

**Joint Committee on Employee Benefits Q&A  
with the Equal Employment Opportunity Commission  
based on meeting with staff  
May 10, 2001**

The following questions and answers are based on informal discussions between private sector representatives of the JCEB and EEOC staff members. The questions were submitted by ABA members, and the responses were given at a meeting of JCEB and government representatives. The responses reflect the unofficial, individual views of the government participants as of the time of the discussion, and do not necessarily represent agency policy. This report on the discussions was prepared by designated JCEB representatives, based on the notes of the JCEB representatives at the meeting, and reflects the views of the transcriber as to what was being said by the participants. It has not been reviewed by EEOC staff members. The questions were submitted in advance to the agency, and it was understood that this report would be made available to the public. The questions and answers may not be relied upon or cited as legal authority for the EEOC's official position on any matter.

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1. **QUESTION:** Is it permitted under Title VII and the Pregnancy Discrimination Act (PDA) for an employer plan to require some prescription drugs (including oral contraceptives) identified by name to be obtained from the mail order pharmacy? What if the drugs required to be obtained by mail order (including oral contraceptives) are chosen based on the amounts that the plan would save given the volume of expected use? What if mail order is required to be used for all prescriptions that are taken for more than one month?

**ANSWER:** As long as contraceptives are treated the same as other prescriptions, it is difficult to see any Title VII or PDA violation.

2. **QUESTION:** Is there any problem in covering oral contraceptives but not covering Viagra in an employer plan?

**ANSWER:** No. Viagra is not analogous to oral contraceptives from a Title VII perspective. Although there is no direct analogy between covering Viagra and covering oral contraceptives, as a policy matter the two are often perceived to be analogous. Thus, coverage of Viagra has encouraged some individuals to pursue the coverage of oral contraceptives.

3. **QUESTION:** Is it true that the Bush administration is moving to delete oral contraceptives from the federal health plans? If so, will this cause the EEOC to change its position on oral contraceptives? Other than its case filed in USDC, D. MN against UPS, is the EEOC suing other employers who exclude oral

contraceptives from health plans? Are there other charges pending involving this issue? Has the EEOC joined with Planned Parenthood or intervened in the Erickson v. Bartell Drug case filed against a pharmacy in the Seattle region?

**ANSWER:** With respect to oral contraceptives under federal health plans, the EEOC staff said that it was their understanding that the proposal was to remove the requirement for coverage of oral contraceptives. The EEOC position regarding when oral contraceptives must be covered in order to avoid a violation of Title VII continues to apply. To the EEOC staff's knowledge, the EEOC is not involved in cases other than the UPS case regarding oral contraceptives. The EEOC has not intervened in the Erickson v. Bartell Drug case.

4. **QUESTION:** What is the EEOC's reaction to the Saks v. Franklin Covey Co. infertility case? Will the EEOC pursue health plan infertility exclusions? Are there pending charges or other cases involving this issue?

**ANSWER:** The EEOC summarized the Saks v. Franklin Covey Co. infertility case, noting that the court did find the plaintiff had a disability and that disability status was a case by case determination. The EEOC emphasized that their investigations are on a case by case basis. To the EEOC staff's knowledge, the EEOC is not currently litigating infertility cases but there are a handful of charges regarding infertility exclusions.

5. **QUESTION:** Is the EEOC taking any action with respect to allegations of age discrimination in cash balance plans, either as a result of cash balance conversions or implicit in the design of the plans themselves? How is the agency handling individual complaints regarding cash balance plans under ADEA? Is there a national enforcement policy? Do any of the regions have a policy or an enforcement initiative regarding cash balance plans?

**ANSWER:** The EEOC staff said they are continuing to look at the cash balance issue. They said that all field offices have been instructed to refer cash balance issues to EEOC headquarters. The staff reported they have hired actuaries to assist them in evaluating the issue.

In response to a follow up question, the staff reported that Headquarters would be handling these individual charges. They estimated that the field offices have already referred approximately 1,000 individual charges to Headquarters and that those charges involved between 30 and 40 responsible parties. The staff reported their efforts on this issue are focused upon the processing of these individual charges. The staff also said the EEOC is coordinating with other agencies.

6. **QUESTION:** The EEOC has added the Third Circuit's ADEA interpretation regarding retiree health, as set forth in the Erie County case, to its enforcement manual. What steps is the EEOC taking to pursue this? What enforcement actions has it launched on its own initiative? Does the EEOC believe that it is discriminatory to offer Medicare-eligible retirees full health coverage through an HMO while offering indemnity-type coverage, with co-pays and deductibles, to early retirees? Does the EEOC believe an employer can come into compliance with Erie County by eliminating early retiree coverage? Has EEOC considered the impact of the Erie County position on future offers of early retiree coverage? What is the policy basis for the position?

**ANSWER:** The EEOC staff said the EEOC is asking its field offices to coordinate with Headquarters on Erie County case issues. The EEOC staff said the EEOC did not participate in the remand of the Erie County case and had not addressed the issue of whether indemnity and HMO plans could constitute equal benefits within the meaning of the ADEA. The EEOC staff also noted that retiree health benefit issues had been raised in ADEA charges filed against some school districts.

7. **QUESTION:** Is it ever possible, in the EEOC's view, for a "voluntary early retirement incentive program" to be consistent with the relevant purpose of ADEA if it does not also satisfy the "equal cost or equal benefits" standard? All of the examples in the manual would also satisfy the equal cost or equal benefits standard. If that is required, what is the purpose of the alternative "VERIP" provision in the statute?

**ANSWER:** The EEOC staff said it is difficult to imagine a voluntary early retirement incentive program which would be consistent with the relevant purpose of ADEA which would not satisfy the "equal cost or equal benefits" standard.

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

**ANSWER:** No.

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