Employer Wellness Programs Face Challenges
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Incentives to get workers healthy are growing, but the EEOC says some of them violate the ADA.

Employer wellness programs provide employees access to weight control programs, exercise routines and more. Healthier employees reduce health care claims and employer health care costs. These employees also tend to be absent less and more productive.

In 2000, the Equal Employment Opportunity Commission sanctioned wellness programs provided they included voluntary medical examinations and activities that were part of an employee health program. "A wellness program is "voluntary" as long as an employer neither requires participation nor penalizes employees who do not participate," the EEOC said in its July 27, 2000, "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act."

Wellness programs have flourished since then. However, the EEOC has challenged program incentives as violating the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

On April 18, 2015, the EEOC issued a proposed rule addressing the ADA's interaction with wellness programs and clarified what constitutes a permissible program in light of the ADA's prohibition from requiring employees to submit to medical examinations and inquires.

The rule lists requirements for participation in wellness programs to be considered voluntary. An employer may not require employees to participate; deny access to health coverage; limit coverage for nonparticipation; take adverse action or retaliate against employees who do not participate or fail to achieve certain health outcomes.

The maximum allowable incentive an employer may offer employees for program participation or for achieving certain health outcomes, and the maximum allowable penalty an employer can impose on employees who do not participate or achieve certain health outcomes, is 30 percent of the total cost of employee-only coverage.

SEFF V. BROWARD COUNTY

The rule is prompted, in part, by EEOC legal actions and lawsuits alleging ADA violations. In Seff v. Broward County, a case decided by the U.S. Court of Appeals for the Eleventh Circuit in 2012, Bradley Seff brought a class action alleging that the wellness program of Broward County, Florida, violated the ADA.

The county's insurer sponsored a program that consisted of a biometric screening and a health risk assessment form. Employees who exhibited diseases had an opportunity to participate in a disease management program after which they became eligible to receive co-pay waivers for medications.

The county charged a fee to employees who enrolled in health care coverage but did not participate in the wellness program. Seff, a former employee who was charged the fee, brought

a class action claiming the screening and form were illegal medical examinations and disability-related inquiries.

The Eleventh Circuit found that the county's wellness program came under the ADA's "safe harbor" provision, which provides that certain ADA provisions "shall not be construed to prohibit" organizations, such as health insurers, from establishing or sponsoring a bona fide benefit plan that is based on underwriting risks, classifying risks or administering such risks.

Despite Seff, the EEOC brought three lawsuits in 2014 alleging that wellness programs violated the ADA and GINA.

EEOC V. ORION ENERGY SYSTEMS INC.

In August 2014, the EEOC brought a suit alleging ADA violations in regard to Orion's wellness program. Orion covered 100 percent of the health care costs for employees who participated in the program, according to the EEOC's complaint. And employees who did not participate paid 100 percent of the premiums — plus a $50 monthly penalty, the suit claimed.

The case is pending in the U.S. District Court for the Eastern District of Wisconsin.

EEOC V. HONEYWELL INTERNATIONAL INC.

In October 2014, the EEOC tried to enjoin Honeywell from implementing its program, claiming Honeywell violated the ADA and GINA by penalizing employees for not participating in biometric screenings. The penalties included a $500 surcharge if an employee did not complete the screening and no entitlement to a Health Savings Account contribution that persons who completed the test received.

The District of Minnesota rejected the EEOC's request for a temporary restraining order and seemed to applaud Honey¬well's efforts through its wellness program to "raise awareness of important health indicators among its employees" while at the same time "supporting one of the primary goals of health care reform: reducing overall health care costs."

The court did allude to the struggles employers face in this area, noting that the EEOC's recent lawsuits "highlight the tension" between laws that encourage these programs and the ADA.

The court expressed a need that many employers are seeking "clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law." According to the court's docket, the case closed on the date of the court's decision.

EEOC V. FLAMBEAU INC.

In September 2014, the EEOC claimed that Flambeau, a manufacturer and seller of plastic products, violated the ADA by conditioning participation in its employee health insurance plan on completing a health risk assessment and a biometric screening test.

If employees did not complete the testing and assessment, Flambeau shifted premium cost responsibility to the employee. Employees who performed the testing and assessment were only required to pay 25 percent of their premium cost.

In December 2015, the Western District of Wisconsin agreed with Seff that the ADA's safe-harbor protection enables employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment. Of particular importance for employers, the Flambeau court rejected the EEOC's own interpretation of its rule. In its April 2015 rule, the EEOC specifically called out Seff and stated that it did not believe that ADA's safe-harbor provision applicable to insurance "is the proper basis for finding wellness program incentives permissible."

The court disagreed, noting that the EEOC rule speaks only to the safe harbor's application to "wellness program incentives." The court pointed out that the rule says nothing about the safe harbor's applicability to medical examinations that are part of a wellness program and are used to administer and underwrite insurance risks associated with an employer's health plan.

In light of these cases, employers should review and adhere to the EEOC's rule on wellness programs. They should also administer these programs as part of full insurance programs.

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