

**Questions for the EEOC Staff for the  
2015 Joint Committee of Employee Benefits Technical Session  
May 7, 2015**

**Question 1: ADA and Exclusion of Rx Drugs from Formulary**

Can a self-funded group health plan formulary exclude a specified drug from coverage, strictly on the basis of cost, without violating the Americans with Disabilities Act (ADA)?

For instance, a drug called Harvoni that is used for the treatment of chronic hepatitis may cost \$90,000 for a 12 week treatment. There are many other very expensive drugs for treatment of various diseases, and new drugs are continually being developed. If a plan excludes coverage of Harvoni for the treatment of chronic hepatitis, for example, is the plan viewed as singling out certain individuals based on their health condition? Would doing so raise ADA issues?

**Proposed Answer:**

There is currently no safe-harbor or exception under the ADA based on cost. Thus, whether the exclusion of a particular drug from the formulary violates the ADA depends on the facts of the case. However, if the formulary includes one or more drugs that treat the disabling condition in as effective a manner as the excluded drug, the exclusion of the particular drug will not violate the ADA. There also could be race or sex discrimination implications if the excluded drug is used to treat conditions specific to or more prevalent in one sex or race/ethnic group.

**EEOC Answer:**

The staff agreed with the proposed answer.

**Question 2: ADA and Exclusion of Rx Drugs from Formulary**

Can certain drugs be excluded from coverage under the formulary of a group health plan even if they are not considered experimental and are deemed medically necessary?

**Proposed Answer:**

The ADA does not explicitly outline whether any particular drug must be included in the formulary. However, the exclusion of a drug that is medically necessary to treat a disabling condition may result in the plan violating the ADA. See 42 U.S.C. §12201(c)(2). See also *Bragdon v. Abbott* 524 U.S.624 (1998); compare *Public Employees Retirement System of Ohio v. Betts* 492 U.S. 158 (1989).

**EEOC Answer:**

The staff agreed with the proposed answer based on the analysis, set out in EEOC's Interim Enforcement Guidance on Disability-Based Distinctions in Employer-Provided Health Insurance, that exclusions of treatments utilized exclusively, or nearly exclusively, by individuals with disabilities constitute disability-based distinctions. An employer or health plan would have to demonstrate that such a distinction is not a subterfuge to evade the purposes of the ADA in the manner described in the Interim Guidance.

### **Question 3: Wellness Plan Design**

Is the following wellness plan design permissible under the ADA?

- Baseline biometric screening occurs in January of year one – participant receives a reward based on completing the screening.
- Comparison screening occurs in January of year two – participant receives the reward if he or she has met the biometric risk criteria or shown improvement in the relevant categories from year one.
- If the participant has not met the standard or improved his or her screening results, the participant may complete a reasonable alternative (for example: four telephonic coaching sessions) to earn the reward. The participant will have six months to complete the reasonable alternative.

*Example A.* Don Juan completes his biometric screening on January 1, 2015 and receives a 20% premium reduction for the entire year. Don Juan completes his biometric screening on January 1, 2016 and does not meet all biometric risk requirements. The requirement he did not meet was waist circumference, which was required to be less than 40 inches. In 2015, his waist circumference was 45 inches, and in 2016 his waist circumference is 42 inches. Although he did not meet the requirement for waist circumference in 2016, because he did show improvement in that category, he would be eligible for the premium reduction for 2016.

*Example B.* Ricky Martin completes his biometric screening on January 1, 2015 and receives a 20% premium reduction for the entire year. Ricky Martin completes his biometric screening on January 1, 2016 and does not meet all biometric risk requirements. The requirement he did not meet was waist circumference, which was required to be less than 40 inches. In 2015, his waist circumference was 42 inches, and in 2016 his waist circumference is 43 inches. Although he has not met the requirement for waist circumference in 2016, he has the opportunity to complete lifestyle coaching to earn his 20% premium reduction for 2016. For 2016, his premiums will initially be charged without the 20% discount; when he completes the coaching sessions the premiums reduction will apply retroactively to the beginning of the year.

#### **Proposed Answer:**

The proposed design does not raise any concerns from an ADA perspective, as the medical condition of the participant does not affect overall coverage, only the availability of a reward for meeting wellness protocols.

#### **EEOC Answer:**

If the program only provides for measuring participants' waistlines, then EEOC's Notice of Proposed Rulemaking (NPRM) on the ADA and Wellness Programs would not apply, since measuring a participant's waistline is not a disability-related inquiry or medical examination. If, however, incentives are tied to an employee answering disability-related questions or taking a medical examination, then the incentives for both participating in the program and for achieving certain health outcomes must not exceed 30 percent of the total cost of self-only coverage in order to comply with the NPRM.

#### **Question 4: ADA and GINA Issues Relating to a Spouse's Disability**

An employer sends individualized correspondence to its employee and her spouse indicating that, based upon medical information it received concerning the spouse's diabetes and hypertension, it recommends that the spouse participate in the wellness plan the employer sponsors. Further, the employer states that if the spouse does not participate in the wellness program, the level of coverage for the family will be reduced from the level of coverage from last year.

- May a plan that provided family coverage reduce the level of coverage from the previous year if a family member refuses to participate in a wellness program without violating the ADA?
- Has the plan violated GINA by providing an employer medical information for the purpose of determining coverage?

#### **Proposed Answer:**

The reduction of coverage for failure to participate in a wellness program is not a penalty consistent with the non-discrimination rules under the Health Insurance Portability and Accountability Act as amended by the Patient Protection and Affordable Care Act. Further, because these facts suggest that the employer took the action to require the participation in the wellness program based upon the disabling condition of the spouse, there would be a violation of the ADA.

In addition, the distribution of the spouse's medical information to the employer for determining medical plan coverage would violate GINA.

#### **EEOC Answer:**

The staff agreed with the proposed answers, noting that the GINA violation appears clear and the ADA violation appears quite likely based on the association provision of the ADA, i.e., that there is discrimination against an employee because of the employee's association with a spouse who has a disability. Reducing coverage will likely violate GINA as well, since information about the current health of an employee's spouse is considered family medical history, and thus genetic information, about the employee. The staff present at the meeting also said that they have not seen claims involving reduction of health coverage based on current health information about an employee's spouse.

#### **Question 5: Wellness Program Provided by Third-Party Vendor**

An employer sponsors a group health plan and also encourages its employees to participate in some healthy living programs (diet, exercise, smoking cessation, etc.). None of these programs has an incentive tied to the group health plan, though there may be discounts for classes or related products. The employer signs up with a third-party vendor to make a new program available to its employees; the program is based on the "Biggest Loser" challenge, where teams of employees sign up to follow a diet and exercise regimen for a certain number of weeks. Each employee signing up pays a registration fee (\$75), which is not reimbursed by the employer. The teams can win substantial cash prizes (first prize is \$10,000) for losing the most

weight as a group; however, the competition includes teams from other employers across the country. Does the new program constitute a workplace wellness program subject to the proposed ADA wellness rules?

**Proposed Answer:**

No. The program is provided through a third-party vendor and is not part of the employer's group health plan. Also, the incentive is not related to the group health plan and the program is voluntary in nature. Since the employer does not offer the prize money, the program is not required to make reasonable accommodations for employees with ADA-covered disabilities that may not be able to participate in or complete the program.

**EEOC Answer:**

The staff agreed with the proposed answer, noting that as described the program is not an employer-sponsored program. Moreover, the proposed rule applies only to wellness programs that are part of an employer's group health plan. The preamble to the proposed rule asks whether the rule should also apply to employer wellness programs that are outside of a group health plan.

**Question 6: ADEA and Retirement Planning Advice**

As part of a managed account service selected by the employer sponsoring a 401(k) plan, the fiduciary provider of that service will manage participants' investments and advise participants regarding the timing and form of distribution they should elect. Because of minimum distribution requirements that require benefits to begin by April 1<sup>st</sup> after the year a participant attains age 70 ½ and the related rate of payment requirements, older participants will already have received a significant portion of their account balance by the time they reach age 79. The vendor does not wish to perform these functions for participants who have already attained age 79 even though such participants may continue to receive their 401(k) benefits for the remainder of their lives or any shorter distribution period they may have elected. As a result, an employer sponsor that retains this service provider will have put in place a valuable investment management service for participants younger than 79 that will not be available for participants older than 79. Providing such service beyond age 79 would not impose additional costs on the employer or the fiduciary vendor that are any greater than the costs incurred in serving younger participants. May the employer approve this arrangement without violating ADEA?

**Proposed Answer:**

Unless the employer otherwise provides a substantially similar service for participants over age 79, this feature of its 401(k) plan violates the restrictions of the ADEA because participants who are older are treated less favorably than participants who are younger and such lesser benefit is not justified by any additional cost factors.

**EEOC Answer:**

The staff agreed with the proposed answer.