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Employer-Sponsored Wellness Program Held Lawful Under the Americans with Disabilities Act's Safe Harbor Provision

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An employer's wellness program—despite certain "penalty" provisions—was recently held not discriminatory under the Americans with Disabilities Act ("ADA") by the U.S. Court of Appeals for the Eleventh Circuit in *Seff v. Broward County*. The Eleventh Circuit found that the wellness program sponsored by Broward County, Florida ("County"), was established as a term of the County's insured group health plan and, as such, fell under the ADA's bona fide benefit plan "safe harbor" provision. This ruling is welcome news for employers with or considering wellness programs.

However, if the County's wellness program had not been found to be a part of the County's health benefits plan, then potential plaintiffs or the Equal Employment Opportunity Commission ("EEOC") might try to argue that the wellness program would run afoul of the EEOC's views on "voluntariness" requirements for employer-sponsored wellness programs.

The ADA's Impact on Wellness Programs

Wellness initiatives seek to boost employee productivity and reduce both direct and indirect medical costs, all of which are extremely desirable outcomes for employers. Employer-sponsored wellness programs have grown exponentially over the past decade, as employers have increased their focus on controlling health care costs and improving the overall health and wellness of employees.[1] Despite the growing popularity and positive aspects of wellness programs, legal uncertainties surrounding these programs—including restrictions imposed by the ADA, the Genetic Information Nondiscrimination Act ("GINA"), and the Health Insurance Portability and Accountability Act ("HIPAA")—have presented obstacles to their implementation and growth.

Certain ADA restrictions have contributed to many employers declining to have wellness programs. Specifically, the ADA prohibits employers from making disability-related

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[1] According to recent studies, approximately 46 percent of participating employers have implemented wellness programs to improve the health of their employees.

inquiries or requiring medical examinations of prospective or current employees unless they are job-related or subject to a business necessity exception. On the other hand, voluntary medical examinations are permitted so long as the information obtained is kept confidential and not used to discriminate against employees. There is little guidance, however, either from the courts or the EEOC, analyzing whether an employer-sponsored wellness program that encourages participation by providing incentives, or penalizes non-participation, can be considered "voluntary" and therefore permissible under the ADA.

The ADA has certain safe harbors for insurers and bona fide benefit plans that exempt such programs from ADA restrictions. Under these safe harbors, employers, insurers, and plan administrators are permitted to establish a health insurance plan that is "bona fide" based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law. Thus, if a wellness program qualifies for the ADA's safe harbor provision, an employer need not worry whether such program otherwise would have been considered voluntary. Notably, the EEOC has not addressed wellness programs and the ADA's safe harbor provision.

Seff v. Broward County

In October 2009, the County adopted a wellness program for its employees as part of its health plan open enrollment. The wellness program consisted of three parts: (1) a biometric screening consisting of a "finger stick" to measure glucose and cholesterol; (2) disease management for five specified conditions; and (3) an online Health Risk Assessment ("HRA"). Participation in the program was not required as a condition of participation in the County's health plan, but employees who did not undergo the screening or complete the HRA incurred a $20 bi-weekly charge subtracted from their paychecks.

In response to this program, current and former County employees who enrolled in the County's health insurance plan and incurred the $20 bi-weekly fee filed a class action lawsuit in the U.S. District Court for the Southern District of Florida. They alleged that the wellness program's biometric screening and online HRA violated the ADA's prohibition on non-voluntary medical examinations and disability-related inquiries. The County argued that its wellness program was part of its health plan and, as such, fell under the ADA's safe harbor provision.

The primary question addressed by the district court was whether the wellness program was a "term" of a bona fide benefit plan, which would allow it to come within the ADA's safe harbor provision for such plans. In granting summary judgment to the County, the district court determined that the program was indeed a "term" of the County's group health plan based on the following three factors:

1. The health insurer offered the wellness program as part of its contract to provide insurance and paid for and administered the program;

2. The wellness program was available only to plan enrollees; and

3. The County presented a description of the wellness program in at least two employee benefit plan handouts.

Thus, the district court held that the wellness program was part of the County's group health plan and, as such, the County could administer the program without running afoul of the ADA.

On appeal, the plaintiffs argued that the district court had erred in concluding that the wellness program was a "term" of the County's health plan. A unanimous panel of the Eleventh Circuit, however, relied on the same three factors and held that "the district court did not err in finding as a matter of law that the employee wellness program was a 'term' of Broward's group health insurance plan, such that the employee wellness program fell within the ADA's safe harbor provision."

What Employers with or Considering Wellness Programs Should Do Now

1. The County's victory is a positive development for employers, as it provides useful guidance for structuring wellness programs in accordance with the ADA's safe harbor provision. Employers with or considering wellness programs should strongly consider making any wellness program a clear term of a bona fide benefit plan. By doing so, employers can point to the safe harbor for ADA compliance and thus alleviate concerns regarding whether the wellness program violates the ADA's otherwise applicable "voluntary" rules. Of course, the *Seff v. Broward County* decision is only a binding precedent in the states covered by the Eleventh Circuit.

2. If a wellness program is not a term of a bona fide benefit plan, employers should assure that participation is voluntary and that an employee is not required to disclose disability-related information on an HRA to participate in the wellness program to avoid running afoul of the ADA, as currently interpreted by the EEOC.

3. Employers must also consider GINA-related issues when establishing and implementing wellness programs. GINA is similar to the ADA in that it limits information that an employer can require an employee to disclose on an HRA or in a medical examination, namely genetic information. GINA and the EEOC's implementing regulations do not contain a blanket exemption for wellness programs similar to the one found in the ADA. Therefore, GINA should be taken into account even if the ADA exemption applies. For example, the EEOC's GINA regulations provide that an employer must make clear that if it requires completion of an HRA to participate in a health plan or to receive an incentive, employees need not answer questions requesting genetic information to participate or receive the incentive.

4. Finally, any wellness program needs to comply with HIPAA's non-discrimination requirements and the new statutory rules codifying the HIPAA

wellness provisions (and increasing permitted reward or incentive levels) in the Patient Protection and Affordable Care Act ("PPACA").

If you have any questions about this Advisory or any other ADA, GINA, PPACA, or HIPAA issues, please contact:

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