

**JCEB Equal Employment Opportunity Commission Questions
May 6, 2004**

EEOC JCEB Questions and Answers May 6, 2004

Recently, the number of bariatric surgeries for weight loss has sharply increased and some hospitals and physicians are actively marketing the procedure. In light of the high incidence of complications, sometimes including death, some plans have limited or completely excluded bariatric procedures from coverage. Can a Plan limit bariatric surgery without violating ADA?

Proposed Answer: Provided that the limitation is not a disability based distinction and applies generally to all weight loss situations it is permissible under ADA. A broad based exclusion based that does not apply solely to individuals with a disability (e.g. morbid obesity) is valid.

EEOC Answer: The EEOC stated the answer was not necessarily clear cut although they did say it would be problematic if the provision excluding coverage for the procedure constituted a disability based distinction, meaning essentially that all or substantially all of the individuals affected were disabled. If a health insurance plan provision denies coverage specifically for bariatric surgery, two questions are relevant in determining whether the exclusion is a disability-based distinction. One is whether the procedure is performed only on individuals with morbid obesity (which EEOC and courts have said is an "impairment" under the ADA) or on people who are morbidly obese and on others who are simply overweight. If the procedure is performed only on individuals with morbid obesity, the second question is whether all or substantially all individuals with morbid obesity are substantially limited in a major life activity.

Has the EEOC's recently approved exemption for Erie County received any feedback from OMB with regards to clearing for finalization? Will the exemption be incorporated into EEOC's Enforcement Manual?

Proposed Answer: None.

EEOC Answer: At this time, EEOC staff could not discuss the Erie County regulation to any great extent because it is not yet effective and any communications about it would be considered to be ex parte. They did say that the regulation was in the process of being circulated to several agencies for comment. If there are no comments, it will be sent to OMB, which will have 90 days to act on it. It could be held up if there are comments requiring changes since the Commission would have to again vote on the changes. Since this is a regulation, it will appear in C.F.R. rather than the Enforcement Manual

With respect to the *Erie County* exemption, what if there is a change in a retiree medical plan (e.g. a dollar based plan where a certain number of dollars apply before and separate amount after age 65)? Does there have to be a relationship between the amounts and Medicare?

Proposed Answer: None.

It was clarified that this question was based on a "defined contribution" type medical plan. Since this issue dealt with the Erie County regulation, the staff did not feel they could respond at this time.

The regulation does not define Group Health Plan? If a Plan loses its tax favored status, does it remain a Group Health Plan for purposes of the exemption?

Proposed Answer: None.

EEOC staff was uncertain of the intent of the question and how characterization of the plan as a "Group Health Plan" would relate to the rule. Again, however, staff did not feel they could discuss the rule at this time.

In an outsourcing situation where an employee has been terminated and is then employed by a sourcing vendor can the sourcing vendor condition employment upon obtaining a valid ADEA release/waiver from the employee that applies to the original employer?

Proposed Answer: None.

The staff said that the Commission has not addressed the specific issue but noted that such a situation might raise issues as to whether the waiver is knowing and voluntary and whether conditioning employment on agreeing to sign such a waiver is retaliatory. They stressed this was their observation and not an EEOC position.

Has EEOC made any progress on resolving discrimination charges regarding the cash balance plan conversions and is any further guidance contemplated for 2004?

Proposed Answer: None.

They viewed questions 6 and 7 as being interrelated and noted that there was ongoing contact with other agencies but nothing further has taken place.

Have either formal or informal interagency discussions with the DOL and IRS regarding hybrid plans continued?

Proposed Answer: None.

See answer to Question 6.

Given the recent tide of outsourcing, has the agency noticed any change in charges relating to waivers/releases?

Proposed Answer: None.

Staff members noted that EEOC does not maintain separate statistics on outsourcing but had not heard anything in any event. They did note that there had been an uptick in age charges since 2000 and that this was typical during economic downturns.

Is the EEOC considering taking any position on benefits for same sex couples in light of the recent recognition of such marriages by some states?

Proposed Answer: None.

Staff members pointed out that Title VII is currently interpreted not to cover this area and that no action was contemplated.

Now that the Supreme Court has issued its decision in the General Dynamics Land Systems, Inc. v. Cline that ADEA does not prohibit employers from favoring older workers over younger workers, will the EEOC revisit rulemaking on this issue?

Since the Cline ruling directly conflicts with the existing regulation, EEOC will likely move toward eliminating it. They are still in the very early stages.

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