

**Questions for the EEOC Staff for the  
2007 Joint Committee of Employee Benefits Technical Session  
May 10, 2007**

**Note:** This year with the exception of Question 8 none of the questions submitted included proposed answers.

**Question 1: Wellness Programs:**

Does the EEOC have a problem with a severance plan, covered by ERISA requiring that as a condition of receiving a severance payment, the employee must sign a release? What if the release includes all typical employment claims? According to published reports, the EEOC has challenged this practice in two cases: EEOC v. Lockheed Martin Corp. (8/8/2006 D. Maryland) and EEOC v. Ventura Foods, LLC.

**ANSWER:** *While stating that individual can be required waive their rights to severance under a release, the staff took the position that for public policy purposes they will defend the right of individuals to file charges as they did in the cases cited in the question. They noted that Section 7(f)4 of ADEA provides that, "No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."*

**Question 2: Transgender Status**

Recently, the Wall Street Journal reported that an administrator at Spring Arbor University, a college affiliated with a religious denomination, had filed a charge with the EEOC based on transgender status. Does the EEOC see this type of issue impacting benefit plans? For example, provisions excluding medical treatment for gender change surgery?

**ANSWER:** *They viewed it unlikely that this type of issue would impact benefit plans. They noted that in Mario v. P&C Food Markets Inc., 313 F.3d 758, 2002 WL 31845877 (2d Cir. 2992) that the Second Court of Appeals found that a sex change operation was medically unnecessary in upholding the Plan's rejection of a claim for benefits by an employee seeking to have a health plan cover a sex change operation.*

**Question 3: Disparate Impact**

Has the EEOC yet taken a position with respect to Smith v. City of Jackson, 125 S. Ct. 1536 (2005) and has the EEOC pursued any benefit related disparate impact cases under the Age Discrimination in Employment Act ("ADEA")?

**ANSWER:** *The EEOC Staff said they were in the process of writing regulations to conform to the holding in the Smith case.*

**Question 4: Wellness programs:**

Now that final rules were issued on December 13, 2006 by DOL, HHS and IRS regarding bona fide wellness programs, will the EEOC treat programs meeting those rules as also complying with the ADA's provisions on Wellness Plans? If not, will the EEOC be issuing additional guidance on the subject?

**ANSWER:** *While the EEOC has not taken a position on the subject they have been seriously studying it and are gathering information. The EEOC staff indicated that there were concerns about when penalties become large enough to make the Wellness program for all practical purposes involuntary. Section 102(d)(4)(B) of the Americans with Disabilities Act requires that employee wellness programs, one of the limited exceptions to the ADA's restrictions on medical examinations and inquiries, be voluntary.*

**Question 5: Whither Erie County?**

We're almost afraid to ask again, but at what point is the EEOC in finally resolving the post-Erie County exemption for retiree health benefits? What is the current status of AARP v. EEOC?

**ANSWER:** *Since the meeting the Third Circuit Court of Appeals issued its ruling in American Association of Retired Persons v. Equal Employment Opportunity Commission on June 4, 2007. The Court ruled in favor of EEOC's ability to issue regulations which modify the Erie County ruling. The decision can be found at: <http://caselaw.lp.findlaw.com/data2/circs/3rd/054594p.pdf>.*

**Question 6: Genetic Testing and Discrimination**

A report released by the Congressional Research Service on March 7, 2007 entitled, "Genetic Discrimination: Overview of the Issue and Proposed Legislation" referenced the Americans with Disabilities Act as perhaps providing some protections against employers' use of genetic information. What is the EEOC's current stance toward the use of genetic information by employers and has there been any enforcement activity with respect to employer use of genetic testing data?

**ANSWER:** *The EEOC Staff said they were adhering to the position that they took in the 1995 ADA Compliance Manual which essentially treats an employer who takes an adverse employment action against someone as a result of a genetic test that reveals the increased susceptibility to acquiring a condition in the future as "regarding" an individual as disabled. They also noted that genetic testing would appear to be a disability related inquiry and not within one of the*

*limited exceptions to the ADA's restrictions on medical examinations and inquiries.*

### **Question 7: 8<sup>th</sup> Circuit Court of Appeals Ruling on Contraceptives**

In light of the 8<sup>th</sup> Circuit Court of Appeals decision in the *In re: Union Pacific Railroad Employment Practices* case does the EEOC plan to revisit the issue of contraceptives under the Pregnancy Discrimination Act ("PDA")? Is this particular case distinguishable based on Union Pacific Railroads exclusion of contraceptive methods for both females and males?

**Answer:** *The EEOC Staff said they do not expect the Commission to revisit the issue. They also said they were not surprised with the 8<sup>th</sup> Circuit's decision due to a precedent set in an earlier case in that circuit (*Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8<sup>th</sup> Cir. 1996)).*

### **Question 8: Early Retirement Income Plan**

"A private sector employer desires to design a voluntary early retirement incentive plan for eligible employees who have attained age 62 but have not yet attained age 65. If such employees elect to participate in such plan during the open window period they would be imputed with additional years of credited service under the employer sponsored defined benefit pension plan such that they would receive a benefit under the pension plan as if they retired at age 65 (the plan's normal retirement age). Specifically, a 62 year old eligible employee would be imputed with 3 years of additional credited service. By contrast, a 64 year old eligible employee would be imputed with 1 year of credited service. Does such early retirement incentive plan violate the Age Discrimination in Employment Act of 1967, as amended ("ADEA")?

The U.S. Court of Appeals for the Sixth Circuit recently decided a case pertaining to imputed years of service for purposes of a disability retirement benefits plan. See *Equal Employment Opportunity Commission v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) (*en banc*). The number of years of imputed service was the number of years remaining until the employee would have reached either normal retirement age or 20 years of service. In essence, the court held that such plan was a *prima facie* violation of ADEA. As the case did not involve an early retirement incentive plan, the court did not discuss whether the affirmative defense/safe harbor of section 4(f)(2)(B) of ADEA [29 U.S. C. section 623(f)(2)(B)] could apply and save an imputation of service design from violating ADEA.

**Proposed Answer:** Applying the analysis and logic of the Sixth Circuit in *Jefferson County Sheriff's Department* as well as other applicable case law, the above described imputation of service could constitute a *prima facie* violation of

ADEA. However, because the plan is an early retirement incentive plan, and assuming participation in such plan is voluntary, the affirmative defense/safe harbor of section 4(f)(2)(B)(ii) of ADEA applies and saves the plan from an ADEA violation. Congress added such section to ADEA as part of the Older Workers' Benefit Protection Act of 1990. The legislative history accompanying such amendment indicates that Congress approved of early retirement incentives that impute years of service and viewed such plans as legal. Citing such legislative history, the EEOC in its Compliance Manual states that an early retirement incentive plan which imputes years of service (such as adding 5 years of service) is consistent with the relevant purpose or purposes of ADEA. Hence the concept of imputing years of service has been permitted by Congress and the EEOC.

In the situation at hand, although the number of imputed years of credited service decreases for older eligible employees, the ultimate benefit the 62 year old and 64 year old receive are the same: accrued benefits under the defined benefit pension plan as if they retired at age 65 (normal retirement age). In other words, although the awarding of the number of years of imputed service varies based on an eligible employee's age, the ultimate benefit (deemed attainment of normal retirement age) is the same regardless of whether an eligible employee is age 62 or age 64.

In its Compliance Manual, the EEOC has stated that employers may pay higher early retirement incentive benefits to younger employees where the benefits are used to bring those who retire early up to the level of an unreduced pension -- that is, to the amount that those employees would have received at normal retirement age. The Compliance Manual provides an acceptable example of a plan which pays the difference between the annual pension benefits employees between the ages of 55 and 65 would have received for early retirement under the pension plan and the benefit they would have received at normal retirement age. The Compliance Manual states that although the plan provides a greater benefit for younger employees than for older employees (indeed employees over age 65 gain nothing from the plan) all similarly situated employees who are age 55 and older will receive the same annual pension benefit.

The proposed imputed years of service design is conceptually the same as the above described EEOC approved design - it simply bequeaths years of service instead of explicit dollar amounts.

In sum, because (1) Congress and the EEOC have approved of imputing years of service to employees and (2) the EEOC has approved of awarding higher benefits to younger employees so such employees receive a benefit equal to that at normal retirement age, imputing more years of service to younger employees so that such employees receive a benefit equal to that at normal retirement

age satisfies the affirmative defense/safe harbor applicable to early retirement incentive plans under section 4(f)(2)(B)(ii) of ADEA. "

**Answer:** *The EEOC Staff did not accept the idea of an 4(f)(2)(B)(ii) exception for an early retirement window as described in the question. They indicated that older employees should get the same number of years of imputed services as younger employees even if the additional service was of little practical use due to the fact that some of the employees had reached the maximum number of years of service recognized under the Plan.*