

**Questions for the EEOC Staff for the
2006 Joint Committee of Employee Benefits Technical Session
May 4, 2006 at 2:00 P.M.**

Question 1: Wellness programs:

If a wellness program complies with the proposed DOL HIPAA portability rules on bona fide wellness program, will the EEOC treat that program as complying with the ADA?

EEOC: The Commission has not taken a position on this issue. In an informal discussion of the issue, EEOC legal staff said they did not believe that complying with the DOL HIPAA portability rules on bona fide wellness programs would necessarily ensure compliance with ADA. They noted that the proposed DOL HIPAA portability rules for establishing a “bona fide wellness program” differ from the criteria the Commission would use in determining whether a wellness program is permissible for ADA purposes. HIPAA and ADA require separate and independent analyses. The EEOC staff cited Title I of the ADA Technical Assistance Manual, at VI-15, which sets forth the ADA criteria for voluntary wellness programs.

Question 2: Wellness Programs

Many employers have initiated wellness and disease management programs as a means to hold down the rising cost of group health insurance. Some employers are frustrated at employees who fail or refuse to cooperate with the health care plan’s disease management professionals. For example, the plan may refer a diabetic to a disease manager, who offers to assist the individual in understanding the need to control diet, check blood sugar and take insulin as needed, have hemoglobin checked annually, have regular eye examinations, etc. The disease management protocol typically is based on generally accepted standards of treatment. The plan’s hope and expectation is that the individual will agree to work with the disease manager and do the things recommended by the disease manager as a means to control the effects of the disease.

Some employers desire to install punitive-type triggers in the health care plan, under which uncooperative participants and beneficiaries may pay a higher health care premium, or higher deductible. Some of the participants and beneficiaries who are referred to disease management are disabled within the meaning of the ADA. Others are not. In no case does the individual’s condition prevent him or her from cooperating with the disease management professionals. Under the facts presented, does the application of such punitive triggers violate the ADA?

EEOC: The Commission has not taken a position on this issue. In an informal discussion, EEOC legal staff noted that *if* the program requires employees to answer disability-related inquiries or submit to medical examinations, participa-

tion in the program must be voluntary. According to the EEOC's *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees*, at question 22, a wellness program is "voluntary" (thus disability-related questions and medical examinations are permitted) if the employer neither requires participation nor penalizes employees for non-participation in the program. What the question characterizes as "punitive triggers" would seem to amount to penalties for non-participation within the meaning of the EEOC guidance, thus rendering participation in the program involuntary. The fact that the program may affect employees with and without disabilities would not alter this analysis, since the ADA's rules on disability-related inquiries and medical examinations apply to all applicants and employees, not just individuals with disabilities.

Question 3: Health Risk Assessment Related To Health Care Plans

Many employers desire to require their employees to submit to a health risk assessment (HRA) as a condition of enrolling in the employer's health care plan. The HRA is typically a screening that seeks to identify certain risk factors such as obesity, tobacco addiction, high blood pressure, heart disease/high cholesterol, etc., that contribute to the plan's high claim costs. The plan's disease management or wellness vendor may use the information obtained in the course of the HRA to fashion a proposed treatment plan that will be offered to the employee (for example, the wellness vendor might notify the employee that he or she has high blood pressure, and refer the employee to a health care provider for further evaluation and, in many cases, medication to control the high blood pressure). Does the practice of requiring an employee to participate in the HRA as a condition of enrollment in the health care plan violate the ADA?

EEOC: The Commission has not taken a position on this issue. In an informal discussion, the EEOC legal staff observed that conditioning the availability of employer-provided health insurance on an employee's participation in a health risk assessment might well render participation in the assessment involuntary, making unlawful any disability-related inquiries or medical examinations that are part of the assessment.

Question 4: HSA contributions:

Assume an employer sponsors a high deductible health plan and makes a contribution to an HSA for every HSA-eligible employee enrolled in the high deductible health plan. However, the employer cannot and does not make HSA contributions for employees who are enrolled in Medicare and the employer does not provide other benefits to make up for those employees' ineligibility for HSAs. Does the fact that Medicare-eligible employees are getting a benefits package that is less valuable than other employees violate ADEA?

EEOC: The Commission has not taken a position on this issue. The legal staff intends to study the issue.

Question 5: Smith v. City of Jackson

In light of the Supreme Court's decision in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), has the EEOC pursued any benefit related disparate impact cases under the Age Discrimination in Employment Act ("ADEA")? Has the EEOC developed a view as on what constitutes a reasonable factor other than age?

EEOC: The EEOC legal staff said that the EEOC filed an amicus brief in one non-benefits related case, *Meacham v. Knolls Atomic Power Laboratory*, 185 F. Supp. 2d 193 (N.D.N.Y. 2002), *aff'd*, 381 F.3d 56 (2d Cir. 2004), *cert. granted, judgment vacated and remanded*, 544 U.S. 957 (2005).

Question 6: Erie County

What is the status of Erie County from the EEOC's perspective?

EEOC: The EEOC legal staff said the AARP case had been briefed and they were waiting for oral argument to be scheduled. *AARP v. EEOC*, 390 F. Supp. 2d at 462-63, *appeal filed*, No. 05-4594 (3d Cir. Dec. 19, 2005).