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Common Wellness Program Designs Under Attack by the Equal Employment Opportunity Commission (EEOC)

What began late this summer as a surgical strike by the Equal Employment Opportunity Commission (EEOC) on relatively punitive workplace wellness programs appears to be morphing into a broader offensive targeting more routine wellness arrangements. According to published reports, the EEOC recently filed a challenge in federal court, seeking changes to a rather common workplace wellness program maintained by Honeywell International, Inc.

In the past four months, the EEOC sued a pair of Wisconsin employers for either conditioning health plan enrollment on employees' submission to biometric screening, or for shifting the entire cost of coverage to employees who declined to participate.

While such programs appear permissible, at least potentially, pursuant to wellness program rules under the Affordable Care Act (ACA) and Health Insurance Portability and Accountability Act (HIPAA), the EEOC alleged they violate the Americans with Disabilities Act's (ADA) prohibition on "involuntary" medical screenings.

These cases raised the eyebrows of wellness program sponsors, but relatively few wellness programs reflect such an aggressive design for employees who fail to complete a health risk assessment.

Honeywell's Wellness Program

Honeywell's program, and the EEOC's claims against it, hit closer to home. Published reports indicate that the Honeywell program includes the following relatively common wellness program features:

- Health savings account (HSA) contributions are conditioned upon the employee and an employee's covered spouse completing a health risk questionnaire and biometric screening.
- Employees/spouses who do not complete the biometric screenings are assessed a health insurance premium surcharge.
- Employees/spouses who are tobacco users, and those who refuse to submit to testing for tobacco use, are assessed an additional health insurance premium surcharge.

The Honeywell program appears to be compliant with ACA and HIPAA wellness program rules. Nevertheless, some employees complained to the EEOC, which is responsible for enforcing the ADA, and the EEOC in turn has asked a federal trial court in Minnesota to prevent Honeywell from implementing important aspects of its wellness program for 2015.

The Americans with Disabilities Act and its Application to Wellness Programs

The ADA limits the circumstances in which an employer is permitted to require a medical examination or require employees to answer health-related questions. Typical health risk questionnaires and biometric screenings will be considered medical inquiries within the purview of the ADA. Exceptions under the ADA apply to examinations or questions that are voluntary, but they won't be considered "voluntary" if there's a penalty for not participating.

So what's a "penalty"? The EEOC has been infuriatingly silent on this question for years. The suits against the Wisconsin employers seemed to indicate that shifting all the cost of coverage to employees, or denying coverage outright, went too far and amounted to a penalty, at least in the EEOC's eyes. The EEOC's suit against Honeywell reflects an effort by the agency to cast the definition of "penalty" even more broadly, and encompass rather common wellness program incentives.

There's another exception under the ADA that becomes relevant here. Medical inquiries, like biometric screenings, are permissible under the ADA if they are part of a "bona fide benefit plan." In a 2012 ruling, a federal appeals court concluded that a wellness program sponsored by Broward County, Florida was *not* subject to challenge under the ADA, because it was part of the County's health plan; that is, it was part of a bona fide benefit plan. (Broward County assessed a \$20-per-pay-period premium surcharge against employees who refused to submit to biometric screenings.)

What Happens Next?

It is unclear how the federal trial court will rule in the Honeywell case. There is much about the case we do not know, as of the writing of this *Alert*.

But we know a couple of things. First, the results in the Broward County case are not binding in the Honeywell or Wisconsin cases, but the courts in the latter cases will certainly read and consider the Broward County decision. Certainly, that decision signals federal courts' willingness to be more flexible than the EEOC.

We also know this: courts are loathe to assume that Congress intended to make laws that conflict with each other. Where laws appear to conflict, as the ADA and ACA/HIPAA appear to do with respect to wellness programs, courts will search for a way to reconcile them. It seems plausible to us that the courts will allow the ACA/HIPAA rules to trump the EEOC's more restrictive interpretation under the ADA.

But all that remains to be seen. These cases will be closely monitored, and we will continue to post updates as additional information is made known. In the meantime, wellness program sponsors who want to take extra steps to insulate their programs from EEOC scrutiny might consider whether their wellness programs are treated as part of their health plan. Facts that the appeals court in the Broward County case found important were that the wellness program was available only to health plan enrollees, the wellness program was communicated as part of the health plan in multiple disclosures to employees, and the same insurer provided both the health plan coverage and wellness program services.

Further, wellness program sponsors might want to consider plan design changes if they currently condition health plan participation upon the completion of a health-related questionnaire/biometric screening or require employees who fail to complete the questionnaire/biometric screening to pay all or a significant amount toward the cost of health plan coverage.

Finally, we note that the suits against Honeywell and both Wisconsin employers were filed by the same EEOC regional office in Chicago. The Chicago regional office oversees most of northern Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin. Of course, other EEOC regional offices might begin pursuing similar claims, but it is the employers in these six states that might have extra incentive to review and update their wellness program design.

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