

**Questions for the EEOC Staff for the
2009 Joint Committee of Employee Benefits Technical Session
Wednesday, May 6, 2009**

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

1. What is the impact of the ADA Amendments Act on health plan exclusions? For example, is it a problem for a plan to exclude all hearing aids, now that it is likely that the vast majority of those needing hearing aids will be considered individuals with a disability? What about limits on treatments for other chronic conditions (which would likely render the individual disabled for ADA purposes), when similar limitations are not imposed on acute conditions, or on different chronic conditions? Will categorical exclusions for obesity treatments be a problem under the ADAAA (assuming non-experimental, medically appropriate, etc.)?

Answer: *They noted that for both the hearing aid and obesity portions of the question they would continue to apply the 1993 interim guidance in the context of the particular allegation or charge (see <http://www.eeoc.gov/policy/docs/health.html>). The first step in the analysis would be to determine whether or not a disability-based distinction was being made. However, they noted that the question did not contain enough facts to make that analysis. If all or substantially all the impacted individuals are disabled under the ADAAA, such limits would be a disability-based distinction. If there was a disability-based distinction, the second step would be to determine whether or not the provision was a subterfuge. They noted that, with the expanded definition of disability in the ADA Amendments Act, it is quite possible that EEOC will see charges involving the issue.*

2. Many health plan wellness programs provide a reward (premium rebate, for example) if participants fill out a Health Risk Assessment. GINA will curtail much of the information requested, depending on the regulations from the HIPAA Agencies, but a separate question remains as to whether the ADA prohibits HRA questionnaires that the plan sponsors may consider “voluntary” but that are “rewarded” such that the EEOC might not consider them voluntary.

Answer: *It was noted that the Genetic Information Nondiscrimination Act (GINA) will curtail the collection of much of this information, particularly*

the collection of family medical history, which is considered genetic information.

They noted that a letter had been issued to a county regarding the county's practice of requiring a Health Risk Assessment as a condition for group health plan enrollment. In this context, the Health Risk Assessment was an inquiry that was neither job related nor consistent with business necessity. Further, the Health Risk Assessment was not voluntary because the county penalized employees who failed to complete the Health Risk Assessment by denying them participation in the county's group health plan.

The EEOC staff reiterated that the Commission had not taken a position as to what level of inducement would make an inquiry involuntary.

3. Assume an employer needs to reduce payroll. It has a pension plan that is less than 100% funded, so PPA states that it cannot be amended to increase liabilities. Can employer offer an early retirement window outside of the plan, which allows anyone age 55 or older to retire on an unreduced pension? (The subsidy is obviously greater for the younger people within the group.) What options are available, and legal under ADEA, in a time of very strictly limited resources, for employers trying to soften the impact of contracting employment?

Answer: *There is no prohibition against offering an early retirement inducement outside of a defined benefit plan as outlined in the question based on the theory that the same total monthly benefit is being offered to everyone. The EEOC Staff referred to Section 4(l)(1)(B)(1) (<http://www.eeoc.gov/policy/adea.html>) and also noted Schultz v. Windstream Communications, 2009 WL 1028175 where the Plan was amended to pull in younger individuals just short of immediate pension eligibility.*

4. What is the EEOC's position regarding whether or to what extent the Supreme Court's decision in 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?

Answer: *[Predated the Supreme Court's decision in Gross v. FBL Financial Services Inc.] The EEOC staff said that McDonnell Douglas applies in the vast majority of cases. They noted that Desert Palace*

would probably only come up in a Motion for Summary Judgment and that the Supreme Court may again address the issue in Gross (see http://www.scotuswiki.com/index.php?title=Gross_v._FBL_Financial_Services%2C_Inc.) which was argued March 31, 2009.

5. Does the ADA Amendments Act impact exclusions in health plans? The EEOC seems to have a different analysis of the impact of the ADA on health plan exclusions than the courts. Does the EEOC plan to stick with its past approach based on the ADA?A?

Answer: *Same answer as Question 1.*

6. Has the EEOC developed new priorities for benefits-related issues with commencement of the Obama administration?

Answer: *Since new political appointees had not yet arrived no new priorities have been developed yet. The Office of Legal Counsel staff was looking at whether changes in the economy and case law may require additional guidance concerning benefit issues. They noted that they continue to get reduction in force and waiver questions. They said the EEOC may have a formal session on ADEA issues this summer.*

7. In 2007, you noted that benefit related EEOC charges were up across the board. Has that trend continued?

Answer: There were 1,418 benefit charges in 2008 which is 26% more than 2007. They noted that this may not be as dramatic as it first appears since all charges are up 18%. Most of the benefit charges are age cases.