1. **QUESTION**: What is the EEOC's position with respect to the permissibility of welfare plans excluding from coverage infertility treatments and drugs in light of the Supreme Court's holding in *Bragdon v. Abbott* that reproduction is a "major life activity" for purposes of the ADA? Is the EEOC's position that such an exclusion is a disability-based distinction that is justifiable only under the ADA Section 501(c) safe-harbor or that the exclusion of infertility treatments is not a disability-based distinction? Is the analysis for impotence the same?

**ANSWER**: The EEOC staff said that broad-based exclusions are analyzed by a two-step method. First, whether the exclusion applies to a multitude of dissimilar conditions. Second, whether the exclusion constrains individuals with and without disabilities. Applying this analysis to infertility exclusions suggests that a broad-based exclusion for infertility should be permissible because individuals are infertile for various reasons, some of which may constitute a disability and some of which may not. For example, someone with infertility problems because of aging would likely not be disabled because getting old is not an impairment for purposes of determining disability. The EEOC staff said a cap on infertility treatments and drugs should be analyzed the same as an exclusion. There was some discussion among practitioners that courts might not necessarily agree with the EEOC staff’s analysis and never get to the disability-based distinction analysis. Practitioners asked about news reports that an EEOC field office had challenged an infertility exclusion. The EEOC staff said it had no details on the news report. Subsequently, the EEOC New York District Office determination letter regarding an infertility exclusion became available and a copy of such letter is attached to these questions.

The EEOC staff said that the analysis for impotence is similar to that for infertility. Does an exclusion for treatment of impotence affect both the disabled as well as the nondisabled? The EEOC staff mentioned that the EEOC was looking at whether the exclusion of prescription contraceptives might violate the pregnancy discrimination or sex discrimination laws. The EEOC staff said such analysis was at its very preliminary stages. It was mentioned that the inclusion of viagra as a covered expense might be a fact that could buttress a discrimination claim for the exclusion of prescription contraceptives.

2. **QUESTION**: In light of appellate courts' criticisms of the EEOC's Interpretive Guidance with respect to the ADA Section 501(c) safe-harbor (which may require rigorous actuarial data to support disability-based distinctions in welfare plans), and its outright rejection in some circuits, does the EEOC intend to revise its current definition of subterfuge, or to develop additional criteria to abate the criticism that it has received in the courts? If so, what additional criteria are under consideration?

**ANSWER**: Currently, the EEOC staff does not intend to revise its 1993 health insurance guidance. The EEOC staff mentioned that additional criteria would not abate the criticism by those courts that think the *Betts* definition of "subterfuge" should control and the EEOC would not adopt *Betts*. 
3. **QUESTION**: Suppose a plan were to cap all pharmaceuticals at $10,000 per year per covered person. Presumably, such a cap passes muster under the ADA (similar to the EEOC's example regarding the permissibility of a limit on the number of blood transfusions) since both disabled and non-disabled people need pharmaceuticals, even though the limitation's impact on a disabled person with a serious disease needing expensive medications could be great. Please confirm this analysis.

**ANSWER**: The EEOC staff generally agrees, so long as the constraint applies to both individuals with and without disabilities, and it impacts a multitude of dissimilar conditions. The EEOC staff did mention that if the limit was so high that it basically applied to only one designer drug for a specific disability, the limitation could be a proxy for a limitation on a discrete group of disabilities.

4. **QUESTION**: What is the status of the EEOC's challenge to a $150 limit on hearing aids under the Hertz health plan? Does the EEOC intend to make the exclusion or limitation on coverage of hearing aids a significant enforcement initiative? Are there other common health plan exclusions perceived to raise ADA issues?

**ANSWER**: The EEOC staff said that the Hertz health plan challenge has been resolved but the EEOC cannot provide details. The EEOC staff said it maintains its views regarding coverage of hearing aids but has no current intention to make exclusions or limitations on coverage of hearing aids a high priority. The EEOC staff also mentioned that the Federal government health plan has complaints against it for its exclusion of hearing aids.

The EEOC staff said infertility and AIDS remain common health plan exclusions which could raise ADA issues.

5. **QUESTION**: Will the EEOC continue to pursue two-year limits on long-term disability benefits for mental disabilities as a violation of ADA after recent cases rejecting this theory?

**ANSWER**: The EEOC staff said that it would continue to pursue the two-year limits on long-term disability benefits for mental disabilities as a violation of ADA.

6. **QUESTION**: Have there been any further developments regarding potential conflicts between the ADA and union contracts? As noted in the EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under The American With Disabilities Act, footnote 115, some courts have held that it is an undue hardship to provide a reasonable accommodation when doing so will violate the seniority provisions of a collective bargaining agreement.

**ANSWER**: The EEOC staff answered that it believes that union seniority provisions do not per se trump reasonable accommodation. The EEOC staff said the EEOC will not litigate such cases where courts have taken a clear contrary position. The EEOC staff mentioned *Barnett v. U.S. Air*, a Ninth Circuit case where a request for rehearing was
made and letter briefs on both sides were submitted. The EEOC staff said the Ninth Circuit could use the case as an opportunity to discuss the collective bargaining issue. The EEOC also referenced a DC Circuit case where the court said that collective bargaining agreements should be read broadly in favor of making accommodation.

7. **QUESTION**: Is the EEOC planning to update its Health Insurance Guidance?

**ANSWER**: No.

8. **QUESTION**: Please confirm that it is not a violation of the ADA to require an individual on a disability or any other leave to terminate employment (and consequently no longer be entitled to employee benefit coverage) in order to receive a location shutdown or other severance benefit.

**ANSWER**: The EEOC staff said it had not previously considered the question. The EEOC staff's initial reaction was that as long as requiring individuals to choose between terminating employment in order to receive a location shutdown benefit or continuing employment and receiving employee benefits was not a way to target the disabled, the EEOC staff did not think that there would be an ADA problem.

9. **QUESTION**: Do cash balance pension plans violate ADEA?

**ANSWER**: The EEOC staff said it was in its very preliminary stages of investigating cash balance pension plans. The EEOC staff noted that it was familiar with the Wall Street Journal articles and the concern about the conversion process to cash balance plans.

10. **QUESTION**: Suppose an employer is selling assets to a buyer, and offering severance to those employees who do not receive offers from buyer. The severance is conditioned on execution of a waiver under ADEA. Is this an "other employment termination program offered to a group or class of employees?" Must the demographic information of Section 7(f)(1)(H) be provided with respect to those who do and do not receive an offer from the buyer, even if the buyer is not a released party in the waiver (the waiver only relates to claims against the seller)? All employees could be viewed as eligible (they are all participants in the severance plan) because they are all terminating employment with the seller -- the receipt of an offer from the buyer could be a viewed as a subsequent disqualifying event, just like misconduct would be. What is the EEOC's view?

**ANSWER**: The EEOC staff said that this severance program was an "other employment termination program offered to a group or class of employees" and that the demographic information must be provided both with respect to those who do receive an offer from the buyer as well as those who do not receive an offer from the buyer. The EEOC staff said it does not matter whether the severance plan was in place before the deal. The EEOC staff also thought that if it was known which employees would be hired and which would not be hired, the information should be bifurcated accordingly into the two groups.
11. **QUESTION**: Are any changes anticipated with respect to the method of collecting data and reporting EEOC claims, particularly ADA claims?

**ANSWER**: The EEOC staff said that there were no anticipated changes with respect to the manner of collecting data but that the EEOC was looking at ways to give a better picture as to ADA claims in its reporting of ADA claims. The EEOC staff particularly mentioned the ABA study which said that employers won 86% of ADA cases but included in that number situations where the EEOC had made a no cause finding and cases which were administratively closed. The EEOC said that it could present data in such a way that the EEOC wins ADA cases 95% of the time.

12. **QUESTION**: The EEOC has updated its Web page www.eeoc.gov. Are any additional changes to the Web page anticipated? How often is it anticipated that the docket of active and resolved ADA litigation will be updated? We appreciate having EEOC guidance readily available to us under "Enforcement and Litigation."

**ANSWER**: The EEOC staff said it was interested in any comments with respect to ways to improve its Web page and said they were glad we appreciated its updating. The EEOC staff said that they anticipated the docket of active and resolved ADA litigation will be updated two times per year.

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

**ANSWER**: The EEOC staff said ADA cases were pending which may deal with whether one can make distinctions among disabilities, whether the ADA applies to insurance companies as providers of services under Title III, and the permissibility of two-year caps on disability benefits for mental disabilities.

The EEOC mentioned that regulations regarding the tender back of consideration in connection with waivers were issued, the comment period was open and the EEOC would welcome our comments.