Questions for the EEOC Staff for the
2013 Joint Committee of Employee Benefits Technical Session
May 9, 2013

Question 1: Wellness Plans and Financial Incentives

The ADA generally prohibits medical examinations and inquiries. However, there is an exception for “establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.” 42 USC §12201(c).

The Treasury, DOL, and HHS issued proposed tri-agency regulations with new protections for employees whose employers offer wellness programs. 77 Fed. Reg. 70619 (Nov. 26, 2012).

Would the EEOC be willing to treat the underwriting exception as applicable to wellness programs that comply with the standards articulated in the proposed tri-agency regulations?

Answer:

The staff noted that the Commission had just held a meeting on the application of EEO laws with an emphasis on the ADA and were deliberating on Wellness Plans.

Question 2: FMLA Leave

Does the definition of disability under ADAAA, as well as the clarification that when an adult son or daughter’s disability allows parents of adult children who have been wounded or sustained an injury or illness in military service to take FMLA leave include leave for Post Traumatic Stress Disorder (PTSD).

What if the servicemember’s injury, lasts beyond the 12 months covered by the leave entitlement?

Proposed Answer: *The military caregiver provision entitles a parent of a covered servicemember who sustained a serious injury or illness up to 26 workweeks of FMLA leave in a single 120-month period if all other requirements are met. The ADAAA’s expanded definition of the term “disability” will enable more parents to take FMLA-protected leave to care for their adult sons and daughters with disabilities. FMLA adopts the ADA’s definition of “disability” as a physical or mental impairment that substantially limits a major life activity to define “physical or mental disability”.*
The servicemember’s parent can take FMLA leave to care for a son or daughter in subsequent years due to the adult child’s serious condition so long as FMLA requirements are met.

Answer:

The EEOC staff noted that the ADAAA makes it is easier to demonstrate a disability and that PTSD is specifically identified as a disability. They noted that the specific amount of time of the leave would require a factual determination. They also noted that although the parent of a child with PTSD would not be entitled to leave as a reasonable accommodation, EEOC has issues with some “no-fault” leave policies and indicated that a policy might have to be modified if an employee with PTSD needs more leave than is normally permitted.

Question 3: Smoking Cessation

Some welfare benefit plans have not treated smoking cessation as a mental/nervous (M/N) or substance use disorder (SUD) condition. They consider this to be a “gray” area so the Plans could determine decide how they wanted to treat it.

If the plans treat it as a medical condition under their wellness/preventive benefit they do not need to apply MHPAEA. Is this correct?

Answer: Industry white papers and guidance from Milliman classifies smoking cessation as a SUD due to the diagnosis codes of Nicotine Dependence (ICD-9 305.10), Nicotine Withdrawal (ICD-9 292), and Nicotine-Related Disorder Not otherwise Specified (ICD-9 292.9) inclusion in the DSM-IV. Plans should start advising that this is a SUD and should be applied with parity so that they will pay the same as any other illness so deductibles, co-pays, co-insurance, etc. will be applied just like the medical without separate limits, accumulators, etc.

Answer:

No answer.

Question 4: Smoking Cessation (follow-up question)

What is different after PPACA?

Answer:

No answer.

Question 5: Letter In Response To Nashville Office Inquiry

EEOC published a letter on January 18, 2013 in response to an employer inquiry made to the Nashville office of the EEOC. The EEOC letter deems the arrangement described as a Wellness Plan and letter seems to focus on reasonable
accommodations even though the questioner stated they were not operating the arrangement as a Wellness Plan. Is this an official position?

Answer:

The staff noted that this was an informal discussion letter and not necessarily the view of the Commission. The letter was treated as a request for technical assistance. They also noted that an arrangement without a Health Risk Assessment can still be a Wellness Plan.

Question 6: Duty of Care for Special Needs Students

With renewed enhanced security in schools and use of Security Resource Officers and off-duty police, is there an enhanced duty of care in dealing with special needs students?

Answer:

The staff noted that the question does not seem to relate to issues over which they have jurisdiction.

Question 8: Enforcement Activity

Have charges related to employee benefits increased or changed in nature during the past year? Can you breakdown the types of charge you have seen over the past year?

Answer:

See attached.