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Recent EEOC Enforcement Jeopardizes Employer Wellness Programs

By David W. Garland, August E. Huelle, and Adam Solander

Introduction

Despite issuing little to no reasonable guidance on what constitutes a voluntary medical exam under the Americans with Disabilities Act ("ADA"), on October 27, 2014, the Equal Employment Opportunity Commission ("EEOC") alleged that Honeywell International, Inc. ("Honeywell") violated the ADA's prohibition on involuntary medical exams. Specifically, in a case filed in the U.S. District Court for the District of Minnesota, the EEOC alleged that Honeywell's practice of using financial inducements to incentivize participation in the wellness program's obligatory biometric screenings renders the screenings and program involuntary under the ADA.[1] The EEOC requested that court issue a Temporary Restraining Order ("TRO") and an expedited preliminary injunction to enjoin Honeywell from withholding any contribution to a Health Savings Account ("HSA") or imposing any surcharge on an employee because the employee or the employee's spouse declined to undergo biometric testing.

According to the EEOC's filing, the same financial inducements that cause the wellness program to violate the ADA also cause the program to violate the Genetic Information Nondiscrimination Act ("GINA"). The EEOC argues this is so because the inducements are tied to the collection of family medical history from an employee's spouse. On November 3, 2014, U.S. District Judge Ann D. Montgomery denied the EEOC's application for a TRO.

Honeywell marks the third wellness program suit initiated by the EEOC in the past three months. Two lawsuits were recently filed in Wisconsin that also challenge employer wellness programs under the ADA, *EEOC v. Flambeau, Inc.*[2] and *EEOC v. Orion Energy Systems, Inc.*[3] As in *Honeywell*, the EEOC claims the Flambeau and Orion wellness programs violate Title I of the ADA by requiring employees to submit to involuntary medical examinations and inquiries that are neither job-related nor consistent with business necessity. In all three challenges, the merits of the EEOC's allegations are not yet decided.

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1 *Equal Employment Opportunity Commission v. Honeywell International, Inc.*, No. 0:14-04517 (D. Minn. Oct. 27, 2014).
2 No. 3:14-00638 (W.D. Wis. Sept. 30, 2014).
3 No. 1:14-01019 (E.D. Wis. Aug. 20, 2014).

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Regardless of how these cases may ultimately turn out, the EEOC's actions have sparked much debate and unease in the employer community. Wellness programs are governed by the EEOC and the Departments of Health & Human Services, Labor, and Treasury, but because the EEOC has been almost entirely silent on the matter, many employers have relied upon the tri-agency Affordable Care Act ("ACA") guidance. This guidance expands long established rules under the Health Insurance Portability and Accountability Act ("HIPAA"), which increase the permissible level of financial incentives[4] employers may offer to encourage participation in wellness programs and provide safeguards to protect participants from abuse. Indeed, the lack of helpful EEOC guidance, coupled with concerns stemming from undue litigation risks and Cadillac tax[5] exposure, could cripple the use of wellness programs. Wellness programs are one of the few levers employers can pull to bend the cost curve; reducing the effectiveness of wellness programs places the entire employer-based system in jeopardy.

EEOC Allegations

According to the *Orion* Complaint, Orion sponsors a wellness program that requires employees to complete a health risk assessment ("HRA"), which requires blood work and disclosure of medical history. The complaint alleges that Orion covers 100 percent of the health care costs for employees who agree to participate in the wellness program, but if participation is declined, employees must cover 100 percent of the premiums—plus a $50 monthly penalty. On April 24, 2009, the employee in this case signed a form opting out of the HRA. A month later, Orion terminated the employee. The EEOC alleges that the termination occurred because the employee objected to and declined to participate in the wellness program.

The Complaint in *Flambeau* alleges that Flambeau, through its wellness program, requires employees to complete biometric testing and an HRA, which includes blood work, measurements, and the disclosure of medical history. If an employee completes the biometric testing and HRA, then Flambeau covers roughly three fourths of the employee's health insurance premiums; if not, then the employee's coverage is cancelled. Here, the employee allegedly was unable to complete the biometric testing and HRA on the day appointed by Flambeau because the plaintiff was on medical leave being treated at a hospital. After allegedly denying the employee's request for additional time to complete the required biometric testing and HRA upon return from medical leave, the employee's medical insurance was cancelled. In turn, the employee was provided the opportunity to participate in the plan as a COBRA participant, paying 100 percent of the premiums.

In *Honeywell*, the EEOC's memorandum in support of the TRO claims that in connection with the upcoming 2015 plan year, employees were informed that they (and their spouses if enrolled in family coverage) will be required to undergo biometric testing or incur financial penalties. The EEOC contends the financial "penalties"include: (1) a $500 surcharge if the employee does not complete the tests; (2) a $1,000 premium increase for each enrollee who is a tobacco user, which is presumed if the tests are not taken; and (3) the withholding of an HSA contribution ranging from $250 to $1,500, which is distributed only to persons who complete the tests. Employees and their spouses are eligible for health insurance coverage regardless of whether they choose to participate in the wellness program and are not subject to any discipline or termination if they choose not to participate.

Background

Title I of the ADA explicitly prohibits employers from maintaining employee medical examinations and inquiries, subject to two exceptions. One exception permits medical examinations or inquiries if they are "job-related and consistent with business necessity."[6] The other exception permits "voluntary medical exami-nations"[7] if the information obtained is maintained according to the confidentiality requirements of the ADA

4 The cap (based on the applicable COBRA premium) on "rewards"offered for participation in certain types of wellness activities increased from 20 percent to 30 percent, and up to 50 percent for tobacco cessation programs. *See* ERISA Section 715, as added by P.L. 111-148, § 1563(e) (incorporating by reference amendments to the HIPAA nondiscrimination rules made by ACA and set forth in the Public Health Service Act); Public Health Service Act, 42 U.S.C. § 2705(j).

5 Beginning in 2018, a 40 percent excise tax will be imposed on high cost employer-sponsored health coverage. *See* 26 U.S. Code § 4980I. The provision is referred to as the "Cadillac"tax because it targets so-called Cadillac health plans that supposedly provide the most generous level of health benefits.

6 42 U.S.C. § 12112(d)(4)(A).

7 42 U.S.C. § 12112(d)(4)(B).

and the information is not used to discriminate against the employee.[8] The EEOC specifically addresses wellness programs in its July 27, 2000 Enforcement Guidance, which explains that a "wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate."[9]

After enactment of the ACA and twelve years after the Enforcement Guidance, on May 10, 2012, the ABA Joint Committee on Employee Benefits held a meeting with EEOC staff.[10] In this meeting, the EEOC staff was asked whether the ADA prohibits standards-based wellness programs with incentive structures permissible under the ACA. Additionally, the EEOC staff was asked if there are policies or practices that an employer could adopt to avoid potential violations of the ADA when the employer offers a financial incentive in connection with a wellness program.

According to the EEOC staff, "[p]rograms that include disability-related inquiries and/or require medical examinations will violate the ADA if they are involuntary."The EEOC stated that while a program cannot require participation or penalize individuals who do not participate, it has taken no position as to whether a financial incentive provided as part of a wellness program that makes disability-related inquiries or requires medical examinations would render the program involuntary. In a January 18, 2013 informal discussion letter, the EEOC again confirmed that "the EEOC has not taken a position on whether and to what extent a wellness program reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary."[11]

The EEOC, which is charged with the administration, interpretation and enforcement of Title I of the ADA, has provided no other guidance on the matter.

Prior to *Honeywell*, John Hendrickson, regional attorney for the EEOC Chicago district, commented on the *Orion* and *Flambeau* cases. According to Hendrickson, "Employers certainly may have voluntary wellness programs . . . but they have to actually be voluntary. They can't compel participation in medical tests or questions that are not job-related and consistent with business necessity by cancelling coverage or imposing enormous penalties such as shifting 100 percent of the premium cost onto the back of the employee who chooses not to participate."This statement seems consistent with the

notion that the EEOC sees a "mere nominal incentive" when an employee incurs a minor obligation for non-participation, but as dollar amounts increase so too does the likelihood that the EEOC sees a "substantial"financial penalty forcing an employee into participation. If this sliding scale approach truly is afoot, the question quickly becomes at what point does the scale tip?

On May 23, 2014, the EEOC announced in its Spring 2014 Semiannual Regulatory Agenda[12] that it anticipated issuing a rule in June 2014 that would address whether, and to what extent, the ADA lets employers offer financial rewards or impose financial penalties as part of wellness programs through their health plans. The EEOC has yet to issue these rules, however. Speaking at an October 2, 2014 briefing hosted by Epstein Becker Green, EEOC Commissioner Victoria Lipnic mentioned that the issue is on the EEOC's agenda but stressed that clarification should not be expected in the near future.[13]

Lack of Guidance Invites Conflicting Interpretations

In all three cases, the focus points were the two prongs of the EEOC definition of voluntary—does not require participation and does not penalize non-participants. *Honeywell* confirmed that the interpretation of these two prongs currently lies in the eye of the beholder. As to the penalty prong, the EEOC argued in *Honeywell* that the Honeywell wellness program is involuntary because the financial inducements constitute "large"or "substantial"penalties that do not amount to a "mere nominal incentive."Even though the EEOC has yet to provide a definition of "penalty"or articulate any standard defining when a surcharge would make biometric screening

8 *See* H.R. Rep. No. 101-485, pt. 2, at 75 (1990) ("As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or preventing occupational advancement, these activities would fall within the purview of accepted activities.").

9 EEOC Notice 915.002, Q22 (July 27, 2000), Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

10 EEOC Staff for the American Bar Association's Joint Committee of Employee Benefits Technical Session (May 10, 2012), *available at* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2012_eeoc_final.authcheckdam.pdf.

11 EEOC Informal Discussion Letter, ADA: Voluntary Wellness Programs & Reasonable Accommodation (Jan. 18, 2013), *available at* http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.

12 *Available at* http://www.reginfo.gov/public/do/eAgendaMain.

13 Ben James, Don't Expect Wellness Program Guidance: EEOC Commish, Law360, New York (Oct. 2, 2014, 7:47 PM ET).

involuntary, it nonetheless argues that the surcharge, increased premiums, and withholding of an HSA contribution are penalties that render the wellness program involuntary.

On the other hand, Honeywell argued in its memorandum in opposition to the TRO that "merely providing a financial incentive to participate in a program does not transform it into an involuntary program."In support of this statement, Honeywell pointed to ACA provisions stating that the absence of a surcharge may constitute a reward.[14] Further, Honeywell cited DOL regulations that state a reward includes a surcharge or other financial or nonfinancial incentives.[15] Additionally, Honeywell posited that the EEOC was attempting to create an artificial distinction between incentives and surcharges, which are two sides of the same coin. Honeywell explained that offering a participant a $42 per month contribution reduction produces precisely the same economic result as assessing nonparticipants a $42 per month contribution surcharge. In both instances, the participant pays $42 less than the non-participant.

The determination that the seemingly mainstream financial inducements linked to the Honeywell wellness program amount to penalties was perhaps the most interesting development in the EEOC's line of wellness program challenges, and certainly the stark difference that sets *Honeywell* apart from *Orion* and *Flambeau*. On the one hand, non-participation in the Honeywell program may result in a surcharge and the withholding of a reward—both of which are apparently consistent with the ACA. On the other hand, failure to participate in the Flambeau program supposedly resulted in health coverage cancellation, curable only by COBRA continuation coverage at the full premium rate. Failure to participate in the Orion program triggered a full premium plus surcharge obligation. Without a clearer definition of what constitutes a penalty with regard to financial inducements, one may surmise that an assessment of 100 percent or more of healthcare premiums is a penalty. Withholding a reward and assessing financial inducements consistent with other prevailing federal laws, however, may not lead one to the same conclusion.

With regard to requiring participation, the EEOC does not allege that the challenged wellness programs explicitly require participation. Rather, the EEOC argues that the participants implicitly have no choice in the matter due to the financial incentives or other features of the wellness programs. The practices that the EEOC challenged vary greatly. Again, *Honeywell* distinguishes itself from *Orion* and *Flambeau*. In the earlier cases, the EEOC challenged a wellness program where employment was terminated or medical coverage was contingent upon an employee's participation in medical exams. In *Honeywell*, however, the EEOC took issue with the mere use of financial incentives authorized under the ACA.

In the context of *Honeywell*, the EEOC asserts that, based on the financial inducements, employees have no possible choice but to sign up for the medical tests (*i.e.*, the Honeywell coverage is not affordable if surcharges are incurred). Honeywell argues that with or without all applicable financial inducements, the cost of healthcare coverage for Honeywell employees falls below the ACA definition of affordable care.[16] Honeywell effectively advances the position that the coverage is affordable even with the surcharges and, therefore, the employees have reasonable alternatives to the tests, which is to say the employees are not forced to participate.

Mere ACA Compliance Is Not Enough

The Departments of Health & Human Services, Labor, and Treasury have issued comprehensive guidance for wellness programs. For example, tri-agency guidance confirms that an employer may provide a financial

reward to employees participating in "health-contingent" wellness programs, which generally require individuals to meet a specific standard related to their health to obtain the reward.[17] Final regulations under the ACA clarify that rewards given under health-contingent wellness programs can be up to a maximum of 30 percent of the cost of health coverage, or, in the case of programs designed to prevent or reduce tobacco use, 50 percent.[18] No limits on rewards are imposed on "participatory"wellness programs, which generally make rewards available without regard to an individual's health status (*e.g.*, programs that reimburse the cost of membership in a fitness center).[19]

14 42 U.S.C. § 2705(j)(3)(A) ("A reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.").

15 29 C.F.R. § 2590.702(f)(1)(i) (defining "reward"to include "imposing a penalty (such as a surcharge or other financial or nonfinancial disincentive)").

16 Up to 9.5 percent of an employee's adjusted gross income. *See* 29 U.S.C. § 36B(c)(2)(C)(i)(II).

17 *See, e.g.*, Federal Register, Vol. 78, No. 106 (June 3, 2013), Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, Final Rule.

18 45 C.F.R. 146.121(f)(5)(i).

19 *See* DOL Fact Sheet, The Affordable Care Act and Wellness Programs, *available at* http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html.

That being said, the EEOC takes the position that adherence to the tri-agency guidance is not enough to avoid exposure to potential allegations of ADA violations. The EEOC argues that a wellness program can offer rewards compliant with the ACA while simultaneously being an involuntary program in violation of the ADA. Honeywell contends that because both the ACA and the ADA deal with wellness programs, and because Congress endorsed surcharges in the ACA, the EEOC should not view such surcharges as a violation of the ADA.

As with the ADA, the EEOC contends that compliance under the ACA and HIPAA does not necessarily equate to concurrent compliance with GINA. GINA prohibits employers from offering inducements to employees to obtain family medical history information. In support of its allegations in the TRO memorandum, the EEOC posited that a contribution to an employee's HSA and the imposition of tobacco surcharges inappropriately incentivizes the use of biometric testing to gather family medical history from an employee's spouse. The EEOC appears to suggest that a wellness program can offer employees reward-type incentives in compliance with GINA, but not if the incentives are tied to family medical information from an employee's spouse. In fact, in the May 10, 2012 ABA Joint Committee on Employee Benefits meeting with EEOC Staff, the EEOC stated "there is generally not an issue with respect to an employ-ee's spouse participating in a health risk assessment provided that the spouse's response is voluntary, and there is no incentive tied to the collection of health status information about an employee's spouse." Honeywell contends, however, that the intent of GINA was to bar discrimination against employees based upon their genetic predisposition, and because spouses are not related by blood, GINA does not apply to their medical histories. Yet, the EEOC claims that by defining "family member"to mean dependent under ERISA, Congress explicitly expanded the definition of family members to include those related by marriage and adoption.

Honeywell also advances the position that the biometric screening offered to employees and their spouses does not constitute "genetic testing,"does not collect family medical history information, and is otherwise consistent with the type of tests the DOL has approved in its guidance. In any case, Honeywell's position is that its wellness program satisfies GINA's voluntary wellness program exception.

Shielding the Potential Impact

At this juncture, it is unclear whether the EEOC wellness program lawsuits constitute the official view of the EEOC or only its Chicago regional office. It is nevertheless remarkable that these recent wellness program lawsuits were filed by the agency that has for fourteen years not provided significant guidance concerning the same issue on which its lawsuits are premised. Almost equally surprising is that the suits come at a time when the EEOC's sister agencies are encouraging employers to implement and utilize the ACA's wellness program incentives. Not so surprising is the resulting forecast: a perfect storm that could not only swamp the laudable policy goals of promoting affordable healthcare and transforming America's workers into a healthier and more productive workforce, but could easily clear a destructive path towards more Cadillac taxes or fewer healthcare benefits. Without instructive EEOC guidance, the EEOC's actions may result in higher-cost wellness plans that expose employers to undue litigation and unwanted excise tax risks, all of which may encourage employers to turn to minimum benefit plans that do not carry the same hazards and costs.

Before simply abandoning use of wellness programs, however, prudence suggests first trying to learn from these recent lawsuits and develop best practices to shield against potential liability. This is possible notwithstanding the fact that the EEOC's motion for TRO was denied and the merits of the EEOC's allegations are not yet addressed. To mitigate risk exposure when establishing and maintaining wellness programs, employers may consider the following lessons learned from the lawsuits.

The recent lawsuits first suggest implementing a conservative wellness program design that complies with the ACA, HIPAA, and all other applicable laws independently, including GINA and the ADA. A careful reading of the EEOC Complaints recommends employers clearly communicate to employees that HIPAA *and* ADA confidentiality and non-discrimination requirements are strictly followed with regard to any information obtained pursuant to voluntary medical examinations or inquiries associated with a wellness program.

With the EEOC's silence on what type of financial inducements turn a wellness program into a potential lawsuit, employers may wish to ensure that any inducements offered are clearly presented as rewards, not penalties. Semantics appear to convey consequential import with the EEOC. As to GINA, consider not tying incentives to information from an employee's spouse and other family members—even if the incentives are otherwise permissible under the ACA or HIPAA, and even if the information does not appear to relate to genetic information. Remember an inducement that depends in whole or in part on information about a spouse or family member's current health status could arguably violate GINA.

Confirm wellness programs are sensitive to the ADA's reasonable accommodations provisions. If incentives are conditioned on the achievement of health outcomes, for example, provide reasonable accommodations in the form of alternate goals for those whose disabilities otherwise prevent achievement of the health outcomes. Also, assure employees that any medical information they may disclose is *never* available to a supervisor or manager making employment related decisions.

Lastly, even though the EEOC's TRO memorandum argues that the Eleventh Circuit got it wrong in *Seff v. Broward County*,[20] employers are well advised to review this decision. In *Seff*, the Court of Appeals for the Eleventh Circuit found that a wellness program that was established as a term of the insured group health plan fell under the ADA's bona fide benefit plan safe harbor provision. In ruling so, the wellness plan essentially bypassed the EEOC's voluntary analysis as it was exempt from complying with the ADA requirements regarding medical examinations and inquiries. Designing a wellness program to be part of a health benefits plan, therefore, may be a sound method to shield the impact of the recent EEOC wellness program lawsuits. It is a strategy to strongly consider whenever possible. This is especially true as the EEOC commenters have taken no public position on the *Seff* decision and only the Chicago Regional Attorney has addressed it in the *Honeywell* TRO memo. The Commissioners may or may not adopt his position.

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