

ABA Joint Committee on Employee Benefits
GOVERNMENT AGENCIES MEETINGS

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

EEOC Question and Answers

Q. Is the Age Discrimination in Employment Act Amendments Act of 1996, which was incorporated into the Omnibus Consolidated Appropriation Act of 1997, P.L. No. 104-208, unconstitutional? It can be argued that the statute, which reenacted and made retroactive the state and local police and firefighters exceptions to the ADEA which had expired at the end of 1993, is unconstitutional. One attorney at the EEOC informally said he thought that the statute passed muster because it was enacted pursuant to the Commerce Clause of the Constitution so that Congress merely had to have a "rational legislative purpose" for enacting it. As I understand it, if on the other hand, Congress was acting pursuant to its 14th Amendment powers, then the Amendments Act would have to pass a type of "strict scrutiny" test, a much higher standard than rational legislative purpose and so might be declared unconstitutional.

A. The EEOC has not made any pronouncement nor done anything formally on this issue. The EEOC staff believes that the law is constitutional.

Q. A local government retirement plan for police officers and firefighters wishes to reinstate the maximum entry age provision in effect prior to the expiration of the exemption for public safety officers in 1993. This particular plan had an age 31 limitation on entry into the plan. Eligibility for participation in the pension plan is a condition of employment. This means that no person over the age of 31 will be eligible to be hired as a police officer or firefighter. Is the institution of such a condition consistent with the recent amendments to the Age Discrimination in Employment Act?

A. The EEOC staff stated that they were unclear regarding the question. The EEOC staff said state law can again impose a maximum hiring age, but a pension plan cannot have a maximum age for participation in the pension plan. *EEOC v. Commonwealth of Massachusetts*, 68 FEP Cas 915 (D. Mass. 1995); *Quinones v. City of Evanston, Illinois*, 58 F.3d 275 (7th Cir. 1995).

Q. If the answer to the preceding question is in the affirmative, to what extent does the permission provided by this exemption overcome any state law provisions prohibiting discrimination on the basis of age?

A. The more stringent state requirement will control over the less stringent federal requirement.

Q. A local government retirement plan provides disability and death benefits to members in addition to service retirement benefits. A disqualifying event for a service-connected disability retirement is the existence of a pre-existing medical condition. No disability benefit may be based upon a medical condition (whether disabling or not) in effect on the date a member began employment. The fund performs a pre-entry physical on all new hires who will be eligible for membership in the pension plan. No person is denied membership in the pension plan on account of any physical or mental impairment. The pension plan conducts a medical exam solely for the basis of determining the baseline medical condition of a member in the event that a future application for a service-connected disability retirement is made. In the management of this program the following questions arise:

A. Q. Is there a limitation as to the form of medical examination which can be required?

A. No medical examination is permitted prior to a conditional offer of employment. Thereafter, a medical examination may be performed prior to employment if it is performed for entering employees in the same job category.

B. Q. What protocol should be established to ensure the confidentiality of the medical information obtained?

A. The ADA confidentiality requirements should be followed. The medical information must be maintained in files separate from personnel files and access must be limited.

C. Q. Would allowing the plan-appointed physician to maintain all medical records until such time as an application for disability retirement is made constitute an adequate measure of confidentiality of medical records?

A. The physician could keep the records but the records must be kept confidential. The employer cannot contract away its own legal liability. Therefore, the employer could be liable if the physician failed to keep the records confidential.

D. Q. May the employer's pre-employment, post-offer physical be transmitted to the retirement fund for use to determine preexisting conditions without a separate release from the employee?

A. A release would be necessary for the employer to transmit the employer's pre-employment, post-offer physical to the retirement fund for use in determining pre-existing conditions. The plan benefit could be initially designed so that the employee would have to provide a release of the information in order to obtain the benefit so that the employee would have an incentive to provide the release.

E. Q. To what extent does a pension board of trustees, which is a governmental agency, incur liability from a breach of confidentiality made by an independent contractor such as a third party administrator or physician?

A. The EEOC staff thought the pension board of trustees could incur liability from a breach of confidentiality made by an independent contractor.

Q. A local government retirement plan has a provision providing for the reexamination of disability retirees on a periodic basis. A retiree who has been out for more than twenty years is demanding reexamination claiming that he has recovered sufficiently to regain employment. If the retiree returns to the workplace, he will automatically receive a pension which is three times higher than the current disability payment. The board of trustees has traditionally declined to reexamine disability retirees for this reason. To what extent does the board's exercise of its financial discretion in choosing not to reexamine a disabled worker constitute a violation of the ADA? It should be noted that nothing prohibits the retired member from applying directly to the employer. If the employer accepts the person for reemployment, the disability retirement would automatically be suspended.

A. The EEOC staff thought that the decision not to re-examine disability retirees is not a disability-based distinction. The EEOC staff emphasized that in the question the person could apply directly to the employer for re-employment.

Q. A local government retirement plan is required to conduct all of its deliberations in public meetings, including consideration of applications for disability retirement. An applicant for disability retirement is declining to execute releases to the retirement fund to enable its staff and trustees to have access to the medical records necessary to consider the disability application at a public meeting. State law does not permit deliberations in executive session. The board of trustees has declined to process the application until such time as the member authorizes discussion of the medical records and evidence in support of the application at a public meeting. Is this action by the board of trustees a violation of the confidentiality provisions relating to the ADA?

A. The EEOC staff believes that a plan can condition benefits on a release even if such a release could result in discussion of the medical records and evidence in support of the application at a public meeting.

Q. A disabled public safety employee has claimed to have recovered from disability. He is demanding reexamination by the retirement fund. If the reexamination results in a finding that he is no longer disabled, he is automatically returned to the workforce. Does the request for reexamination make the disabled retiree a "bona fide applicant" as that term is used in ADA? If the disability was granted prior to the effective date of the ADA but the demand for reexamination occurs after the effective date of the ADA, does ADA apply, assuming that the disabled retiree requesting reexamination is a "bona fide applicant?"

A. The EEOC staff believes the plan has no obligation to reexamine and the mere request for reexamination does not make the individual a "bona fide applicant". The individual would have the right to seek reemployment.

Q. We understand that the EEOC is more frequently participating in mediation. Which cases are most likely to be mediated? Who acts as mediators and how are they trained? Who pays the cost of mediation?

A. The EEOC has become more involved in ADR, subject to standards of fairness, equal access to information and resources, confidentiality and voluntariness at all steps. The EEOC chooses newly-filed charges as candidates for ADR, concentrating on "B" charges. The EEOC first asks the charging party whether the charging party would be interested in ADR and if the charging party says yes the EEOC then asks the employer. About 90% of the charging parties are interested in ADR but employers tend to be less interested. Based on a relatively small sample, about 50% of the employers eventually agreed to ADR. About 25% of the mediated cases are ADA cases; reasonable accommodation cases often are very appropriate for mediation. Mediators are often pursuant to contract with a federal mediation contract service, law students, volunteer mediators from local bar associations and sometimes (because of limited resources) EEOC staff. The EEOC is not a party to the negotiation of the agreement but will sign off on the agreement resulting from ADR for purposes of enforceability. The charging party does not pay for the mediator. Typically the charging party has not been represented by counsel.

The EEOC opposes mandatory arbitration clauses. The EEOC has generally been unsuccessful in opposing arbitration clauses in the courts. One exception to this trend is a southern district of Texas case (River Oaks Imaging and Diagnostic).

Q. The EEOC issued guidance explaining its position that an individual's assertion of total disability in application for Social Security or disability insurance may be relevant but is not an absolute bar to coverage under ADA. The courts have not necessarily followed the EEOC's position. Does the EEOC believe that the written guidance will influence future cases? If so, has the EEOC seen any evidence of such influence?

A. The EEOC staff believe that their guidance as well as an amicus brief filed by the Social Security Administration (supporting the EEOC position) in Swanks v. Washington Metropolitan Area Transit Authority has already influenced cases and will continue to influence cases. The EEOC staff noted that the Social Security Administration does not consider reasonable accommodation in determining disability and Social Security has a work release program. The EEOC staff also noted that employers sometimes encourage individuals to file for disability.

Q. What is the status of the EEOC's rules on ADEA waivers? Any unexpected reaction to the proposed rules?

A. The EEOC is still working on its proposed rules on ADEA waivers; the comment period is scheduled to end May 9th but only four comments have yet been received. In response to a verbal question, the EEOC said it would be interested in reviewing a comment on providing demographic data in five year age brackets up to age forty rather than in one year brackets in order to protect the identity of employees at small employers.

Q. The EEOC takes the position that individuals cannot waive their rights to file charges with the EEOC or cooperate with the EEOC but can waive their right to recovery. How specifically does this ability to file charges with the EEOC have to be included in ADEA waivers?

A. The statutory language does not require that an ADEA waiver state that the individual cannot waive his or her rights to file charges with the EEOC or cooperate with the EEOC. The EEOC likes to see such language in waivers but such language is not legally required.

Q. Is the EEOC going to participate in the case the Supreme Court agreed to review regarding whether consideration received for an ADEA waiver must be returned in order to sue?

A. The Solicitor General has asked the EEOC if it is interested in participating in this case and it is anticipated that the EEOC will participate.

Q. Has there been any unexpected reaction to the EEOC's guidance on psychiatric disabilities under ADA?

A. The EEOC staff noted that significant reaction was delayed and started only within the couple of weeks before the meeting. The EEOC staff said they were more concerned when there was no reaction. The EEOC staff thought the articles and publicity were running about 2-1 in favor of the guidance. The EEOC staff said they thought employers would find the discussion of enforcement of conduct rules helpful.

The EEOC staff noted that they continued to believe that differentiating between mental/ nervous and physical conditions was permissible in group health plans. The EEOC staff reported on the EEOC's involvement in Leonard F. v. Israel Discount Bank in which the EEOC filed an amicus brief taking the position that a two-year limit on disability benefits for mental/nervous disability as opposed to physical disability violates ADA. The EEOC distinguishes this position from its health insurance position based on the disability plan singling out a type of disability. Most individuals under disability plans are disabled while not all mental and nervous conditions for which treatment is provided under health plans are disabling conditions. The court has deferred the issue as to whether the disabled individual is a qualified individual. Many courts have dismissed cases based on the disabled individual not being able to perform the essential functions of the job. The court characterized the EEOC position with respect to disabled persons being qualified individuals for purposes of disability benefits as "noteworthy". The case also raises the Title III issue as to whether the insurer is liable.

Q. Have there been any further developments regarding potential conflicts between the ADA and union contracts? It is our understanding that the EEOC filed a brief and participated at the Seventh Circuit in the Eckles v. Consolidated Rail Corp. case. The U.S. Supreme Court declined to review the case. Was the EEOC involved in the submission to the U.S. Supreme Court?

A. The EEOC staff said that they believe the union and employer both have a duty of reasonable accommodation under ADA and they should work together to satisfy such obligation.

Q. What reaction, if any, has the EEOC heard regarding the Ninth Circuit's Lucky Stores case? Any reluctance to refer to an employee assistance program? Can work-related stress be a disability?

A. The EEOC staff said they have not heard of any reaction to the case. The EEOC staff referred us to the psychiatric disability guidelines. The EEOC staff stated that stress itself is not a disability but stress might be related to an impairment that substantially limits a major life activity.

Q. The EEOC takes the position that whether something is a disability for ADA purposes should be considered without regard to any treatment for the disability. The courts have not necessarily agreed. Have there been any developments in this area?

A. The EEOC said the question should have referred to "devices or other mitigating measures" rather than "treatment". Treatment implies a cure while mitigating measure implies that the condition is relieved for the period when the measure is used. The EEOC takes the position that disability should be determined without regard to any devices or mitigating measures. The EEOC staff described the courts as split and mentioned cases involving diabetes/ insulin and psychiatric/medication. The EEOC staff thought a case finding a person with ulcerative colitis not to be disabled because the person could have gotten a colostomy outrageous.

The EEOC staff noted that the EEOC was litigating under ADA a health plan limitation on hearing aids.

Q. Has the EEOC been coordinating with the other government agencies regarding the HIPAA health benefit rules? Will the HIPAA rules eliminate certain ADA issues?

A. The EEOC is coordinating with other agencies regarding the HIPAA health benefit rules.

Q. When does the EEOC decide to become involved in a case? Will Rep. Fawell's letter to EEOC Chairman Casellas have any impact on the EEOC's litigation strategy?

A. The EEOC staff noted that the EEOC intervenes in about three cases each year and the EEOC's interest in cases is somewhat different from the interest of private plaintiffs. The EEOC is more often concerned with changing the employer's manner of operation and addressing future discrimination. Private plaintiffs are sometimes more concerned with monetary issues.

Q. Can an employee benefit plan, other than in its role as an employer of its own employees, as opposed to the employer-sponsor be sued under Title VII?

A. The EEOC staff said that it believed the plan could be sued as the agent of the employer or as a third party interferer.

Q. Are there any other cases or EEOC issues that the EEOC thinks would be important for employee benefit practitioners to be aware?

A. The EEOC has taken a position that retirees are covered under ADEA in an amicus brief it recently filed in the third circuit case of McKeever v. Ironworker's District Council. In the case, a union plan reduced retiree health benefits at age 65.