

## **AMERICAN BAR ASSOCIATION**

### **Technical Session Between the Equal Employment Opportunities Commission Staff and the Joint Committee on Employee Benefits**

#### **Questions and Answers**

**May 8, 2003**

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 representatives as of the time of the discussion, and do not necessarily represent the position of the agency. This report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting. The questions were submitted in advance to the agency, and it was understood that this report would be made available to the public.

**Questions for the Equal Employment Opportunities Commission**  
**For JCEB Technical Session on May 8, 2003**

**Question 1:** 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 limited by the employer?

**Proposed Answer:** Contraceptives must be treated the same as other prescriptions. To limit their use would violate Title VII and PDA.

**EEOC Answer:** The EEOC staff responded that it would depend on the facts at issue. It is not per se unlawful for the employer to limit certain benefits under the PDA and Title VII. The Act does not require an employer to offer a specific category of benefits. The employer may limit drugs for a non-discriminatory reasons, such as cost.

**Question 2:** Is there any problem in covering oral contraceptives but not covering Viagra in an employer plan? Has the EEOC position, included in the answer below from 2001, changed?

**Proposed 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.

**EEOC Answer:** The EEOC staff agreed with the proposed answer that Viagra is not directly analogous to oral contraceptives but that people have made that connection in their own minds. The Commission's December 2000 decision mentions Viagra in a footnote because that case involved an employer saying that only prescription drugs for "abnormal" conditions were covered, which the EEOC found to be untrue as indicated by the fact that the employer's plan also covered Viagra. However, that was the only connection between the two. The decision was at the charging stage, so the names of the employers are not public.

**Question 3:** What is the EEOC's position where an employer takes an employment action against an employee who is unable to continue her job during her pregnancy? In *Murray v. Wackenhut Corp.*, an employee was denied light duty status, even though she showed light duty was given to security fire watch positions. Similarly, in *Cunningham v. Dearborn Bd. Of Education*, the employer required an employee take FMLA leave when her pregnancy-related physical restrictions prohibited her from doing her job even though they provided light duty to employees with on-the-job injuries.

**Proposed Answer:** There is a conflict on the issue under the PDA in the federal courts.

**EEOC Answer:** The EEOC agreed that there is a conflict in the Circuits. The Commission continues to take the position that treating people disabled by pregnancy differently from people disabled by other means, can make out a prima facie case of discrimination. These individuals may be able to do light duty, which leads to issues asserted in *EEOC v. Horizon/CMS Healthcare Corp.*, where the EEOC alleged that pregnant workers were not permitted to work light duty

though the employer did allow other people with off the job injuries to do light duty. The EEOC has not taken a position in litigation as to whether there would be a violation if it was the employer's policy to exclude all people with off the job injuries from light duty.

**Question 4:** What is the EEOC's current position on coverage for prescription contraceptives in a health plan that covers other prescriptions for preventative treatments? Does the EEOC take the position that it also violates the PDA? Are there other issues that the EEOC is currently examining that may be treated similar prescription contraceptives?

**Proposed Answer:** The practice violates Title VII and the PDA as established in *EEOC v. United Parcel Service*, *Saks v. Franklin Covey Co.*, and *Erickson v. Bartell Drug Co.* The EEOC argued at hearing in *United Parcel Service* that the exclusion violated the PDA although the complaint did not raise a PDA issue.

**EEOC Answer:** The EEOC noted that in *EEOC v. UPS* they argued that exclusion of coverage for prescription contraceptives in a health plan that covers other prescriptions for preventative treatments violates Title VII. The plan in the case failed to cover prescription contraceptives for treatment of female hormonal disorders, but did not exclude prescription drug coverage for male hormonal disorders. The complaint stated a claim for disparate treatment related to sex. The UPS case did not address whether the terms of the employer's plan also violated the PDA.

In the EEOC commissioner's decision of December 2000, posted on the EEOC website, there was a challenge that the health benefit plans violated both Title VII and the PDA, and the decision found reasonable cause to believe there were violations of Title VII and the PDA. To date, there has been no litigation on the issue reached in that decision.

**Question 5:** Is it permissible for an employer to charge older workers higher health care premiums than younger workers?

**Proposed Answer:** Generally, it is permissible for older workers to pay more for their coverage than younger workers with some restrictions. The amount of the employer contribution for the older worker should be the same or more than the amount of the employer contribution for the younger worker.

**EEOC Answer:** The EEOC said that the employer is not permitted to charge a higher premium in a mandatory plan, i.e., if a condition of employment requires that the employee enroll in the plan. That, according to the EEOC, would be considered discriminatory. Where the premium has increased for an older employee, the employer must offer the employee the options of withdrawing from the benefit plan altogether or reducing his/her benefit coverage in order to keep his/her premium cost the same.

The staff then commented on scenarios in which an employer maintains a voluntary plan. An older employee who chooses to participate in a voluntary plan can have his or her benefit levels reduced, but only to the extent necessary to achieve approximate equivalency in cost for older and younger workers. They may be offered the option of paying \* or paying more -- for the benefit in lieu of sustaining otherwise justified reductions in coverage.

Where the employee does choose to pay more, s/he can be charged no more than the amount necessary to maintain full coverage. Moreover, age-weighted premiums must comply with the regulations requiring equal costs or equal benefits. The equal cost test must be measured in brackets of no more than five years, as explained in the EEOC equal cost regulation at 29 C.F.R. § 1625.10. Thus, for example the costs of benefits for persons age 45-49 must be compared to cost of benefits for persons age 50-54.

Second, if the plan requires the employer and employee to share the costs of the plan, the regulations and EEOC's Compliance Manual state that older employees cannot be required to pay a greater percentage of the premiums than are paid by younger employees.

**Question 6:** What is the EEOC's position on limits on mental/nervous conditions?

**EEOC Answer:** The staff first responded that they would rephrase the question to clarify the question they understood was being posed. That is, is it allowable under the ADA for an employer to limit coverage for mental/nervous conditions in health insurance plans? The answer is that whether a limitation on particular benefits establishes a disability-based distinction that violates the ADA depends on whether a specific disability is singled out, such as cancer, or kidney disease, or whether the limit applies to disability more generally. It is not necessarily a disability-based-distinction if the employer limits benefits for mental conditions as compared to those for physical conditions, because not all mental conditions are disabilities. Thus, any limit under a plan will apply to individuals with and without disabilities.

So long as the provision is a facially neutral limitation, the Commission has said that the provision can be valid, even though it may disproportionately impact individuals with disabilities.

**Question 7:** What is the EEOC's position on exclusions in plan language for morbid obesity, bariatric surgery, organ transplants and bone marrow transplants, cochlear implants or any treatment to do with loss of hearing?

**Proposed Answer:** Organ transplants and other topics mentioned may originally have been excluded from plans as experimental, however they are now subject to the ADA analysis whether the limitation is a disability-based distinction.

**EEOC Answer:** The EEOC did not specifically respond to each of the conditions or treatments mentioned in the question, but said that in general it is first necessary to determine whether there is a disability-based distinction. For example, in the case of an exclusion for bariatric surgery, it would be necessary to know who is eligible for such surgery; i.e., is this surgery solely or primarily for people with a disability or is the surgery also intended to aid people who are simply overweight. If it is the latter, then an exclusion for bariatric surgery would exclude both people and with and without a disability and therefore would not be considered a disability-based distinction.

If there is a disability-based distinction the next inquiry is whether it can be justified by legitimate business and/or insurance needs. Among the possible justifications identified by the EEOC was experimental treatments (i.e., treatments that are in the experimental stage and have not been shown to have medical value in treating a specific condition).

In a follow-up question regarding specific plan languages, the EEOC surmised that limits for "eating related disorders" should be considered a broad exclusion, not a disability-based distinction, if it is shown that it covers a multitude of dissimilar conditions and affects individuals both with and without disabilities.

The staff also said an exclusion for cochlear implants probably is a disability-based distinction, based on their understanding that only persons whose hearing is substantially impaired receive this treatment. Also, this exclusion is to be contrasted with a more general exclusion for any treatment for loss of hearing because not all persons who have a loss of hearing have a disability.

**Question 8:** Is the exclusion of coverage for disability or health problems from alcohol or drugs a disability-based distinction?

**Proposed Answer:** Yes, it is a disability-based distinction. In the case of addiction, there is a question as to whether addiction in and of itself is a disability or whether an addict has to demonstrate an impairment of a major life function.

Illegal drug use is not protected at all by the ADA. Rehabilitation programs may be a reasonable accommodation under the ADA.

**EEOC Answer:** Same general answer as in Question 7. The focus should be on the terms of the plan, whether those terms constitute a disability-based distinction, and if so, whether that distinction can be justified.

With respect to the last sentence of the proposed answer, the staff pointed out that the ADA does not provide protection to persons currently engaging in the illegal use of drugs, and therefore the law does not require that any form of reasonable accommodation be extended to such individuals. Also, providing drug or alcohol rehabilitation is not considered a form of reasonable accommodation (although time off to receive such treatment may be a form of reasonable accommodation). The ADA, however, does not prohibit employers from providing voluntary assistance programs for employees, including those with substance abuse problems.

**Question 9:** What has the EEOC done to coordinate between field offices and headquarters on Erie County case issues?

**EEOC Answer:** In 2001, started coordination between headquarters and field offices; specifically there is coordination between the Office of Field Programs and the Office of Legal Counsel regarding how to process charges.

**Question 10:** Does EEOC intend to provide further guidance on their position with respect to retiree medical? If so, when can we anticipate seeing the guidance?

**EEOC Answer:** A Notice of Proposed Rulemaking was published in the Federal Register on July 14, 2003 (68 FR 41542). The proposal is aimed at preserving employer-sponsored retiree health

benefits for older Americans. EEOC's proposal would permit employer-sponsored retiree health benefit plans to lawfully coordinate benefits with eligibility for Medicare or a comparable State-sponsored health benefit plan under the Age Discrimination in Employment Act (ADEA). The proposal would allow employers to continue to provide retirees with health benefits that bridge the gap between retirement and Medicare eligibility or that supplement a retiree's Medicare coverage. There will be 60-day comment period closing September 12, 2003.

**Question 11:** The recent IRS guidance on account based defined benefit plans discusses cash balance plans in detail but does not address pension equity plans. Does EEOC have a position on pension equity plans and is it fully in accord with IRS' position on cash balance plans?

**EEOC Answer:** The EEOC staff commented that the Commission has no formal opinion on pension equity plans. They do understand that the agencies need to establish a consistent policy and will coordinate with IRS on this issue to the extent necessary.

**Question 12:** Is the EEOC currently litigating or challenging any releases related to terminations under severance plans based on its Older Workers Benefit Protection Act guidance?

**EEOC Answer:** The EEOC is litigating regarding releases under the OWBPA. Representative cases are: *EEOC v. Sundance Rehabilitation Corp.*, No. 1:01-CV-1867 (ND District Ohio) (no published decisions to date), *Massachusetts v. Bull HN Information Systems Inc.*, 143 F. Supp. 2nd 134 (N.D. Mass. 2001) (denying in part defendant's motion for summary judgment), and *EEOC v. UBS Brinson, Inc.*, 2003 WL 133235 (S.D.N.Y. 2003) (failure to comply with OWBPA did not state a cause of action under ADEA).

In addition, the EEOC is litigating *EEOC v. Allstate Insurance Co.*, No. 01-CV-7042 (E.D. PA.) (no published decisions to date), challenging the validity of waivers where the employer terminated the employment of insurance salesmen and required that they sign releases of all violations of any EEO laws as a condition of becoming independent contractor agents.

**Question 13:** Are there any issues or cases currently being followed by the EEOC that would be of interest to representatives of JCEB?

**EEOC Answer:** The EEOC staff declined to respond to this question.