

**Questions for the EEOC Staff for the  
2010 Joint Committee of Employee Benefits Technical Session  
May 6, 2010**

**Note:** *This year none of the questions submitted included proposed answers.*

**Question 1: “Request For General Employment Information”**

The attached very general Request for General Employment Information was recently sent to an employer in Ohio. Many of the questions appear to be unrelated to any specific charge and a number of the questions relate to employee benefits. In fact, the questions are apparently not related to the underlying charge. Does this type of generalized questionnaire represent a different approach by the EEOC?

**Answer:** *The EEOC staff said the questionnaire does not represent a general practice of the EEOC. They noted they could not discuss specific cases, including the one relating to the questionnaire.*

**Question 2: Health Plan Exclusions**

During previous meetings, the EEOC staff has provided general statements regarding the use of health plan exclusions. Given the broader coverage of ADA due to the ADA Amendments Act has the EEOC staff changed its views on any specific type of exclusion or have issues been raised about particular types of plan exclusions? Has the analysis of exclusions changed in any way?

Two exclusions which have been discussed in the past are for bariatric surgery and cochlear implants. Any change in position regarding plan exclusions for these two procedures?

Also, in light of the new Tax Court decision accepting a Gender Identity Disorder as a mental condition and making Sex-Change Surgery deductible as a deductible treatment, is there any issue about whether plans excluding it are discriminating against individuals with disabilities?

**Answer:** *They stated that the analysis has not changed and pointed to the EEOC’s 1993 guidance on employer provided health plans, which says that a health plan exclusion is not disability-based if it applies to a multitude of dissimilar conditions and affects individuals with and without disabilities. They said the second part of the question as it relates to Bariatric surgery requires a more complex analysis. To determine whether exclusion of coverage for bariatric surgery would constitute a disability-based distinction, it would be necessary to determine whether all or substantially all of the individuals who have the procedure would be considered individuals with disabilities. They indicated that a*

*broad based exclusion on cochlear implants might be a problem since most individuals requiring the surgery would likely be considered individuals with disabilities after the ADA Amendments Act. They noted Section 511 of the ADA in response to the part of the question relating to exclusions for sex change surgery.*

### **Question 3: Health Plan Hearing Aid Coverage**

Under the ADA Amendments Act has the EEOC modified or taken a position with respect to the exclusion of hearing aids from coverage by an employer-sponsored health plan?

**Answer:** Like any health plan exclusion, whether an exclusion of coverage for hearing aids would be considered a disability-based distinction would depend on whether all or substantially all individuals who wear hearing aids are individuals with disabilities.

### **Question 4: Health Risk Assessments**

Many group health plans now require potential participants to complete a health risk assessment before they may enroll in the employer's group health plan. Other group health plans only permit an employee who does not complete a health risk assessment to enroll in a plan with lesser benefits or only catastrophic coverage. We understand that some consulting firms are advising employers to adopt this approach.

In prior Joint Committee on Employee Benefit meetings with the EEOC, the EEOC staff indicated that both of these practices would likely not meet the voluntary requirements of the ADA. Has the EEOC's position on this changed? Does the EEOC have a concrete position on at what point requiring a health risk assessment will cease to be voluntary? Will the EEOC be issuing formal guidance on these issues anytime soon?

***Answer:*** *While the staff noted that the EEOC does not have a formal position on the Health Risk Assessment issue, they would be concerned about voluntariness in a situation where a person does not receive coverage or only catastrophic coverage as a result of not completing a Health Risk Assessment. Staff noted two informal discussion letters from OLC which say that an employer may not condition receipt of health benefits on completion of a health risk assessment.*

### **Question 5: Downsizing and Involuntary Termination Programs**

Given the sharp downturn in the economy and the resulting job losses, have the number of EEOC charges relating to waivers under the Older Workers Benefit

Protection Act increased? If so, has the EEOC taken any new or modified positions relating to such waivers?

**Answer:** *The EEOC Staff said that there was a reduction in the number of charges relating to waivers. But they noted that charges in all other areas were increasing substantially.*

#### **Question 6: Gross v. FBL Financial Services, Inc.**

During last year's session, a question was posed regarding the impact of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) holding that a Title VII plaintiff need not produce direct evidence that discrimination was a motivating factor for the employment decision being challenged in order to shift the burden to the defendant to show that it would have made the same decision absent discrimination in a mixed motive case, has preempted the *McDonnell Douglas* proof paradigm for disparate treatment cases. During the meeting it was noted that another case, Gross v. FBL Financial Services, Inc., 129 S. Ct. 680 (2009) might again address the issue. The following month the court issued its decision. Did the decision in Gross have any further impact on the EEOC's thinking or approach?

**Answer:** *EEOC staff noted that cases since Gross have been mixed and that Plaintiffs are still prevailing in some cases. It was noted that legislation is pending in Congress to overturn Gross.*

#### **Question 7: Enforcement Activity**

It appears that the EEOC now has been allocated increased resources which permitted an expanded hiring program. Has this resulted in an increase of benefits related enforcement activity? Have employee benefit related charges increased during the past year?

**Answer:** *The EEOC staff said there was no special program as a result of the increased resources. Benefit related charges are down slightly and unlike five years ago when a massive number of cash balance plan charges were filed, the EEOC has only receive one in the last couple of years.*