Mainstream Wellness Program Challenged in *EEOC v. Honeywell*

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Despite promulgating a paucity of guidance on what constitutes a "voluntary medical exam" under the Americans with Disabilities Act ("ADA"), on October 27, 2014, the U.S. Equal Employment Opportunity Commission ("EEOC") alleged in *EEOC v. Honeywell*, No. 0:14-04517 (D.MN 2014), that Honeywell International, Inc., violated the ADA by requiring participation in medical exams associated with Honeywell's group health plan and wellness program when it provided financial inducements to incentivize participation. Specifically, the EEOC sought a temporary restraining order ("TRO") from the U.S. District Court for the District of Minnesota and an expedited preliminary injunction to enjoin Honeywell from reducing 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 limited biometric testing associated with the wellness program. The EEOC also argued that, in making financial inducements contingent upon participation by an employee's spouse, Honeywell violated the Genetic Information Nondiscrimination Act ("GINA"). On November 3, 2014, U.S. District Judge Ann D. Montgomery denied the EEOC's motion for a TRO without reaching the merits.

EEOC v. Honeywell marks the third wellness program challenge initiated by the EEOC in the past three months. Two companion lawsuits in Wisconsin challenging employer wellness programs under the ADA, *EEOC v. Flambeau, Inc.,* No. 3:14-00638 (W.D. Wis. 2014), and *EEOC v. Orion Energy Systems, Inc.,* No. 1:14-01019 (E.D. Wis. 2014), were filed on September 30 and August 20, 2014, respectively. Although these suits did not allege GINA violations, as in *Honeywell*, both actions allege that the 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. With the EEOC's motion for a TRO denied and the *Orion* and *Flambeau* cases pending, the merits of the EEOC's allegations are yet to be addressed, and with the EEOC offering almost no reasonable guidance on this specific issue, critical questions about wellness programs remain unanswered.

For example, despite Affordable Care Act ("ACA") guidance issued by the U.S. Department of Health and Human Services ("HHS"), U.S. Department of Labor ("DOL"), and U.S. Department of the Treasury ("Treasury") that encourages the use of wellness programs through financial incentives, including surcharges, the EEOC's *Honeywell*

TRO request raised the question as to whether offering financial incentives that are compliant with the ACA could nevertheless violate the ADA. Left unanswered, questions such as this may motivate conservative strategies in employee benefit sponsorship. Indeed, the lack of long-sought EEOC guidance on how to promote participation through reasonable incentives and costs, coupled with concerns stemming from undue litigation risks, may challenge the use of certain financial incentives that could make the use of wellness programs more effective. It also might cause some employers to consider providing only minimum or so called "skinny" benefit plans to avoid "Cadillac tax" exposure commencing on January 1, 2018 despite recent questions about such plans from ACA regulators.

Facts Alleged by the EEOC

According to the EEOC's complaint against Orion, Orion's wellness program required employees to complete a health risk assessment ("HRA"), including blood work. The complaint states that Orion covers 100 percent of the health care costs for employees who agree to participate in the wellness program, but if participation in the wellness program is declined, employees must cover 100 percent of the premiums—plus a $50 monthly penalty. The complaint in *Flambeau* alleges that Flambeau's wellness program required employees to complete an HRA and biometric testing, which included blood work, measurements, and the disclosure of medical history. If an employee does not complete the biometric testing and HRA, the employee's coverage is cancelled, but the employee is offered 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 its TRO request states that, in connection with the upcoming 2015 plan year, employees were informed that they (and their spouses if there was family coverage) will be required to undergo limited biometric testing or incur financial penalties. The EEOC contends that the financial "penalties" include: (1) a $500 surcharge if an employee does not complete the test (there is no surcharge if a spouse does not complete the test); (2) a $1,000 tobacco surcharge if the employee does not complete the test; (3) a $1,000 tobacco surcharge if the employee's spouse does not complete the test; and (4) the non-receipt of an HSA contribution up to $1,500, which is distributed only to persons who complete the test (the EEOC failed to note that this benefit is not part of Honeywell's health plan).

Background

Title I of the ADA explicitly prohibits medical examinations and inquiries by an employer unless the examinations or inquiries are either "job-related and consistent with business necessity" or "voluntary." In this regard, the EEOC specifically addressed wellness programs in its July 27, 2000, Enforcement Guidance (Notice 915.002), and stated that a wellness program is voluntary as long as an employer does not require participation or penalize employees who do not participate. What it has never opined on is the meaning of "voluntary" or what would constitute an impermissible penalty.

After enactment of the ACA and 12 years after this limited Enforcement Guidance, on May 10, 2012, the American Bar Association ("ABA") Joint Committee on Employee Benefits held a meeting with EEOC staff. The first question asked at this meeting was whether the ADA prohibits the standards-based wellness programs contemplated by the ACA that permit an employer to offer a financial incentive of up to 30 percent of the cost of coverage for an employee's participation in the program (and up to 50 percent for a tobacco cessation program). The EEOC staff responded by stating that wellness programs that require medical examinations will violate the ADA if they are involuntary and that, while a program cannot require participation or penalize individuals who do not participate, the EEOC has taken no position as to whether a financial incentive provided as part of a wellness program that 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." The EEOC, which is charged with the administration, interpretation, and enforcement of Title I of the ADA, has provided no other guidance on this important issue.

Lawsuits Prioritized Over Guidance

In its spring regulatory agenda on May 23, 2014, the EEOC announced 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, but the EEOC has yet to issue the rule. Speaking at an October 2, 2014, client briefing hosted by Epstein Becker Green, an EEOC Commissioner noted that the issue is on the EEOC's agenda but stressed that, in light of a vacancy on the EEOC, clarification should not be expected in the near future.

Prior to *EEOC v. Honeywell*, John Hendrickson, regional attorney for the EEOC Chicago district, commented on the *Orion* and *Flambeau* cases, stating:

> 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% of the premium cost onto the back of the employee who chooses not to participate.

This comment strongly suggests an EEOC view that causing an employee to pay 100 percent of the premiums for not participating constitutes a penalty, which, in turn, renders the program involuntary in violation of the ADA. What this comment does not address is whether a more nominal surcharge or financial incentives authorized by ACA guidelines is permissible in the eyes of the EEOC. Despite the lack of regulatory guidance, the EEOC's *Honeywell* suit strongly suggests an EEOC view that apparent mainstream financial terms associated with Honeywell's program are supposedly impermissible penalties. Whether financial incentives of lesser amounts or financial incentives offered under different names or circumstances also constitute penalties in the EEOC's view is unknown due to the lack of EEOC guidance. Moreover, what is also unclear is whether the *Honeywell* lawsuit constitutes the official view of the EEOC or only its Chicago regional office and General Counsel.

On the other hand, Honeywell reasonably 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, Honeywell points to ACA provisions that state that the absence of a surcharge may constitute a "reward," and DOL regulations that state a reward includes a surcharge or other financial or nonfinancial incentives. Further to this point, Honeywell persuasively posits that the EEOC attempts to create a wholly artificial distinction between incentives and surcharges, which are merely "two sides of the same coin." Honeywell explains 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.

With EEOC lawsuits against wellness programs piling up and long-awaited guidance nowhere in sight, many find the EEOC's strategy of blindsiding employers not only unfair but at odds with Honeywell's argument concerning the artificial distinction between incentives and surcharges—not to mention the detailed wellness program guidance provided by the EEOC's sister agencies.

EEOC Suits at Odds with Tri-Agency Guidance

In a "tri-agency" effort to administer, interpret, and enforce the ACA and many of the laws it amended, including the Health Insurance Portability and Accountability Act ("HIPAA"), the HHS, DOL, and Treasury have issued significant guidance for wellness programs. Final regulations under the ACA, for example, clarify that rewards given under "health contingent" wellness programs (programs that generally make the reward contingent upon achieving a specific standard related to health) 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. 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 provide a reward to employees who complete an HRA without requiring further action).

That being said, the EEOC's TRO memorandum takes the position that adherence to this clear tri-agency guidance is not enough to avoid exposure to potential allegations of ADA *and* GINA violations. Under GINA, employers are prohibited from offering inducements to employees to obtain family medical history information. In *Honeywell*, the EEOC posits 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 to an employee's spouse. In fact, in the May 10, 2012, ABA Joint Committee on Employee Benefits meeting with EEOC staff, the EEOC stated that, with regard to GINA, "there is generally not an issue with respect to an employee'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 argues 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 that the DOL has approved in its guidance. In addition, Honeywell's position is that its wellness program satisfies GINA's voluntary wellness program exception.

Potential Impact

Tri-agency guidance has made clear that implementing and expanding employer wellness programs offers our nation the opportunity to both improve the health of Americans and help control health care spending. The DOL boasts that "the Affordable Care Act creates new incentives and builds on existing wellness program policies to promote employer wellness programs and encourage opportunities to support healthier workplaces."

Despite the ACA's laudable policy goals of promoting affordable health care and transforming America's workers into a healthier and more productive workforce, the EEOC decided to file the *Orion* and *Flambeau* suits, and far more surprisingly, the *Honeywell* suit—after dragging its feet for 14 years on providing meaningful guidance. In turn, the admirable policy goals of the ACA may very well be undercut. In addition, without reasonable EEOC guidance, the EEOC's actions may result in higher-cost wellness plans that expose employers to undue litigation and increased Cadillac tax risks, all of which may encourage employers to consider minimum benefit plans that do not carry the same risks and costs.

Shielding the Impact

To mitigate risk exposure when establishing and maintaining wellness programs, employers may consider the following lessons learned from the EEOC lawsuits.

First, the recent lawsuits suggest that employers should consider 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's complaints recommends that 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.

Second, with the EEOC's silence on what type of financial inducements turn a wellness program into a potential ADA lawsuit, employers should consider carefully any inducements offered and how they are presented. Semantics appear to convey consequential import with the EEOC despite the fact that the ACA regulations authorize incentives or surcharges.

Third, employers should also insure that wellness programs are sensitive to the ADA's (and the ACA's) reasonable accommodations provisions. If incentives are conditioned on the achievement of health outcomes, for example, to be ACA and ADA compliant, an employer must provide reasonable accommodations in the form of alternate goals for those whose disabilities otherwise prevent achievement of the health outcomes. Also, assurance should be provided to employees that any medical information they may disclose in connection with a wellness program is ***never*** available to a supervisor or manager making employment-related decisions.

Fourth, as to GINA, at least for the moment, employers should consider not tying incentives to receipt of information from an employee's spouse and other family members—even if the incentives are otherwise permissible under the ACA or HIPAA, if the information does constitute genetic information. Employers should remember that 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 in the eyes of the EEOC.

Fifth, even though the EEOC's TRO memorandum attempts to argue that the U.S. Court of Appeals for the Eleventh Circuit got it wrong in *Seff v. Broward County*, 691 F. 3d 1221 (11th Cir. 2012), employers are well advised to review this decision. In *Seff*, 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 so ruling, the wellness plan essentially bypassed the EEOC's voluntariness 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 seek to shield a program from a successful EEOC challenge. It is a strategy that employers should strongly consider, whenever possible. This is especially true as the EEOC Commissioners 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.

Until there is additional guidance from the courts or clear guidance from the EEOC, the above suggestions may be helpful in avoiding a successful challenge to a wellness program with incentives for participation.

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