

**Questions for the EEOC Staff for the  
2008 Joint Committee of Employee Benefits Technical Session  
May 8, 2008**

**Question 1: Health Plan Inquiries by Applicants**

Assume an applicant with a disability inquires about the availability through the employer's health plan of an off-label drug for the treatment of a condition that they self-disclose during the interview process. The prospective employer's health plan only covers the drug on an "off-label" basis under very specific and limited circumstances. Is the prospective employer required under ADA, as a reasonable accommodation, to pursue the issue on the applicant's behalf with the third party administrator and the plan. If so, is the employer obligated to provide a definitive answer regarding coverage to the applicant on what possibility could be inadequate or inaccurate information provided by the applicant?

**ANSWER:** *The EEOC staff said that there would be no obligation to pursue the issue with the third party administrator provided that conforms to the normal practice of the employer with respect to other applicants and employees. However, they also noted that the employer would have to answer questions regarding what was covered under the Plan if asked.*

**Question 2: Health Risk Assessment**

It appears that the number of employers utilizing Health Risk Assessments ("HRAs") as part of their Wellness Plans continues to grow. Frequently, incentives are used to encourage the completion of Health Risk Assessments by participants and in some cases the HRA has been made mandatory. Can HRAs meet the voluntariness requirement described in 42 U.S.C. 12112(d)(4)(B) for voluntary employee health programs if they utilize incentives or if they are required for plan participation? Does it matter if the Wellness Plan is completely separate from the Health Plan?

Do HRAs fit under the insurance exception found in 42 USC 12201(c) which provides:

- (c) *Insurance.* Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict -
  - (1) *an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or*

- (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
- (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

*Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.*

(see also: Barnes v. The Benham Group, Inc., 22 F.Supp 2d 1013 (Minn. 1998))

**ANSWER:** *The EEOC Legal Staff noted that they did not currently have a specific policy position on the appropriate level of inducements, but did express some concern about requiring an HRA as a condition for receiving health insurance. They also said that the Barnes case could be distinguished since that case involved an HRA for the specific purpose of calculating a group insurance rate, as permitted under a state statute. They said that there have not been any charges or lawsuits to date on the issue of mandatory HRAs.*

### **Question 3: Hearing Aids**

Can Health Plans exclude from coverage hearing aids? At one point EEOC guidance stated that Plan could not exclude such hearing aids but some hearing impaired individuals may have a marginal need for a hearing aid. Such exclusions continue to be extremely common. Has there been a change or evolution in the EEOC's position?

**ANSWER:** *The EEOC Staff said they have not provided any formal guidance on this issue. They said that Plan provisions that broadly exclude all hearing related services would probably apply to a multitude of dissimilar conditions and affect individuals both with and without disabilities. The EEOC Interim Enforcement Guidance on Employer-Provided Health Insurance and the ADA says that a similarly broad limitation for "eye care" would not violate the ADA.*

### **Question 4: Older Workers Benefit Protection Act and Involuntary Termination Programs:**

29 C.F.R. 1625.22(f)(4)(vi) requires that if an involuntary termination program takes place "in successive increments over a period of time" the disclosure must be updated to include persons terminated to date. This leads to a number of questions:

1. Does this rule apply to any program that results in layoffs over a period of time, or only if there are "waves" of layoffs? For example, if a layoff program is spread over a 6-week period, is any updating required? I would think not. But if there is a permanent severance program, and there

is a layoff in January and then another in June, the information would have to be updated. Is there any rule of thumb that tells you whether updating is required?

**ANSWER:** *They indicated that there is no absolute rule of thumb regarding updating. Rather, the issue is decided based upon the facts and circumstances of each case. A layoff over a six week period almost certainly would not require updating, whereas a five-month long reduction in force might indeed need periodic updating. They viewed the test as whether or not the information provided remained current and whether the subsequent layoff is part of the same program as the first layoff. The Legal Staff said the best practice was to give employees information on all of the layoffs during the relevant time period, to avoid defining the decisional unit too narrowly.*

2. When the information is updated, is the only requirement to include the information with respect to those persons already terminated? Do you have to update the ages of the people previously identified to reflect their now-current ages? And presumably the ages of people terminated are their ages at the time of termination, not their ages at the time the information is provided?

**ANSWER:** *In the case of a second wave of terminations the information, including the data on age and department, would have to be updated and provided to the new group. However, generally it is not necessary to update the data as people leave during the program.*

3. Because the regulation refers to "involuntary" programs, is it correct that no updating is required for a voluntary window program, so that you do not have to disclose the ages of those who volunteered to be severed as the window continues?

**ANSWER:** *The EEOC Staff viewed this as a more difficult question. In cases involving a short 90-day window to elect an incentive and separate it would generally not be necessary to update the data as individuals accept the offer and retire. They were concerned about certain situations involving a permanent early retirement program. In a case in which there was some question about the voluntariness of the program, updating might be appropriate.*

#### **Question 5: Older Workers Benefit Protection Act and Involuntary Termination Programs:**

Assume that an employer needs to reduce headcount by 1000 employees. It first offers employees early retirement or voluntary separation incentives. Does the employer have to give the employees 45 days to consider whether they should retire or resign and the OWBPA job title/age information report and seven days right to revoke their decision to retire or resign or does the 45 day/7day rule apply only to the time given for the individual to consider sign the release itself? And,

what if 800 employees volunteer to accept the incentive offer but the employer only needs to select 500. Does the employer have to wait until the 45 consideration/7 day revocation time periods are up and then decide who to accept for separation and who not to accept?

**ANSWER:** *The EEOC Staff took the position that in a voluntary separation incentive situation individuals must be given the full 45-day consideration period prior to making the decision to separate and sign the release. It is not sufficient to give a shorter period to decide to retire and 45-days to decide whether or not to sign the release. When an employer says they will only accept a limited number of those made a separation offer, an employer that permits only the first 500 to elect the benefit to take early retirement could, in effect, be pressuring employees to shorten the 45-day consideration period. The 45-day rule does not apply to involuntary terminations.*

**Question 6: EEOC Current Activity Relating to Releases Requiring Dismissal/Waiver of Right to File Charge:**

Has the EEOC pursued additional actions against employer utilizing releases that require a charging party to dismiss their EEOC charge or waive their right to file one as a condition of receiving severance benefits subsequent to Lockheed Martin, Sundance Rehabilitation and Ventura Foods? Are there a significant number of charges pending regarding this issue?

**ANSWER:** *The EEOC staff said that **although the agency** did not specifically track the number of charges, they are aware of at least three lawsuits dealing with the issue. They said their position has not changed regarding the application of the Older Workers **Benefit** Protection Act to releases.*

**Question 7: Report of Increased Fiscal Year 2007 Enforcement:**

It appears that according to the Fiscal Year 2007 enforcement and litigation report that discrimination charge filings ran at their highest level since 2002 and disability charges were at the highest level since 1998. Does the EEOC track benefit related charges? If so, are the numbers of those charges also up?

**Answer:** *Benefit charges are up according to the EEOC Staff. Retirement/Pension charges were up from 168 in 2006 to 432 in 2007. Insurance benefit related charges rose from 318 in 2006 to 493 in 2007. Early retirement charges wend from 13 in 2006 to 24 in 2007.*