AMERICAN BAR ASSOCIATION
JOINT COMMITTEE ON
EMPLOYEE BENEFITS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
QUESTIONS AND ANSWERS
MAY 18, 1995
1. What is the EEOC's current position regarding whether a defective waiver that did not meet the requirements of OWBPA may be contractually ratified by employees when they elect to keep benefits? (See, e.g., Wamsley v. Champlain Refining, CA5, 1993, 63 BNA FEP Cas. 821.) Should it matter whether the employee is sophisticated or was represented by counsel?

Answer: The EEOC's position is that a defective waiver cannot be ratified. This view was expressed in amicus briefs the EEOC filed in Oberg v. Allied Van Lines, Inc. 11 F.3d 679 (7th Cir. 1993) (wherein the result was consistent with the EEOC's position) and in Wamsley v. Champlain Refining (which reached an opposite result). The Supreme Court has denied certiorari, even though there is a split in the circuits.

While the EEOC has not addressed the issue of whether the validity of a waiver is affected by whether the employee is sophisticated or represented by counsel, the staff's reaction is that where a waiver does not meet the minimum requirements, those factors (sophistication and representation) cannot cure the failure.

2. Is it now clear that no separate consideration is required for an ADEA waiver?

Answer: The EEOC has never specified its view as to whether separate consideration is required for an ADEA waiver. If it were to consider the issue, the EEOC would most likely compare the statute and its legislative history with prior proposed legislation that was not passed. The OWBPA is less specific about whether a waiver applies only to asserted claims than prior proposed legislation that contemplated a waiver of asserted claims.

The staff of the EEOC is contemplating commencing a "negotiated" rulemaking procedure regarding this and other waiver issues. In negotiated rulemaking, various groups express their views and the resulting rulemaking hopefully reflects a resolution of the issues that arise. The EEOC has been given tentative approval to commence such a procedure, but there is no fixed timetable. The EEOC staff stated that this would be a "maiden voyage" into negotiated rulemaking for the EEOC.

3. Although the trend has been to move to a facially neutral date of birth rule to determine which medical plan has primary coverage when both husband and wife have separate employee coverage, and there is a benefit claim for a covered child, there are still some insured arrangements which attempt to impose a rule that the father's coverage will always be primary in such case, and the mother's coverage will be secondary (even where the mother's policy may have a lower deductible or higher coverage limits.) While insurers are not directly subject to
Title VII, may an employer be liable for offering an insured plan with such a facially discriminatory coordination of benefits rule?

**Answer:** The EEOC staff thought the birthday rule was a problem under Title VII and an employer could be liable although the EEOC staff said the issue has not been studied. The EEOC staff referred to 29 C.F.R. 1604.9 dealing with unlawful discrimination in employment, including fringe benefits and 29 C.F.R. 1604.4 dealing with unlawful discrimination against married women. The EEOC staff was not persuaded that there was not a violation because the employee generally did not in the aggregate receive a lesser benefit. The EEOC staff was concerned that the employer of the female employee was providing a lesser level of benefits. The EEOC staff also stated that there are theories under which Title VII could apply to insurers and the EEOC was not willing to agree that insurers are not subject to Title VII (as the question presupposes).

4. Under what circumstances may a leave policy complying with the FMLA violate provisions of Title VII (including the Pregnancy Discrimination Act)? *(See EEOC complaint against St. Elizabeth's Hospital, April 19, 1995.)*

**Answer:** The EEOC staff first stressed that FMLA does not modify other nondiscrimination laws and the FMLA regulations specifically state that the FMLA does not modify other laws. For example, FMLA does not apply during the first year of employment where employers cannot discriminate against pregnant employees even during that first year of employment. The EEOC staff noted that policies in which no leave may be taken in the first year may violate the Pregnancy Discrimination Act. The EEOC staff stated that the Chicago office had challenged the leave policy of a hospital from which a pregnant woman was required to take leave during the first year of employment. The EEOC staff also noted that even a facially neutral disability program could violate Title VII if it is administered in a discriminatory way. The EEOC staff also noted that FMLA’s 12-week leave period is a floor not a ceiling on benefits.

5. Under section 414(r) of the Internal Revenue Code, many types of pension plans are allowed to test for discrimination by looking separately at each line of business. *(The Congressional intent was to enable businesses to match benefits in their particular industry without having to match what affiliates in other industries might provide.)* In determining whether an employer expends the same benefit costs for older workers as for comparably situated younger employees, is it permissible to compare costs on a line of benefit purposes of the "equal cost or equal benefit" rule.

**Suggested Answer:** So long as IRS separate line of business rules are satisfied, the employer should be permitted to compare all benefit costs (or benefit levels) for workers on a line of business basis for purposes of the "equal cost or equal benefit" rule.

**Answer:** The EEOC staff stated that the regulations only require valid and reasonable data. The EEOC staff indicated that "in the vast majority of cases" use of a separate line of business analysis should be a reasonable method of calculating the data whether that meant
looking at separate companies, divisions or departments organized for purposes other than providing different benefits. The EEOC staff warned, however, that if the data were manipulated, there could be a problem. The EEOC staff also noted that IRS approval does not necessarily have any bearing on EEOC positions. For example, a plan which excluded only 10% of the employees but that 10% represented all the women employed by the employer might meet IRS requirements but not EEOC requirements.

6. Does the simultaneous offering by an employer of an early retirement window program under a qualified pension plan (whereby an extra five years of age and service is given to employees for pension purposes but where the benefit would not equal in all circumstances an unreduced pension at the employee’s termination) and a separate severance plan whereby eligible employees are told they are eligible for and may choose either the early retirement benefit or the severance benefit - but not both, violate the OWBPA?¹

Suggested Answer: OWBPA provides generally that an employer may not offset any employee severance benefits with retirement benefits, except that an employer may deduct from separation pay either or both of the following amounts provided such separation pay is "made available as a result of a contingent event unrelated to age":

(1) the value of any retiree health benefits received by an individual eligible for an immediate pension; or

(2) the value of any additional pension benefits that are made available solely as a result of a contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension² ...(emphasis added).

Under OWBPA, it appears that an employer could not offset the additional pension benefits (the value of the early retirement window's additional 5 years of age and years of benefit service) against the severance benefits otherwise available to certain involuntarily terminated employees unless it is determined for such individuals that their pensions are unreduced in accordance with OWBPA’s requirements. OWBPA does not expressly define what is an "unreduced" pension benefit for purposes of the severance offset provisions. However, the

¹ Such a situation would be present if a company had a small number of employees whose jobs were eliminated during the election window period of the early retirement program; that is, the layoff program and the early retirement program’s election window period overlapped. As a result, the impacted employees would be told that they had to make a choice between electing the early retirement program or receiving severance pay.

² We note that the legislative history on this OWBPA provision is very limited. Therefore, there would not appear to be any specific authority stating that early retirement windows are always deemed to solely result from a contingent event unrelated to age. However, the fact that the OWBPA amendments specifically authorize early retirement windows provide support that such a position can be reasonably taken by the employer and therefore we assume that the condition of OWBPA is satisfied for purposes of this question.
legislative history to OWBPA offers the following example of an unreduced pension benefit. An employee is terminated as a result of a plant closing, at which time the employee is entitled to 80% of a normal retirement pension. As a result of the shutdown, the employee became entitled to an amount equal to 100% of a normal retirement pension benefit. In such case, the legislative history indicates that the value of the additional 20% pension benefit may be offset against severance benefits.

Although this example in the legislative history is helpful it does not answer all the questions regarding the requirement of an unreduced pension benefit. For instance, would the unreduced pension requirement be met if through a window program's offering of additional years of age and benefit service an employee's post-enhancement benefit would be at least equal to 100% of the employee's pre-enhancement normal retirement pension? (Even if the post-enhancement benefit is actuarially reduced to reflect commencement prior to normal retirement age?).

While this analysis seems to have some merit and is not expressly dismissed by either the OWBPA statute or legislative history, it would appear that a strict reading of the severance offset provisions of OWBPA requires that the post-enhancement benefit (i.e., after the window benefit is added) be paid in full and without any actuarial reduction for early commencement if such benefit is to be offset against severance benefits. This would be true even if the window benefit added years of benefit service and thus significantly increased the employee's accrued retirement benefit. Hence, based on such a view of OWBPA it would appear that the employer could deny severance benefits to only those particular terminated employees who with the five years of age or service added, would receive an unreduced pension benefit. This result would hold true even though the early retirement window was an additional benefit to be provided by the employer and not something the employee would be entitled to outside the early retirement window situation.

Answer: The EEOC staff said OWBPA should be read literally. If the individual is not eligible for an immediate and unreduced pension there can be no offset to the severance payment. If an individual is eligible for an immediate and unreduced pension, the value of the additional pension benefits (for example, because of additional years of credited service) made available in a reduction in force program can be deducted from the severance payment. The analysis may result in deductions from severance for certain individuals but not others. For example, five additional years of age may entitle a 60-year old to an immediate and unreduced pension benefit but would not entitle a 59-year old to an immediate and unreduced pension benefit. The EEOC staff described the Lyon case (described in question 22) and expressed its disagreement with such case.

7. If, however, the employer's severance plan makes payments only upon involuntary terminations, are there any ADEA issues if employees as part of an early retirement widow voluntarily terminate (for example to obtain five years of additional age and service for pension purposes) and are therefore not eligible for involuntary termination severance benefits? There does not appear to be an ADEA issue because the employees were never eligible to receive both benefits.
Answer: The EEOC staff said that theoretically if the severance plan applies only to involuntary terminations and the early retirement window program applies only to voluntary terminations there should be no ADEA issue with not providing severance to such early retirees. The EEOC staff was concerned that there would be an implicit threat that those who did not take early retirement would be fired. The EEOC staff said the question raised very fact specific issues.

8. 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?

Answer: The EEOC staff said the EEOC has not taken a position with respect to the question but stated there are two theories. One theory is that the Statement of Managers to OWBPA is the definitive legislative history and it indicates that reductions in retiree medical coverage are not intended to be prohibited or required to be justified by a showing of increased cost to the employer. The second theory is that one does not review legislative history unless there is an ambiguity in the statute and there is no ambiguity with respect to the general cost justification rule. The second theory provides that post-retirement benefits are earned during employment and therefore the same age discrimination rules apply so that post-retirement benefit reductions based on age must be cost-justified.

9. Does an express exclusion in a health benefits plan for high-dose chemotherapy violate the ADA? Note the exclusion would not be predicated upon such treatment being classified as "experimental."

Answer: High-dose chemotherapy is probably only associated with disabling conditions and therefore its exclusion is probably a disability-based distinction. If its exclusion is a disability-based distinction, such exclusion would be prohibited unless the exclusion is not a subterfuge. Apparently, fewer standards today show high-dose chemotherapy to be experimental. If high-dose chemotherapy is not automatically excluded under the experimental provision, it would be more difficult to use the "not a subterfuge" defense of it being experimental.

10. Can a plan deny disability benefits to someone who becomes disabled by reason of drugs, alcohol, or self-inflicted injuries? McGann v. H & H Music Co. provided that Section 510 of ERISA does not prohibit welfare plan discrimination between or among categories of diseases. In this case, there would be no discrimination in favor of non-disabled individual as opposed to disabled individuals. Rather, the issue is whether all disabled individuals must be treated the same.
Answer: The EEOC staff said the issues are being considered. The EEOC staff noted that there is case law under the Rehabilitation Act suggesting that distinctions can be made among different groups of disabilities. The EEOC staff also noted that voluntariness is generally not relevant to the ADA analysis. The ABA representatives also asked about an exclusion for injuries resulting from domestic violence and the EEOC staff said the issue had not been studied.

11. Under the Social Security Independence and Program Improvements Act of 1994, Social Security benefits will terminate at the end of three years for individuals who would not otherwise be disabled but for alcoholism or drug addiction. In addition, if alcoholism or drug addiction is a contributing factor material to a determination of disability and the individuals do not undergo treatment, benefits may be prematurely terminated. Many disability plans coordinate with social security. Would limitations on long-term disability benefits if the disability was due to alcoholism or drug addiction be a violation of ADA?

Answer: The EEOC staff said they were aware of the issue and were reviewing the issue.

12. Employers are in a dilemma when dealing with employees who appear to have mental problems and are demonstrating bizarre behavior in the workplace. For example, if an employee starts talking to himself or herself and starts speaking of dreams concerning the imminent destruction of the world, an employer understandably would have some concerns about the health and safety of the employee and his coworkers. In addition, the employer might be concerned about its legal liability if the employee "loses it" and commits some act of violence in the workplace. Under the ADA, however, the employer appears to be limited in what actions it can take in this situation. Even to require a medical examination of the employee, it is my understanding that the employer must show that the employee poses a "direct threat" to himself or the health or safety of others in the workplace. The "direct threat" test is very difficult to meet, and likely would not be met by the facts described above. What is an employer expected to do in this situation? Has the EEOC considered ways in which an employer can protect itself and its employees when confronting this situation?

Answer: The EEOC staff said that employers can discharge employees with disabilities for misconduct (such as bringing a gun to work) as long as the rules are applied consistently. Employees who violate clear conduct rules can be disciplined. It is important that rules are applied in a nondiscriminatory manner. The EEOC staff seemed concerned with the tourette's syndrome hypotheticals.

The EEOC staff discussed the meaning of "direct threat". The EEOC staff considered talking to oneself generally not to be a direct threat. The EEOC staff thought there were many employees able to do their jobs who heard voices and talked to such voices or themselves. The EEOC staff did not consider talking to oneself about the imminent destruction of the world as threatening behavior unless the employee was talking about participating in the destruction or starting the destruction. The EEOC staff emphasized that not all odd behavior is threatening. The EEOC staff said the analysis is very case specific.
13. The EEOC staff issued a letter to Mr. Henry Saveth regarding the analysis of whether a smoker's addiction to nicotine is a disability under ADA. Under what circumstances does the EEOC staff issues such letters? What are the procedures to obtain a letter? Have there been any further developments in the analysis of whether a smoker's addiction to nicotine is a disability?

**Answer:** The EEOC staff indicated that there were two different types of letter responses available. With respect to the type of letter mentioned in the question, the EEOC staff indicated that it will provide a written response to any letter that it receives unless it answers the question by telephone. The EEOC staff cautioned that there was no guarantee how fast the response would be issued. This type of letter carries an express warning at the bottom that it is staff analysis only. These letters are available through the Freedom of Information Act and are commercially published.

The EEOC staff further noted, however, that the EEOC has authority to issue official opinion letters. The EEOC staff indicated that the authority had not been used in many years.

With respect to the substantive question concerning smokers' addiction to nicotine, the EEOC staff indicated that there was no answer to the question at this time. The EEOC staff noted, however, that not all smokers are addicted to nicotine. The EEOC staff reiterated that even with respect to those smokers who have a nicotine addiction, the EEOC has not taken a position as to whether there is a disability.

14. What is the EEOC position regarding higher medical and life insurance premiums for (i) smokers, (ii) overweight employees or (iii) employees with uncontrolled high blood pressure?

**Answer:** The analysis depends on whether a disability-based distinction is being made regarding the premiums. As indicated in the prior question, some smokers definitely do not have a disability but for other smokers with nicotine addictions, whether they have a disability will depend if nicotine addiction is considered a disability. Some overweight employees are considered to have a disability but many are not. The EEOC staff expressed the view that uncontrolled high blood pressure may be an impairment but the question is whether the impairment is a substantial limitation on a major life activity.

The EEOC noted that even if a disability-based distinction exists there is no violation of the ADA if it can be shown that the challenged disability-based distinction is not being used as a subterfuge. ABA representatives asked whether the no subterfuge standard could ever be met once a disability-based distinction was found. The EEOC staff said the no subterfuge standard could be met but it wanted a nondiscriminatory justification for singling out disability treatments. For example, exclusion of the five most expensive procedures may be justifiable but if only a disability treatment that was the third most expensive procedure was excluded there should be an additional justification other than expense. The EEOC staff questioned the extent to which the EEOC will become involved in plan design. The EEOC reiterated that the basic idea is to treat equally expensive treatments the same unless there is a good justification.
15. Are the following exclusions from coverage permissible: (i) organ transplants; (ii) hearing aids; (iii) infertility treatment; (v) health problems resulting from alcohol or drugs; or (vi) chemotherapy for breast cancer but not other cancers?

Answer: The EEOC staff said the EEOC had not taken a position as to whether the listed exclusions were permissible. The EEOC staff suggested there were good arguments that exclusions for organ transplants, hearing aids and chemotherapy for only breast cancer were disability-based distinctions. The EEOC staff noted, however, that hearing aids are excluded from the federal government’s health plan, Medicare and the proposed national health insurance. The EEOC staff suggested that exclusion for infertility involved an issue with respect to whether there was a substantial limitation on the major life activity of procreation. There apparently is conflicting case law regarding infertility as a disability. At least with respect to health insurance, one can argue that infertility treatment covers a wide variety of cases, some of which may be disabilities and some which are not disabilities (for example, infertility because of age). Exclusions based on current illegal drug use do not violate ADA. Alcoholism is a disability and therefore, an exclusion for alcoholism could be a disability-based distinction. It was suggested that alcoholism may be part of a broader mental/nervous exclusion. The EEOC staff thought such a category exclusion might be permissible but was concerned with the creation of arbitrary categories (such as the flu and AIDS) in an effort to justify exclusions based on only some of the individuals within the categories having disabilities. The EEOC staff acknowledged the historical use of mental/nervous categories.

16. How should wellness programs be analyzed under ADA if contributions or copayments vary depending on health factors? What makes a wellness program voluntary? Will guidance on wellness programs be issued?

Answer: Wellness program contributions and copayments that vary depending on health factors should be analyzed as to whether there is a disability-based distinction being made. For example, a lower contribution rate for those who exercise two times a week probably is not a disability-based distinction.

A voluntary wellness program does not violate ADA. There is currently no formal EEOC guidance as to what constitutes a voluntary wellness program. In the EEOC staff’s view, a “voluntary” program cannot require participation or penalize someone for not participating. The EEOC staff noted that just because a wellness program is not voluntary does not mean it violates the ADA. Wellness programs may be addressed in the EEOC’s future regulatory guidance.

17. Do customary managed care programs raise ADA issues?

Answer: The general notion of managed care is not inconsistent with ADA. However, specific managed care decisions, like specific provisions in other types of plans, might present ADA issues and would have to be analyzed under the disability-based distinction analysis.
18. 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?

**Answer:** The ADA "reasonable accommodation" requirement does not require an employer to reallocate the essential functions in a job. The EEOC has encountered some situations where the terms of a collective bargaining agreement may be interpreted to preclude certain accommodations to employees. The EEOC staff mentioned potential issues involving switching from nights to days and light duty jobs. The situations have generally not involved seniority rights. And, in most situations where there has been a perceived conflict between the requested accommodation and the collective bargaining agreement, the parties have been able to work out an agreement, usually by adopting other accommodations that do not conflict with the collective bargaining agreement.

19. Is it clear that reasonable accommodation under ADA may require leaves not required by FMLA?

**Answer:** Yes. Examples include where an employer is not covered by the FMLA because of the employer's size, where an employee has not been employed long enough for FMLA coverage and where an employee has exhausted FMLA leave.

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, what are the employer's options?

**Answer:** The EEOC cannot answer this question. The factors the EEOC would look at to determine if a violation of the ADA has occurred are: (1) whether everyone is being individually underwritten, by the insurance company; and (2) whether the insurer is objectively analyzing risk or cost in its underwriting. The EEOC is concerned with how the insurer is doing the underwriting and whether the insurer is willing to cover certain people with just as high or higher risk. It is not sufficient for an employer to say that the "market" will just not provide insurance to the individual. The same analysis would apply to disabled dependents through the "association clause" of the ADA. The Interim Guidance does provide that, if the true choice is between a disability-based distinction or no insurance at all, an employer can acquire insurance for his other employees without covering the disabled employee. An open questions exists as to whether the Department of Justice is going to pursue insurers for discriminatory practices under Title III.
21. Can the guidance in the EEOC Interim Guidance on the application of ADA to health insurance be utilized in analyzing other benefit issues?

**Answer:** The EEOC Interim Guidance on its face applies only to health insurance plans. The EEOC is in the process of reviewing whether its framework can be applied in analyzing the ADA’s application to other benefit issues.

22. Please describe any recent benefit cases in which the EEOC is involved which address new ADEA or ADA benefit issues.

**Answer:** Two cases were noted:

a. In *Lyon v. Ohio Education Association*, Civ. Action No. 93-4072, 1995 U.S. App. LEXIS 9575 (6th Cir. April 27, 1995). The Court of Appeals affirmed the District Court’s grant of defendant’s motion for summary judgment, dismissing the suit challenging an early retirement incentive plan under ADEA. The early retirement incentive plan imputed service to age 62 thereby providing a larger additional benefit to younger employees. The Court considered the OWBPA legislative history as support for imputing additional years of service and considered the differences in retirement benefits identical to the disparity that would exist if young and old employees worked until normal retirement age. The EEOC generally considers imputing additional years of service for purposes of benefit accrual as proper if all employees received an equal number of additional years of service. The Court reasoned that the plaintiffs failed to advance a prima facie case of disparate treatment or disparate impact discrimination. The Court stated that any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62; since this factor was not being used as a "proxy" for age, it was not considered to be evidence of discriminatory animus. The Court relied heavily upon the U.S. Supreme Court’s decision in *Hazen Paper Co. v. Higgins* for the proposition that an ADEA violation does not occur where an employer is motivated by a factor other than age.

b. In *Parker v. Metropolitan Life Insurance Company*, 875 F. Supp. 1321 (W.D. Tenn. Jan. 18, 1995), the issue was whether a long-term disability plan which provides lesser benefits (two-year limitation) to employees with mental disabilities than to employees with physical disabilities violates the ADA. The Court granted Defendant’s motion to dismiss all claims under the ADA. The Court held that the employee lacked standing to bring the suit under Title I of the ADA because she was unable to perform the essential functions of the job at the time she brought the suit (even though she may have been "qualified" to perform such functions at the time of her enrollment in the plan), and therefore was not a "qualified individual with a disability" entitled to protection under Title I. The EEOC submitted an amicus brief in the case with respect to the jurisdictional issues arguing that a "qualified individual with a disability" when a post-employment benefit is challenged means an individual qualified for the benefit and the employment position in such situations is that of benefit recipient.
23. Is there a trend to include an ADA claim when a claim is denied under an ERISA health plan as experimental?

Answer: The EEOC staff said they did not know whether there was a trend to include an ADA claim when a claim was denied under an ERISA health plan as experimental.

24. Please provide some indication of the types and frequency of complaints under ADA involving benefits.

Answer: The EEOC staff said through March, 1995 approximately 45,000 complaints were filed and approximately 1800 (approximately 4.1%) involved benefits. Benefit issues were involved in approximately 10 of 65 cases litigated. Complaints were still being filed with respect to HIV caps but such litigation was settling well. A large number of complaints involved whether disability retirement payments could be lower than service retirement payments. [Subsequently, an EEOC staff member informed the Title VII Subcommittee of EEOC Notice No. 915.002 issued May 11, 1995 which generally provided that service retirement benefits and disability retirement benefits need not be the same because they are two separate benefits which serve different purposes.] Complaints have also been filed regarding lower payment periods for mental disability than physical disability under long-term disability benefits plans.