savings, the financial situation of their spouse, the terms and conditions of individual or union contracts with their employers, or any other of a multitude of idiosyncratic values residing within the worker's mind. This reality of unencumbered retirement options is simply a corollary of the fact that people at any age do not *have* to work if they desire not to — although such a course of action, depending on one's preexisting means, may not be that desirable. It is under this rubric of employment freedom and market economics that the ADEA must operate.

So how do early retirement plans fit into this mix? Early retirement incentive plans are almost universally offered for one primary reason: to save employers money by allowing them to not pay the full salary of senior employees who are commonly on the highest level of the pay scale. Employers clearly run afoul of age discrimination laws by forcing elder employees into early retirement or firing older workers solely because of their pay levels. These are forms of age discrimination that laws such as the ADEA were written to eliminate, and these protections will continue even in the absence of this sudden crackdown on otherwise innocuous ERIPs. Such practices are not even remotely similar to what is at issue in the current controversy. The early retirement incentive plans at issue here are *voluntary*, and this fact cannot be discounted.

For some workers, they are eager to retire and would be more than willing to do so early,

as long as they receive some reasonable offer of benefits to supplement their income until they receive full pension and federal benefits. The economic decision and distinction is clear. As Racine Unified School Board president David Hazen remarked, "Early retirement is an option. Everyone had the same chance. If they take it, they take it. If they don't, they don't."⁵ In other words, a person either values working for more years and earning the salary that accompanies that employment, or they value the offer to earn less in total income but to have their early retirement partially subsidized by their former employer. It is a clear example of the classic economic paradigm of the leisure-labor tradeoff.

Given this understanding, it becomes easy to see that the current attack on these plans is little more than a classic case of envy. In fact, it is one of those instances where the definitional difference between envy and jealousy is important. Webster defines envy as "painful or resentful awareness of an advantage enjoyed by another *joined with the desire to possess the same advantage*," while jealousy is merely "hostility toward a rival or one believed to enjoy an advantage." The difference is subtle, yet important, especially within the context of law and politics. When we get to the point of using the law to deny one person a benefit simply because others freely decide to not accept that offered benefit, then it is truly a dangerous (and costly) game we play. This characterization is appropriate for the current attack on early retirement incentive plans.

Certainly, ERIPs should have to be grandfathered in, such that every employee has the opportunity to accept the benefits at their fullest point. But if two workers reach the age of 55 at the same time, both are offered the same benefit package to retire early, and one accepts while the other declines, we simply have a case of individual workers making independent judgments about what is in their own financial and lifestyle interests. This need not nor should not be deemed unlawful discrimination.

Cutting Off Our Nose To Spite Our Face?

Of course, school districts and other employers are in no manner obligated to offer early retirement incentive plans and therefore be subject to this scrutiny.⁶ What has been ruled now is simply that once an employer *does* offer such a plan, it must do so in a fashion that does not discriminate on the basis of age in how benefits are distributed.

Yet the direct, negative effect on economic incentives from this ruling is considerable. If all employees are granted a legal right to the same benefits as offered to those who actually retire early, then that takes a major portion of the incentive out of an early retirement incentive plan. If an employer wants to induce its employees to retire at age 55, it is much more difficult to do so if the duration and amount of benefits offered to an employee at 55 will also be offered to him or her at age 56, 57, and so forth. Therefore, the law, as now applied, is a major disincentive for employers to establish any early retirement incentive plans. Moreover, if you take the "early" and the "incentive" out of the plan, all that remains is a "retirement plan." And as some astute participants in this issue have observed, what is essentially the result of this legal interpretation is the *de facto* creation of a severance plan, available to all employees above a certain age, no matter when they retire.

As with most games of compelled equality, the choice is between either raising up those without a particular benefit that others enjoy versus lowering or outright depleting that benefit from those who enjoy it. In this context, employers are left with the choice of raising benefits for all retirees to the level and length of early retirees, or to eliminate or lower the

benefits currently offered to early retirees. Not surprisingly, given the large costs involved, many employers will opt to eliminate the offered benefits altogether. This result serves no one and creates a huge, completely unnecessary social cost. Such a social cost should only be incurred to secure a genuine individual or civil right, and subsidized voluntary early retirement just does not rise to that level of significance.

Furthermore, the Gary School System, the defendant in the *Solon* case, made a seemingly compelling argument on the issue of whether, in fact, any harm is being done to those who opt to not take the "carrot" of an early retirement plan. Although the argument was couched in the legal issue of standing on behalf of the plaintiffs, the more general point is one to ponder. Why should an early retirement system, of the type at issue here, which is agreed to by both teachers and school districts, be overruled by the government?

To overcome the voluntary negotiations and decisions of these contracting parties, the government should be required to show a compelling reason. All such standard reasons for overriding contractual provisions are not available in this instance. Clearly such plans are not "unconscionable," such that no reasonable person would have knowingly agreed to such terms. Moreover, it is not as if the parties supposedly being protected — public school teachers — are in an unequal bargaining position, where they are implicitly coerced into agreeing to such terms. Wisconsin public school teachers subject to the terms of these contracts are backed in their contract negotiations by arguably the most powerful public union in the country. It is exceedingly difficult to suggest (with a straight face at least) that school districts are in such a powerful bargaining posi-

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tion relative to their unions that they could float by such a provision without the informed assent of the teachers' representatives.

More importantly, it is the unions that actually argued for and supported the early retirement systems now under attack. For example, the case in Gary arose when the school district needed to react to declining student enrollment, and the choice was between either establishing these ERIPs or facing significant layoffs of teachers and staff. Although WEAC and other branches of the teachers union maintain that they have warned districts for years that such ERIPs were discriminatory and possibly illegal,⁷ the reality is that unions have seen such plans as in the interest of teachers. After all, most unions find early retirement plans, in most any form, to be beneficial to their members since they offer a desirable benefit to some and harm none. Or so we thought.

When you combine these preceding facts with the notion that applying the ADEA law in this context is a stretch, you can get an uneasy sense of trepidation. It seems that once again the belief that a benevolent government must rise up and save us from ourselves has been invoked, and in a manner that is potentially destructive to the financial well-being of many Wisconsin school districts, teachers, and possibly numerous other employers. The EEOC and the federal courts have decided they must protect those who decline early retirement benefits in lieu of continuing to work from the alleged oppression of age discrimination. Never mind that these plans were approved by all those involved, or that no actual substantive right is being violated.

One of the expressed purposes of the ADEA law is "to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁸ One such "problem" confronted by employers is that of addressing the budgetary realities of employees in their ranks who are high on seniority and the pay scale. If employers faced with these pressures can find a means to address them, methods that are mutually beneficial to

both themselves and their employees (including older employees), then a problem arising from the impact of age on employment will be met. Instead, the ADEA law is now being interpreted to utterly frustrate that purpose.

Smoke On The Water?

The alarm generated by these recent judicial rulings and EEOC actions is not surprising. The resulting costs will be large to school districts, many of which are already experiencing budgetary pressures. Estimations of the cost to comply with this new ruling are usually around tens of thousands of dollars per individual teacher, which easily runs up to or above \$1 million per district.⁹

Fortunately, under the relevant statute of limitations, discrimination claims based on ERIPs can only be put forward on behalf of teachers who have retired in the previous two years. Still, the costs generated by the required recompensation of these retirees who did not receive early retirement benefits will be large enough. In most districts, especially medium to large-sized ones, there are hundreds of employees who fall under the ambit of this enforcement, and the costs could be in the millions of dollars for *each* district involved.

Yet there are also the continuing social costs that will be experienced as these plans are curtailed. Districts will lose a reasonable means of trimming their growing budgets. Teachers looking to retire early will lose the ability to make such a move more economically feasible. Finally, taxpayers in general will lose out on the efficiency gains realized under a system of ERIPs for teachers. We must remember that ERIPs were created to address a real business need, in an economically efficient manner, while also being respectful of employee rights. Now to protect an envious few, it seems we are about to throw the baby out with the benefit bathwater.

While the EEOC continues to expand its breadth of oversight, many school districts are currently standing put, all the while waiting, hoping, and expecting elected representatives to step in and alter the existing ADEA law to

expressly allow businesses to maintain honest and helpful early retirement incentive plans. WEAC and others have expressed their view that the *Solon* decision will be overruled by the U.S. Supreme Court or modified by the Seventh Circuit. Hopefully, that will be the eventual result. But for now, many school districts are facing EEOC threats and are standing in limbo, a precarious state that will dramatically affect their financial obligations from the past, for the present, and into the future. Moreover, it is disturbingly plain that if these recent rulings and interpretations of the law continue to apply, then they could also affect nearly all early retirement incentive plans, and the results will be enormous.

Why Are We Here?

In some ways, the disallowance of voluntary early retirement plans is reflective of a broader, problematic mentality. Proponents of laws against employment discrimination often accord themselves too much comfort in the fact that their goals are noble ones. After all, working to protect people from arbitrary and capricious forms of discrimination based on factors wholly unrelated (at least in the court's eyes) to the ability of one to perform their job, is a worthy mission to pursue. Yet a meritorious purpose does not justify laziness in the drafting or interpretation of laws aimed at this purpose. It does not excuse the development of laws that lack common sense and that have dramatic unintended, or even intended, harmful consequences.

To say that decisions affecting retirement are discriminatory based on age is both a bit circular and a bit self-evident. Nonetheless, we now live in world in which a person who decided to not accept early retirement incentives, and who did anything but retire early, will receive early retirement benefits. What's next? Uninjured workers receiving worker's compensation? A proclamation that single-sex restrooms discriminate on the basis of sex?

Give a bureaucrat an inch and they'll take a mile. Give the EEOC an age discrimination

law, and it will take away a multitude of sensible voluntary early retirement plans. The EEOC and federal courts have gone immeasurably out of their way to complicate the previously understandable concept of voluntary early retirement. Either the existing law as written is poor, or the interpretation being applied to that law is erroneous, or both. Whatever the source of this present assault on voluntary early retirement incentive plans, something must be done to rectify the situation and to restore sensible liberties to employers and employees willing and able to bargain for their respective interests.

Notes

1. *Solon v. Gary Community School Corp.* 180 F.3d 844 (7th Cir. 1999).
2. *Milwaukee Journal Sentinel*, November, 23, 2000.
3. The EEOC states that the test for "voluntariness" is whether under the facts and circumstances of a particular case "a reasonable person would have concluded that there was no choice but to accept the offer."
4. In 1987, the upper age limit was removed from the ADEA, effectively eliminating mandatory retirement for most employees. See 29 U.S.C. § 631(a.)
5. *Milwaukee Journal Sentinel*, Racine County Section, September 17, 2000.
6. According to the court in *Solon*: "although an employer of course has no duty to offer early retirement incentives, once the employer elects to do so it must make those benefits available on nondiscriminatory terms, just as it must with any other fringe benefit." 180 F.3d 844, at 849.
7. In fact, according to a WEAC statement regarding federal action on ERIPs, the union states "We do not believe that an employer can reduce a vested benefit for any retired employee, and have reason to believe that the EEOC's position may ultimately help locals bargain better retirement packages." This characterization of voluntary early retirement incentive plans as a "vested benefit" is arguably a stretch. The more important point is that all parties privy to the contract negotiations clearly knew of the language, purpose, and effect of the early retirement provisions.
8. 29 USCA § 621(b).
9. *Milwaukee Journal Sentinel*, September 12, 2000.