ABA Sections of Business Law, Labor Law, Real Property, Probate and Trust Law, Taxation, and Tort and Insurance Practice

ABA Joint Committee on Employee Benefits

Meetings with Agencies
May 6-9, 1996
EEOC Questions and Answers

**ADEA**

1. **QUESTION:** Under what circumstances, if any, can a collective bargaining agreement legally provide for retirement incentives with cutoff dates based on age?

**Proposed Answer:** If retirement incentives, when first agreed to, are available to all employees regardless of age, then thereafter, the retirement incentives may be limited to employees when they first become eligible.

**ANSWER:** The EEOC staff does not believe cutoff dates based on age are permissible. The EEOC staff said in its view the difference between questions 1 and 2 is the existence of the lesser retirement incentive to older employees in the collective bargaining agreement. The EEOC staff said that provisions in a collective bargaining do not alter its view that a cutoff based on age is permissible. The EEOC staff noted that if a collective bargaining agreement provided for a lesser retirement incentive for older employers, then the union as well as the employer could be charged with an ADEA violation.

The EEOC staff provided a short summary of how some early retirement incentives may result in a lower benefit to older employees without violating ADEA: subsidized early retirement benefits; social security supplements complying with ADEA §4(f); equal cost expensed on benefits consistent with ADEA §4(f)(2)(B)(i); and voluntary early retirement incentive plans consistent with the relevant purposes of ADEA (ADEA §4(f)(2)(B)(ii)). The EEOC staff noted that the 6th Circuit in *Lyon v Ohio Education Association*, 52 F.3d 135 (6th Cir. 1995) did not adopt the EEOC’s position. There was discussion that public employers appear to be trying to limit benefits to older employees more than private employers are.

2. **QUESTION:** Does an early retirement incentive program that reduces and/or eliminates the early retirement benefits in correlation with increasing age violate the Age Discrimination in Employment Act (“ADEA”)?

**Proposed Answer:** Yes. Early retirement incentives are lawful if they are voluntary and consistent with the relevant purposes of ADEA. Section 4(f)(2)(B)(ii). An early retirement incentive that denies or reduces benefits based on age conflicts with ADEA’s purpose of prohibiting arbitrary age discrimination in employment. See §1511 Final Substitute: Statement of Managers, found at 136 Cong. Rec. §13,596 (daily ed. Sept. 24, 1990) (“Early retirement incentive plans that withhold benefits to older workers above a specific age while continuing to make them available to younger workers may conflict with the purpose of prohibiting arbitrary age discrimination in employment. The purpose of prohibiting arbitrary age discrimination in employment is also undermined by denying or reducing benefits to older workers based on age-related stereotypes.”).

It is also important to emphasize that for an early retirement incentive that denies or reduces benefits based on age to be found discriminatory, the employer need not have been motivated by an improper age-based stereotype. See Brief Amicus Curiae of the Equal Employment Opportunity Commission filed in *Lautner v. AT&T* (6th Circuit):

Johnson v. State of New York, 49 F.3d at 80 (employer’s mental state is irrelevant where the policy explicitly discriminates); Diflase v. SmithKline Beecham Corp., 61 F.3d at 726 (“when the policy itself displays the unlawful categorization, the employee is relieved from independently proving intent”).

**ANSWER**: See Answer to Question 1.

3. **QUESTION**: The Older Workers Benefit Protection Act (the “Act”) was signed into law on October 16, 1990 and amended ADEA. The centerpiece of the Act is its reversal of the Supreme Court’s 1989 decision in Public Employees Retirement System v. Betts, which held that bona fide employee benefit plans were exempt from ADEA, even if they discriminated on the basis of age. Section 102 of the Act was that prohibited age-based discrimination in the terms and conditions of employment includes discrimination under employee benefit plans, and Section 103 of the Act also specifically provides that all employee benefit plans, including those adopted prior to the effective date of ADEA, are covered by the provisions of ADEA. It is not clear, however, whether retiree health benefits are governed by ADEA. The question, then, does ADEA cover retiree health benefits when retiree health benefits are conditioned upon the receipt of an immediate pension from the employer? Thus, is it permissible for an employer to require, that the employee accept payment of pension plan benefits immediately upon retirement (even if the pension plan permits a retiree to wait until age 70 1/2 to commence his or her pension) as a condition of receiving retiree health benefit coverage?

**Proposed Answer**: Retiree health benefits and other retiree fringe benefit plans are not covered by ADEA. Congressman Clay explained that “since the ADEA covers only employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees.” 136 Cong. Rec. H. 8618 (daily ed. Oct. 2, 1990). Further, the Statement of Managers indicates that reductions in medical coverage provided to retirees upon retirement or after they qualify for Medicare are intended to be permissible, even though it is clear from the examples given that the cost justification rules applicable to employees would not (if applied to retirees) justify post-retirement reductions in coverage. 136 Cong. Rec. S. 13597 (daily ed. Sept. 24, 1990). The broader implication is that except where otherwise specified, the new rules apply only to active employees.

The provision requiring employees to accept an immediate pension plan is based upon the legitimate business purpose that if an employee decides to work for another employer (which is often likely if a pension benefit is deferred) after becoming eligible for retiree pension benefits from the previous employer, then the previous employer is not obligated to provide retiree benefits (unless the employee elects to receive pension payments immediately) since the employee has not in fact retired. The purpose of retiree benefits is to provide employees with assistance with health and other benefits upon retirement.

**ANSWER**: The EEOC staff analyzed the retiree health benefit issue in three steps:

The EEOC staff stated that in its view, retiree health benefits are covered by ADEA. Even though the benefits are paid after retirement, the benefit constituted part of the terms and conditions of employment. Moreover, if a plan was discriminatory while an employee was active, it will still be discriminatory after the employee retires. The EEOC staff said that it could not cite any case law in support of this interpretation. The issue was more difficult where the plan is amended after an employee retires; the staff thought that an employer might have a good argument that ADEA would not apply to such an amendment, but the issue is not settled.

The next step in the EEOC staff’s analysis focused on whether an employer may deny retiree health benefits when the employee does not commence benefits under the pension plan immediately after termination of employment. Here, the denial would be based not on age, but an employee’s action or failure to act to commence retirement payments. As a result, the EEOC staff did not state that a concern under ADEA...
would be raised as a facial matter. However, the EEOC staff said that it was possible that a disparate impact analysis could apply, because although the Supreme Court might disagree, the EEOC staff would apply such an analysis. The EEOC staff declined to elaborate on how the disparate impact analysis would be applied.

The third step focused on whether a plan could permissibly eliminate eligibility for benefits at Medicare eligibility age. The staff contrasted the two opposing positions on the issue—one which says this practice is allowed (based on the Statement of Managers to the OWBPA) and the other which holds that because the statute unambiguously prohibits this practice, the Statement of Managers is never relevant to the analysis. The EEOC staff noted that an employer may plan around the issue under the EEOC regulation by using a Medicare carveout plan or an equal cost approach.

4. **QUESTION:** Does the EEOC continue to take the position that a defective waiver that did not meet the requirements of OWBPA is not contractually ratified by employees when they elect to keep benefits?

**ANSWER:** The EEOC staff has opposed the attempts of employers to argue that acceptance of and retention of early retirement incentives, severance benefits or other benefits constitutes ratification of an otherwise defective ADEA waiver. The EEOC staff was not persuaded by the argument that an employee who retains such benefits is unjustly enriched in the restitution sense. The EEOC staff’s view is that in requiring a waiver, the employer is buying an affirmative defense and has no assurance that such defense will be successful or that such waiver will be binding. If the waiver is defective the EEOC staff said the employer should be viewed as having taken its chances and lost. The EEOC staff did acknowledge there was a split in the Circuits. The 4th and 5th Circuits have adopted the contractual ratification theory. *O’Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.) cert. denied, 113 S.Ct. 412 (1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The 7th Circuit has rejected this approach in *Oberg v. Allied*, 17 EBC 2083 (7th Cir. 1993). However, in rejecting that approach, the 7th Circuit in *Oberg* did talk about the possibility that the employer might be able to offset the benefits provided against the backpay award resulting from an ADEA violation. Id. at 2088. The EEOC staff said it has not yet opposed the offset approach, although it cautioned that such fact should not be construed as an indication of support for the offset approach.

5. **QUESTION:** Can an employer require ADEA releases of future terminated employees to receive severance benefits when releases were not required for previously terminated employees? Assume the severance plan is a welfare plan which permits plan termination at any time.

**ANSWER:** The EEOC staff said that whether severance plans can be amended to require ADEA releases is an open question that has been a subject of much discussion in the negotiated rulemaking process regarding ADEA waivers.

6. **QUESTION:** What is the status of the negotiated rulemaking regarding ADEA waivers? Have any determinations been made?

**ANSWER:** The EEOC staff said that through the negotiated rulemaking process, it feels it has learned the issues and arguments on both sides of many of the waiver issues. The EEOC staff did not predict when rules might be issued but noted that at this time no meetings of the advisory committee had been scheduled past July.

7. **QUESTION:** Please describe any recent benefit cases in which the EEOC is involved which address new ADEA benefit issues.

**ANSWER:** The EEOC staff did not mention any cases in response to this question.

**ADA**

1. **QUESTION:** Can an employer, consistent with the Americans with Disabilities Act ("ADA"), require as a condition of health insurance coverage that employ-
ees receive a standard physical examination once a year for preventative purposes? What if the physicians to perform such examinations are selected by the employer? (Assume the physicians are specifically instructed to share the results only with the examinees, not with the employer, and honor those instructions.) Does it matter if the physicals are performed actually at the worksite for convenience and to monitor compliance? What if refusal to submit to coverage leads only to loss of the employer’s contribution (i.e., employee pays full premium cost) rather than loss of the right to group coverage?

Proposed Answer: The practice is permissible, if for no other reason, because it falls within the insurance exclusion of ADA §501(c), as it involves administration of risk not inconsistent with state law, and does not constitute a subterfuge because it makes no disability-based distinction. Moreover, the employer is not “requir[ing]” a medical examination ... as to whether such employee is an individual with a disability” within the meaning of ADA §102(d)(4)(A) because the employer does not receive the results. Lastly, since the examinations are not required as a condition of employment, they are permissible as voluntary examinations under an employee health program within the meaning of §102(d)(4)(B).

Answer: The EEOC staff explored the different issues that arise when a company sets out to require all employees to take physical examinations. According to the EEOC staff, there seems to be a good argument that a physical which is required for insurance falls under ADA Section 501(c). ADA Section 501(c), which specifically addresses insurance, creates a limited exemption from the statute’s broad proscription against discrimination based on disability. Section 501(c) provides in relevant part that ADA subchapter I “shall not be construed to prohibit or restrict” a covered entity “from establishing, sponsoring, observing or administering the terms” of an ERISA-regulated bona fide employee benefit plan, so long as it is not “be[ing]” used as a subterfuge to evade the purposes” of subchapter I. See also 29 C.F.R. Section 1630.16(f). Section 501(c) renders permissible, benefit plan terms that might otherwise be considered unlawful under the Act. Section 501(c), moreover, enables insurers and employers to “design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification.” See Senate Report at 85-86; House Labor Report at 138. Thus, an insurance plan “which limits certain kinds of coverage based on classification of risk” may base distinctions in rates or coverages on “a physical or mental impairment” where the “limitation or rate differential” is based on sound actuarial principles or is related to actual or reasonably anticipated experience. See Senate Report at 85; House Labor Report at 137. Section 501(c) enables insurers and employers to vary the insurance benefit afforded an individual based on actuarially verified predictions regarding the class of individuals with the same risk characteristics.

ADA provides for examination or inquiry of employees for a legitimate business interest. The provision provides that a medical test or inquiry that does not serve a legitimate business purpose is prohibited. 29 C.F.R. Section 1630.13 Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. 29 C.F.R. Section 1630.14(a) Employers are permitted to make inquiries or require medical examinations (fitness for duty examinations) when there is a need to determine whether an employee is still able to perform the essential functions of the job. 29 C.F.R. Section 1630.14(c) Voluntary medical examinations are permitted as a part of the employee health program. It should be noted that the medical records developed in the course of such activities must be maintained in the confidential manner required by the ADA. 29 C.F.R. Section 1630.14(d)

The EEOC staff was especially concerned that the information available from a physical taken by a physician under the contract of the employer remain confidential, even saying that the mere fact that a physical is refused should be held in confidence. The EEOC staff reiterated that the information can’t be used for the purpose of denying health benefits on the basis of a disability and that any findings must be kept confidential.
On the issue of whether the physical is administered by a company doctor, the EEOC staff felt that it was not important which doctor did the physical so long as the confidentiality rule is complied with and information received from the physical not be used to deny benefits based on an employee’s disability.

The EEOC staff questioned whether the physical exam is a voluntary exam at all. In its opinion, if the employee loses something if the employee does not comply, e.g., if the employee is penalized in any way for not taking part in a physical, then the physical is not voluntary.

There was a follow-up question on the use of exit physicals by some companies undergoing downsizing in anticipation of a greater number of employees’ filing for workers’ compensation benefits. Such companies require employees to undergo physical examinations prior to announcement of the downsizing effort to establish a baseline for the employees’ general health. This information later becomes evidence as to whether there existed any injuries to support a workers’ compensation claim. The EEOC staff noted that this is a new issue and that it may raise some of the same issues cited above about whether the physical is voluntary. But the EEOC staff did note that generally this type of physical cannot be required under Section 501(c) unless it falls under the limited circumstances where Section 501(c) allows a physical due to business necessity. In order for the business necessity threshold to be reached, the employer must ascertain that the physical is job related. In this case, the physical examination is being required for reasons other than to determine the individual’s ability to do the individual job and may not be allowed under ADA if information is misused or an abuse of the confidentiality requirement takes place. If the information is given to an attorney for evidence in a workers’ compensation claim, is this use justified as business necessity? The information may be extremely speculative in nature.

2. **QUESTION:** Can an employer offer a voluntary health insurance premium reduction program in which employees are invited to submit to simple medical tests for body fat, cholesterol level, and blood pressure, and employee health insurance contributions are modestly reduced (e.g., $15/month) for employees who meet reasonable standards on all three tests? What if special waivers are made available for employees whose medically-documented disabilities substantially interfere with their ability to qualify on some or all of the tests?

**Proposed Answer:** The practice is permissible, if for no other reason, because the distinctions made, as modified by the available waivers, are not disability-based distinctions, thus permitting the practice to qualify as legitimate risk classification and administration under §501(c) without regard to actuarial justification. Collection of information in regard to waivers would be protected under ADA §501(c) as administration of risk not inconsistent with state law, would also not be a prohibited inquiry under §102(d)(4)(A), and would be voluntary for employees within the meaning of §102(d)(4)(B).

**ANSWER:** The EEOC staff indicated that offering employees voluntary health insurance premium reductions in accordance with the facts stated in the question may be consistent with Section 501(c) and therefore might not violate ADA. It was noted, however, that an argument might be advanced that this type of program would have a disparate impact on disabled employees. In that regard, the EEOC staff further noted that if, pursuant to the second part of the question, special waivers were made available to employees with medically documented disabilities, even this argument would appear to be undercut and that there would be even less likelihood of an ADA violation. The EEOC staff indicated that the waiver possibility raised in the second question did not appear to be essential to its analysis. The EEOC staff further noted that if nothing adverse would happen to an employee if he or she did not participate in the program, i.e., did not submit to the medical test described, then the EEOC staff would view the program as being voluntary and as long as equal access was provided, there should not be a problem.
3. **QUESTION**: Can an employer offer a modest reduction (e.g., $5/month) in employee health insurance contributions for employees who certify that they do not smoke?

**Proposed Answer**: Yes, because smoking is not a protected disability. Nicotine addiction is also not a protected disability, since it does not interfere with any major life activity. However, even if it were, adverse impact analysis is not applied in this context, as stated in the Interim Policy Guidance. Moreover, even if nicotine addiction were protected and implicated, the practice would be protected under §501(c), would not constitute a prohibited inquiry within the meaning of §102(b)(4)(A), and would be "voluntary" for employees within the meaning of §102(d)(4)(B).

**ANSWER**: The EEOC staff noted that its view was that casual smoking was not a disability protected under ADA but that employees with nicotine addiction might be considered disabled under ADA. The EEOC staff indicated that even if such an employee were considered disabled, the ramifications of that might not be adverse to employers. The EEOC staff noted that the EEOC has already indicated that it was acceptable to establish workplace rules on smoking.

The EEOC staff indicated that in general the answer to this question regarding modest reductions in health insurance premiums for nonsmokers was similar to the answer to the previous question. Even if a disability exists, the program may still be acceptable under Section 501(c) since it may be treated as a voluntary program in accordance with the previous discussion.

4. **QUESTION**: Can an employer’s accident or health insurance plan provide for an additional $500 deductible where the participant or beneficiary is under the influence of alcohol or drugs (or riding with an intoxicated driver) at the time of an accident?

**Proposed Answer**: Yes, because intoxication is not an "impairment." Adverse impact analysis in regard to alcoholism is not applied.

**ANSWER**: Yes. The plan appears to be punishing misconduct and illegal behavior rather than discriminating on the basis of a disability-based distinction. Therefore, the deductible under this plan should not violate ADA. An ADA issue might be involved if we assume that the allegedly intoxicated person actually has a disability (i.e., firing someone because he/she appeared to be intoxicated, when in fact that person has a disability).

5. **QUESTION**: Does it matter if the requirements and premium adjustments in 2., 3., and 4. above are contained in state-regulated insurance policies, such that they reflect no action by the employer other than purchasing the policy and making it available to employees on a fixed-subsidy basis?

**Proposed Answer**: The inclusion of such requirements and premium adjustments in state-regulated insurance policies would constitute another defense to ADA claims, since recognition of such claims would “invalidate, impair, or supersede” state insurance laws, contrary to the McCarran-Ferguson Act, 15 U.S.C. §1011-1015.

**ANSWER**: The McCarran-Ferguson Act does not protect ADA violations.

6. **QUESTION**: When is additional leave of absence a reasonable accommodation under the ADA? We keep encountering situations where someone uses all FMLA-guaranteed leave and still is unable to return to work for weeks or months. The employers generally want to replace the employee because of the difficulty of covering for the absent employee. What advice would you give in these situations?

**Proposed Answer**: Reasonable accommodation issues are fact-intensive and require individual analysis, so it is hard to give an answer that will apply generally.

Leave of absence is mentioned in the EEOC guidance on the regulations as one possible accommodation that should be considered. When an employee is totally unable to perform the responsibilities of the employee's position, and other employees perform...
the employee’s entire job for many days, the reasonableness of this as an accommodation depends on how much hardship the absence and covering cause. Certain positions may be easier to cover in an employee’s absence, depending on the skill level and the availability of others in the workplace with similar skills. In a small company, or when the position is highly skilled or involves a lot of discretion and judgment, leave might never be considered a reasonable accommodation because of the lack of appropriate staff to cover the position. In that case, replacement might be required, assuming there is no other accommodation that will allow the employee to perform the essential functions. In a large company in which there are several people performing the same or very similar jobs, it may be quite easy to accommodate a long absence, and following a policy demanding termination after an arbitrary period of time could be deemed discriminatory.

It may seem counter-intuitive to treat employees as protected by ADA even when they cannot directly perform the essential functions of their job. An applicant is not so protected. An existing employee who can perform the essential functions in the near future, in a company that can absorb some leave in that position without undue hardship, may be entitled to leave as one possible accommodation. The crucial issue in these cases will be determining when the leave is causing enough burden to the employer that it is no longer a reasonable accommodation. Employers in these circumstances would be well-advised to document the burdens associated with the absence as they become more apparent.

**Answer:** The EEOC staff said that additional leaves of absence are reasonable accommodations under ADA, but the employer may show that granting such leaves would create an undue hardship. This analysis is based on a consideration of all the facts and circumstances. The staff was reluctant to state that a job applicant was not precluded from asking for a leave of absence as a reasonable accommodation under ADA. An applicant could seek a delayed starting date, and then, the issue would become whether the employer could agree to such a request without undue hardship.

7. **Question:** Can a dependent bring suit for failure to pay health benefits as a qualified person with a disability?

**Proposed Answer:** No, but the employee can bring suit for such benefits as a “person who associates with a person with a disability.”

**Answer:** The EEOC staff said it agreed with the proposed answer.

8. **Question:** Can a former employee who is a COBRA continuee bring a lawsuit for failure to pay health benefits as a qualified person with a disability?

**Proposed Answer:** Maybe. If the former employee meets the definition of a qualified person with a disability, then a lawsuit can definitely be brought. If the person cannot do the job at the time the lawsuit is brought, but could have done it at the time benefits were denied or at the time the employee was terminated, then a lawsuit can be brought.

**Answer:** The EEOC staff believes the answer is yes but notes that some courts have taken a different view. The EEOC staff believes that as far as benefits that inherently occur only after employment terminates such as disability benefits and COBRA the time when one has to be a qualified disabled individual is during the working period not necessarily during the period when the benefits are received.

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. There are two issues involved. The first issue concerns when that person must have been qualified to do the job with a disability. In *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321 (W.D. Tenn. 1995), the court reviewed whether an individual was qualified to perform the job at the time of her enrollment in the plan (as opposed
to the time when benefits were claimed, etc.). The court held that although the participant may have been qualified to perform the essential functions of her job at the time of her enrollment in the plan, she failed to show that she was a “qualified individual with a disability” at that time. The EEOC is currently litigating this definition.

The second issue involves whether such individual is an “employee.” The ADA legislative history provides that the definition of a “qualified individual with a disability” is directed towards job applicants and employees. This individual, however, is a participant and beneficiary by virtue of his status as a former employee. This issue needs to be addressed under the ADA. In a Title VII retaliation case, Robinson v. Shell Oil, 70 F.2d 325 (1995), cert. granted, 64 U.S.L.W. 3707 (1996), the Fourth Circuit held that “employees” does not include former employees. The EEOC is currently litigating this definition.

9. **QUESTION**: How would you challenge the configuration of an HMO or PPO?

**Proposed Answer**: A challenge would be based on the disability-based distinctions set forth in the Interim Guidance.

**ANSWER**: The EEOC staff stated that the fact that access to certain specialists might be limited would likely apply to both those with disabilities and those without disabilities (similar to the EEOC approach with limits on blood transfusions) and therefore such limitation should not be a ADA violation. The EEOC staff noted that the facts of specific situations would have to be analyzed and the EEOC would sue HMOs/PPOs if they participated in an ADA violation.

10. **QUESTION**: When does provision for a lower level of benefits for specific treatments constitute discrimination? For instance, if the plan only pays 50% of the costs for a blood transfusion but 80% for all other treatments, is this discrimination?

**Proposed Answer**: Analyze the lower level of benefits using the disability-based distinction under the Interim Guidance.

**ANSWER**: Blood transfusions are needed by both individuals with disabilities as well as by those without disabilities. As stated in the Interim Guidance, a limitation on blood transfusions should not violate ADA. Adverse impact analysis for ADA is generally not appropriate. Similarly it is permissible under the ADA to have a rubric where plan provisions provide different levels of reimbursement for physical versus mental treatments; but it would violate ADA for a plan solely to exclude all treatments for schizophrenia, a disability.

11. **QUESTION**: Does the medical plan which covers the transplant of certain listed organs (e.g., kidney, liver, lung, heart) violate the ADA by excluding coverage of other organ transplant procedures? The exclusions are not based on a determination that the specific transplant procedures are experimental, but simply that the plan chooses to cover some, but not all, organ transplant procedures.

**Proposed Answer**: Since no organ transplants may be needed for a variety of disabilities and since a plan is not required to cover all disabilities, the decision to exclude one type of transplant is not a disability-based discrimination. Existing EEOC guidelines permit a plan limitation on treatment even though that limitation may impact people with certain disabilities more than others (e.g., limitation of blood transfusions to a specified number per year impacts more heavily on hemophiliacs but is not a disability-based distinction). This limitation should fall within that sort of acceptable non-disability based limitations.

**ANSWER**: The EEOC staff appears to believe those in need of organ transplants are disabled. Therefore, although the EEOC staff did not specifically answer the question, there appears to be some ADA risk in excluding certain organ transplants.
12. **QUESTION:** How would one determine whether a utilization review is disability-based, discriminatory and justified?

**ANSWER:** The EEOC staff did not directly answer the question. The EEOC staff said if disabled and nondisabled individuals are treated equally in the utilization review’s cost containment measures, there should not be an ADA issue. Discrimination against disabled individuals in the utilization review process could violate ADA. The EEOC staff noted certain situations may present mixed motives.

13. **QUESTION:** 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 individuals as opposed to disabled individuals. Rather, the issue is whether all disabled individuals must be treated the same.

**ANSWER:** The EEOC staff did not have an answer to the question. The EEOC staff appeared not to consider a suicide exclusion to be a disability-based distinction.

14. **QUESTION:** 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 did not have an answer to this question. The EEOC staff noted that current drug addicts are not protected by ADA.

15. **QUESTION:** Has the EEOC decided whether the following exclusions from coverage are permissible: (i) organ transplants; (ii) hearing aids; (iii) infertility treatment; (iv) health problems resulting from alcohol or drugs; or (v) chemotherapy for breast cancer but not other cancers?

**ANSWER:** Organ transplants: The EEOC staff considers the exclusion of organ transplants to be a disability-based distinction.

Hearing aids: The EEOC staff believes that the exclusion of hearing aids is probably a disability-based distinction based on the fact that hearing aids, unlike eye glasses, are uniquely used by those with hearing loss.

A disability-based distinction is one that:

1. Singles out a particular disability (such as AIDS, schizophrenia);

2. Singles out a discrete group of disabilities (such as cancers); or

3. Singles out disability in general (such as all conditions that substantially limit a major life activity). EEOC Interim Guidance.

The burden will be on the employer to demonstrate that a disability-based distinction complies with ADA. Therefore, applying the Interim Guidance standard, a plan limiting coverage to individuals with hearing loss may be making a disability-based distinction and violating ADA. The EEOC staff acknowledged that an argument could be made that hearing aids are analogous to eye glasses, the exclusion of which would not be a disability-based exclusion. However, both disabled and nondisabled individuals wear eye glasses while generally those with hearing loss requiring hearing aids would be considered disabled.

Infertility treatment: The EEOC staff believe that infertility treatment is not a disability-based distinction. Infertility treatment is used to treat a wide variety
of causes ranging from advancing age to problems with the employee’s partner. In Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), a federal district court held that infertility may be an impairment in the nature of a physiological disorder, but the impairment failed to substantially limit a major life activity, and therefore was not protected by ADA. Comparing “reproduction” against other major life activities provided in the EEOC’s ADA regulations, the court concluded that getting pregnant was not a major life activity. After all, a person is required to walk, see, learn, speak, breath and work, however, a person is not called upon to reproduce throughout the day, every day according to the court. An anchor person claimed that her contract was not renewed after she demanded extra time off during the period of her fertility treatments. Other cases suggest otherwise. See Pacoure v. Inland Steel Co., 916 F. Supp. 797 (N.D. Ill. 1996).

Health problems resulting from alcohol or drugs: ADA generally does not protect persons engaging in the illegal use of drugs, but it does cover individuals who are erroneously regarded as engaging in the illegal use of drugs or who are participating in a supervised rehabilitation program and are no longer engaging in such use. ADA Section 510; 42 U.S.C. Section 12210; EEOC Reg. Section 1630.3(a)&(b). Alcoholics are persons with a disability under ADA and therefore are entitled to the protections of ADA.

The EEOC staff believes strongly that if the health plan will cover an employee’s lung cancer treatment caused from smoking that it should also cover liver damage from alcoholism. The EEOC staff finds troublesome exclusions based on “voluntariness” of the condition.

Breast cancer: Several cases have come about on this issue. Most notably the Henderson v. Bodine Alumi-num, Inc., 70 F. 3d 958 (8th Cir. 1995) decision in which an employer-sponsored health plan excluded high-dose chemotherapy (HDCT) as treatment for cancer because the employer considered it experimental treatment. The Eighth Circuit Court of Appeals held in Henderson that a health plan’s denial of high dosage chemotherapy treatment for breast cancer on the basis that it was “experimental treatment” violates ADA. The decision reversed a previous U.S. District Court decision in Missouri which accepted a plan’s denial of treatment based on disability type. Henderson was covered as a dependent under her husband’s health plan, suffered from an aggressive form of breast cancer and was recommended for entry into a clinical trial program including high dose chemotherapy (HDCT). This form of treatment is substantially more expensive than standard chemotherapy and requires a bone marrow transplant. Because of the high cost of the treatment, the plan refused to precertify the placement, pointing to policy provisions covering HDCT only for certain types of cancer, not including breast cancer. Henderson sued claiming discrimination based on her cancer. The district court held for the employer. The appeals court disagreed and determined that Henderson’s treatment had passed beyond the experimental phase to accepted treatment for this type of cancer. It held that since Bodine covered HDCT for cancers for which it was an accepted treatment, its denial of the treatment for breast cancer was discriminatory and forbidden by ADA. The court ordered the health plan to pay for the participant’s treatments.

16. QUESTION: 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 EEOC staff said the analysis is a facts and circumstances issue. The collective bargaining agreement does not trump ADA and ADA does not trump a collective bargaining agreement. The employer and union have a duty to negotiate a variance under the collective bargaining agreement unless such a variance would cause an undue hardship.
17. **QUESTION**: 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? Does the insurer have potential liability under Title III?

**ANSWER**: The EEOC staff said disabled people should have equal access to employee benefits programs as other active employees. It makes no difference to the analysis whether the disabled person is a disabled employee or a disabled dependent.

It is an open question whether there has been discrimination in a situation where there was equal access and the insurer looked at everyone following permissible underwriting principles, but refused to issue coverage. It is important to distinguish whether the benefit under scrutiny is the insurance coverage or the right to apply for coverage. If the employer is acting in good faith and the benefit is the right to apply, but the disabled individual is turned down, maybe there is no ADA violation. The EEOC staff said that if the choice is to provide insurance with the disability-based distinction or have no insurance program at all, it is preferable to have the insurance program.

Query whether an employer that attempted to get coverage for all its employees, but such coverage was unaffordable and so the employer contracted to cover all employees except the disabled individual at a premium of $2000 per employee and gave the disabled individual $2000 toward buying the employee’s own coverage would satisfy ADA.

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

**ANSWER**: The EEOC staff basically said that its responses to the earlier questions covered the significant cases that the EEOC is involved with currently.

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Title VII

1. **QUESTION**: Can an employee benefit plan as opposed to the employer-sponsor be sued under Title VII?

**ANSWER**: The question was first clarified. The EEOC staff was asked to comment on situations in which a plan would be sued in a capacity other than as the employer of the plan’s own employees. The EEOC staff indicated that EEOC field offices follow a practical approach of suing whoever the EEOC can find and letting the courts sort out later whether there is a cause of action against the plan. The EEOC staff indicated that if the plan doesn’t belong in the case, it may be entitled to be dismissed later. The EEOC staff indicated that the legal theories it uses to involve plans as third parties in such actions include a third party interferer theory and theories that view a plan as a joint employer or agent of the employer. The EEOC staff elaborated on the third party interferer theory. It said a plan could be a third party interferer if the plan stands in the middle and controls the relationship between the employer and the employee. As an analogy to such status the EEOC staff referred to Sibley Memorial Hospital v. Wilson, 488 F. Supp. 1338 (D.C. Cir. 1973) and Spirt v. TIAA-CREF, 691 F.2d 1054 (2d Cir. 1982).

The EEOC staff said a reason for bringing employee benefit plans into litigation in many cases is that the plan needs to be in the suit to provide complete relief to the plaintiff. The EEOC staff indicated the EEOC will include the plan in the action if the EEOC is “looking for something from the plan” and the EEOC sees evidence that the plan was structured or operated in a discriminatory manner. The EEOC staff claimed this was consistent with conventional third party joinder principles which indicate a third party may be joined if joinder is necessary to provide complete relief.