AMERICAN BAR ASSOCIATION

JOINT COMMITTEE ON

EMPLOYEE BENEFITS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

QUESTIONS AND ANSWERS

MAY 11, 1994
EEOC Questions

ADEA

1. In its amicus brief submitted in Cipriano v. Board of Education of the City School District of the City of North Tonawanda (10 EBC 1521. W.D., NY 12/7/88) the Commission suggested that certain "sliding scale" early retirement incentives reduced by steps as the employee advances in age, might be acceptable under the ADEA. What are the EEOC’s current views on this issue?

A: The Commission has no position on the issue of the acceptability of a sliding scale incentive since the passage of the OWBPA. The EEOC has participated in the case of Lega v. Ohio Educational Association, where the Commission argued that it would not be permissible under Section 4(f)(2)(B)(ii) to cut off projected years of service at age 62. This type of scenario does not meet the requirements of Section 4(f)(2)(B)(ii) because younger persons are getting a better deal than older persons. A plan provision which provides that no participant is credited with more than a maximum number of years of service (for example, 30) would not be a problem. The EEOC staff noted that based on a comment in the Statement of Managers providing health benefits to age 65 may be permissible.

2. Waivers of claims under the ADEA will not be valid unless they follow certain specific statutory requirements designed to guarantee that the waiver was knowing and voluntary. One such requirement is that the individual from whom a waiver is being received must have been given at least 21 days to consider the agreement or, if the waiver was requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must have had at least 45 days to consider the waiver.

When an employer seeks a waiver in connection with an exit incentive or other employment termination program offered to a "group or class" of employees, the employer, before the 45 day consideration period, must also disclose certain information to each individual from whom a waiver is being sought.

Under what circumstances does an employer create a termination or exit incentive program offered to a "group or class" of employees? Are the additional disclosure requirements for waivers triggered merely if any predetermined package of benefits is offered to more than one employee? Please comment on this question, preferably providing an example of what is meant by an exit incentive program offered to a "group or class" of employees. The EEOC could consider offering an objective quantitative standard
that can be applied by employers. Examples could include a percentage of total work force (i.e., 20% like the IRS partial plan termination standard), a finite number of total employees or a number or percentage of non-highly compensated employees (with less protection for highly compensated employees, like ERISA’s approach to top-hat plans).

A: The EEOC staff felt strongly that based on legislative history individual waivers must truly be waivers negotiated on an individual basis and a program offered to a group or class was to be read very broadly. Although the staff felt that more than one individual waiver could be negotiated at the same time, the coincidence of timing could lead to scrutiny. Basically, the staff said that whether a waiver was being obtained in connection with an exit incentive or other employment termination program offered to a group or class of employees was something, like pornography, one would know when one saw it.

3. If part way through an exit incentive program or other employment termination program the class of individuals covered by the program or the time limits are expanded will the 45-day period set forth in Section 7(f)(1)(F)(ii) start again for the individuals in the initial group? Could the expansion of the group or the time limits be considered a new exit incentive or other employment termination program for only the additional individuals?

A: The EEOC staff thought that the significance of the change in the program had to be reviewed. If the change was so significant that it might affect the manner in which employees evaluated the program, an employer to be safe may want to start the 45-day period over again. The staff thought that the employees needed to have enough information to evaluate the program so that in the

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1 In the legislative history to the Older Workers Benefit Protection Act (P.L. 101-433, Oct. 16, 1990) which added Section 7(f) to ADEA, the Senate Committee on Labor and Human Resources recognized a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. S. Rept. No. 101-263. In the former situation, the Committee noted the employee understands that action is being taken against him and he may engage in arms-length negotiation to resolve any differences with the employer. In contrast, the Committee noted that in the case of a program targeted at a group of employees such programs are characterized by a standardized formula or package of employee benefits, the terms of which generally are not subject to negotiation between the parties.

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staff's view expanding the age group to whom the program was offered might be a significant enough change requiring restarting of the 45-day period. The staff did not think that as a matter of course all changes to the program would start a new 45-day period - each change would have to be evaluated on its own merits. In the staff's view, if the benefits under the program were increased, some employees who accepted the original offer would be unhappy and it probably would be prudent to restart the 45-day period.

The staff stated that the commencement of a new employment termination program after the expiration of a prior employment termination program was probably alright if it was not part of a scheme. There was discussion regarding the drafting of plans to accommodate employer needs if too many employees accept the offer. Different methods of accommodation were discussed. Reserving the right to take only the most senior employees if too many employees elected was considered appropriate. There was some question whether a "first come, first served" program may jeopardize the voluntariness of the program by putting undue pressure on employees.

4. Please confirm that an employee validly can waive ADEA rights within the 21 or 45-day consideration period, as applicable, of Section 7(f)(1)(F) and that the period during where the employee has the right to revoke the employee's waiver is the 7 days following execution of the waiver regardless of when the waiver was executed.

A: The EEOC confirmed that an employee may validly waive ADEA rights in less than the normal 21- or 45-day consideration period by executing the waiver at an earlier date. Such a waiver would be valid seven days following execution of the waiver.

5. Please address the issues involved in the determination of the sufficiency of the consideration for an ADEA waiver.

A: The EEOC has no opinion on this issue. The EEOC staff did note that OWBPA was a compromise bill emphasizing informing employees. Prior versions of the bill clearly required separate consideration and such provisions were deleted in the compromise bill.

6. Has the EEOC decided to issue regulations or other guidance regarding ADEA? What is the EEOC's reaction to the comments submitted in response to the EEOC's request for comments on the OWBPA? In comments prepared by individuals of the ABA Section of Taxation and Section of Real Property, Probate and Trust Law, clarification of the application of ADEA to cafeteria plans and
permissibility of considering medical benefits in the benefit package approach were requested. Are these requests likely to be followed?

A: The EEOC has not yet decided whether to issue regulations or other guidance regarding ADEA. The EEOC staff found the comments useful. The EEOC staff said that they were not aware of any complaints regarding the operation of cafeteria plans and thought that medical benefits could be used in the benefit package approach as long as the medical benefits were not reduced more than could be justified under a benefit-by-benefit approach.

7. The Statement of Managers to OWBPA indicates that reductions in retiree medical coverage (including a complete cessation of medical coverage upon retirement) are not intended to be prohibited or required to be justified by a showing of increased cost to the employer. However, there is no section of the OWBPA that specifically exempts post-retirement changes in medical or other coverage. Will the EEOC accept the position in the Statement of Managers that reductions in retiree medical coverage do not require cost justification, and, if so, would this be a special rule for medical coverage or as part of a general interpretation that the OWBPA cost justifications are required only with respect to active employees?

A: The EEOC staff noted that the Supreme Court sometimes analyzes statutes without looking at legislative history. If the Statement of Managers to OWBPA is correct, the EEOC staff thought that the interpretation regarding reductions without showing increased cost to the employer would be applicable solely to health benefits. Retiree benefits which were structured during employment appear covered by ADEA while those benefits which may have been provided ad hoc after employment may not be covered by ADEA.

8. Section 4(l) of ADEA has detailed technical rules regarding when special early retirement benefits (e.g., an early retirement window) may be used to reduce severance benefits. Are these provisions triggered where a voluntary early retirement is introduced by an employer who has a non-discretionary severance pay plan that only makes payments upon involuntary termination? Where an employer has not announced any involuntary layoffs to employees that would trigger payment of severance, the early retirement benefit should be viewed as a voluntary program where employees freely decide to terminate their positions. Does the EEOC agree that the fact that employees who so decide to voluntarily terminate (e.g., to obtain five years of additional age and service on their pension under the provisions of the window) are thus not eligible for involuntary termination severance benefits should not be viewed as being violative of ADEA (which generally prohibits severance
offsets) because the employee was never eligible to receive both benefits.

A: Assuming that an employee's retirement under the early retirement window program is, in fact, voluntary, there is no problem in not paying severance pay under a plan limited to involuntary terminations of employment.

9. Will EEOC provide some guidance as to what constitutes an obligation of the employer to provide medical benefits "of unlimited duration" for purposes of determining permissible offsets from severance pay? All insured plans have contracts for a fixed term that must be renewed for the contract to continue, and provide for circumstances in which the insurance company may refuse to continue coverage. Even if the plan is self-insured by the employer, there will be provisions permitting the employer to determine to reduce or discontinue contributions. All ERISA plans are required to set forth the procedures for amending and terminating the plan. Will the EEOC consider guidance that these standard provisions alone do not make the employer's obligation "limited"?

A: An employer has an obligation to provide medical benefits of unlimited duration for purposes of determining permissible offsets from severance pay if it does not have a right to terminate benefits whether by contract or otherwise. In the insured plan context, this means that where an insurance policy terminates, the employer must obtain new coverage or provide the benefits.

10. If an individual files concurrently in the appropriate State Civil Rights Commission and the EEOC, and the State Civil Rights Commission investigates and determines it was not probable that the employer engaged in discrimination, then how is a subsequent request for review of that determination coordinated with the EEOC investigation and determination? Is the right to sue letter, which commences the 90 day period for filing suit, obtained from the EEOC or the State Civil Rights Commission?

A: The EEOC staff noted that the EEOC has work sharing arrangements with the states and the EEOC automatically reviews matters filed with State Civil Rights Commissions. The EEOC issues the right to sue letter.

11. IRS Revenue Ruling 93-88 addressed the taxation of discrimination recoveries under Title VII and the ADA. Why weren't ADEA awards addressed? How does the EEOC consider ADEA awards?

A: The EEOC defers to the Internal Revenue Service on tax matters.
ADA

12. What is the EEOC position regarding higher medical and life insurance premiums for (A) smokers, (B) overweight employees or (C) employees with uncontrolled high blood pressure?

A: The EEOC is reviewing these issues. Are these criteria disability-based? If not, no problem. If so, the use of such criteria must be actuarially justified.

The EEOC staff has not yet determined whether smoking is a disability. Smokers may be nicotine addicts or abusers. The EEOC staff mentioned the Surgeon General’s statements that smoking is more addictive than heroin and references to addiction within the Rehabilitation Act context. If smokers have disabilities, then they might be entitled to leave time for treatment. The EEOC staff noted that it is clear that a smoke-free workplace is permissible.

Obesity and uncontrolled blood pressure may be disabilities in certain circumstances. Morbid obesity has been held to be a disability.

13. Is a "bad back" a disability - a physical or mental impairment that substantially limits one or more of the person’s major life activities?

A: A bad back can be a disability if it substantially impairs a major life activity. For example, a bad back which prevents lifting which can be performed by an average person would generally be a disability.

Employers cannot request workers’ compensation history before an individual is hired. Inquiries about workers’ compensation history can be made after the employment offer if made of all applicants in the same job category.

14. Is infertility a disability and therefore health plans cannot limit infertility treatment without proving that the limitation is not a subterfuge?

A: The EEOC staff would like to address infertility in their final EEOC guidelines, but the EEOC hasn’t decided what to say. Is infertility a disability? The EEOC is not sure. The legislative history clearly provides that procreation is a major life activity. Absence of an ovary is clearly an impairment. However, a 49-year-old woman who cannot conceive is probably not impaired because it is not unusual not to be able to conceive at 49.
The next question is whether limits on infertility treatment are disability-based distinctions. It appears that a strong argument could be made that they are not because they affect people both with and without disabilities. Birth control would have nothing to do with disability whatsoever, so an exclusion of anything having to do with reproductive health might be broad enough that it isn’t disability-based.

If an employer could exclude something altogether, but tries to offer a little of it, does that subject the plan to more criticism? No. Lifetime caps are clearly safe. Similarly, if the distinction is not disability-based, there are no ADA issues. The EEOC staff would consider a cap and an exclusion regarding the same benefits or conditions similarly.

If the number of drug rehabilitation treatments a plan will pay for can be limited to two, for example, based on recidivism rates, can the same limit be placed on the number of fertility treatments? The EEOC is considering the issue.

15. Is the exclusion of organ transplants and hearing aids from health plans a disability-based distinction?

A: The EEOC is looking at whether exclusion of organ transplants or hearing aids is permissible. It was noted that hearing aids are not currently in the health care reform bill. It was also noted that hearing aids could be used by some with only a small hearing loss while some individuals may be more severely hearing impaired. There was a discussion that organ transplants may originally have been excluded from plans as experimental. How much obligation does the EEOC have to look behind the explanation that a procedure is experimental? Bone marrow exclusions were mentioned.

16. Is the exclusion of coverage for disability or health problems from alcohol or drugs a disability-based distinction?

A: Yes, it is a disability-based distinction. In general, the rule is that how an impairment is acquired is irrelevant to whether a disability exists.

In the case of addiction, the courts never addressed what life activity was impaired; therefore, there is a question as to whether addiction in and of itself is a disability or whether an addict has to demonstrate an impairment of a major life function.
Current illegal drug use is not protected at all by ADA, so a reasonable accommodation does not have to allow the employee to shoot up. Rather, rehabilitation programs or AA meetings might be reasonable accommodations.

The EEOC staff hopes to deal with substance abuse caps in the final guidance, too, but the EEOC does not know what the answer will be. Can a plan limit the number of rehabilitation treatments to two, for example? The EEOC staff does not know the answer at this time.

17. How should wellness programs be analyzed under ADA if contributions or co-payments vary depending on health factors? What makes a wellness program voluntary?

A: In determining whether contributions or co-payments based upon wellness comply with the ADA, it is first necessary to determine if the distinctions are based upon a disability or not. For example, wellness may be defined as the absence of disability. If distinctions within the wellness program are not disability-based, they will not violate the ADA.

If, on the other hand, the definition of wellness is disability-based, then a determination must be made whether the different contributions and co-payments are actuarially based. If they cannot be justified actuarially, then the differences violate the ADA.

EEOC defines mandatory wellness programs as being ones where there is some penalty or charge for failing to participate in the plan. Mandatory wellness programs are being looked at by the EEOC. Perhaps some are OK, perhaps some are not. Voluntary wellness programs are OK.

18. Some qualified plans which have annuities as the normal form of benefit provide a lump sum benefit election to those individuals who can provide evidence of good health. This feature is limited to those participants who can provide evidence of good health in order to avoid adverse selection against and increased cost to the plan.

Retirement benefits under defined benefit plans are typically funded based on actuarial estimates of factors such as the life expectancy of the plans' participants. If participants are permitted to obtain benefits beyond what the plan anticipated paying them pursuant to its actuarial estimates, the plan could find itself unable to pay benefits to other surviving participants. By requiring a certain uniformly applied standard of good health to be met before permitting lump-sum distributions from the plan, a plan can protect its funding status against anti-selection against
the plan in participants' selection of benefit options. Is the practice of requiring recipients of lump-sum distributions from defined benefit retirement plans to first submit proof of good physical health violative of the ADA? Such a requirement for lump-sum distributions does not single out specific disabilities and has a rational purpose (to protect the funding basis of the plan) and therefore such a provision should not be viewed as being violative of the ADA.

Good health requirements commonly appear with respect to other benefits. Life insurance programs may impose good health requirements for insurability at normal rates or availability of supplemental coverage. Life insurance and disability benefit programs may require the employee to be actively at work on the date coverage commences. Are these good health requirement problems under ADA?

A: The EEOC staff noted that the answer probably depends on the definition of good health. If good health is defined as the absence of a disability, there is an ADA issue. If good health is defined in a more general manner so as not to depend on whether there is a disability and the definition is applied uniformly, there may not be a problem. The EEOC staff noted that the same analysis applies to active at work requirements.

19. What obligations are imposed under ADA when reasonable accommodation would change a job in such a way that the job with reasonable accommodation would only be available to someone with more seniority within the terms of a collective bargaining agreement? What if reasonable accommodation is inconsistent with the collective bargaining rules such as work hours? Has the EEOC and National Labor Relations Board resolved these issues?

A: The EEOC staff noted that ADA protects those who can perform the essential function of the job and there is no requirement to change the job. The EEOC staff noted that they were reviewing the interrelationship of collective bargaining rules and ADA. The EEOC staff also noted that EEOC staff members had discussions with the NLRB but such discussions had stopped but might be resumed.

20. If a current or prospective employee is either a qualified individual with a disability or has a disabled dependent, and the current or a prospective group insurer is unwilling to cover the disabled individual at all, or is willing to cover the individual only with limitations or at a substantially increased premium -

a. Would a pass-through of individually rated premiums directly to all employees (reflecting the increased risk) be permissible?
b. Can the employer terminate its group coverage (because of the unreasonable cost of covering the disabled individual), and offer to reimburse all employees up to a fixed amount for their cost of coverage?

A: The EEOC staff stated that individual underwriting for all employees or a fixed dollar payment to all employees would be fine.

21. Does ADA provide protection to former employees? Does a qualified individual with a disability include a former employee? Are long-term disability plans subject to ADA?

A: The EEOC staff believes ADA does provide protection to former employees and noted that many charges have been brought by former employees. The EEOC staff said it was reviewing the issue of ADA protection of former employees. The EEOC staff stated that long-term disability plans are subject to ADA and that the EEOC staff was looking at the impact of the ADA on those disability plans which limited payments for psychiatric disability to two years.