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EEOC

The Equal Employment Opportunity Commission's recent attempts to impose limits, under provisions of the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, on the personal health information employers can require of their employees as part of a company's wellness program work against the goal of the Affordable Care Act's wellness provisions to improve the health of employees, Epstein Becker Green attorneys Frank C. Morris and August E. Huelle say in this BNA Insights article.

The authors note that unlike other agencies such as the departments of Labor, Health and Human Services, and Treasury, the EEOC has yet to issue guidance as to what constitutes such violations. They say employers and wellness program providers should proceed carefully and closely watch both the EEOC's wellness program litigation and proposed regulations under the ADA and GINA—when they are finally issued.

EEOC Lawsuits Challenge Wellness Programs—Despite Lack of EEOC Regulations

BY FRANK C. MORRIS, JR. AND AUGUST E. HUELLE

In the latter part of 2014, the Equal Employment Opportunity Commission filed a memorandum in the U.S. District Court for the District of Minnesota seeking a temporary restraining order and an expedited preliminary injunction to stop certain features of the wellness program sponsored by Honeywell International Inc., which, according to the EEOC, potentially violate the Americans With Disabilities Act and the Ge-

netic Information Nondiscrimination Act. In *EEOC v. Honeywell International, Inc.*, D. Minn., No. 14-4517, petition for temporary restraining order and preliminary injunction 10/27/14 (209 DLR A-18, 10/29/14); 30 AD Cases 1584, preliminary injunction denied 11/3/14 (212 DLR A-1, 11/3/14), the EEOC says its preliminary investigation indicates that the wellness program requires employees and their spouses to submit to involuntary medical exams or face substantial monetary penalties.

EEOC v. Honeywell is the third wellness program challenge initiated by the EEOC in the past six months. Two companion lawsuits in Wisconsin directly challenge employer wellness programs under the ADA, *EEOC v. Flambeau, Inc.*, No. 3:14-cv-00638 (W.D. Wis. Aug. 2014) (191 DLR A-4, 10/2/14) and *EEOC v. Orion Energy Systems, Inc.*, No. 1:14-01019 (E.D. Wis. Aug. 20, 2014) (163 DLR AA-1, 8/22/14). Although these suits did not allege GINA violations as in *Honeywell*, both actions allege the wellness programs violate the ADA by “requiring” employees to submit to involuntary medical examinations and inquiries that are neither job-related nor consistent with business necessity.

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Wellness Program Provisions Outlined

According to the EEOC's complaint in *Orion*, the company implemented a wellness program that required employees to complete a health risk assessment (HRA) that required blood work and disclosure of medical history. The complaint states that Orion covers 100 percent of the health care costs for employees who participate in the wellness program, but employees who decline must cover 100 percent of the premiums plus a \$50 monthly penalty. The EEOC alleges that the charging party in this case opted out of the HRA and was terminated about a month later because he declined to participate in the wellness program.

The complaint in *EEOC v. Flambeau* alleges that Flambeau, through its wellness program, requires employees to complete biometric testing and an HRA, which included blood work, measurements, and disclosure of medical history. If an employee completes the biometric testing and HRA, Flambeau covers roughly three-fourths of the employee's health insurance premiums; if not, 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 Consolidated Omnibus Budget Reconciliation Act (COBRA) participant, paying 100 percent of the premiums.

In *EEOC v. Honeywell*, the EEOC's memorandum in support of the TRO states that employees were informed for the 2015 plan year that they (and their spouses if there was family coverage) would be required to undergo biometric testing or incur financial penalties. The EEOC contends the financial "penalties" for those who do not complete the tests include: (1) a \$500 surcharge for the employee; (2) a \$1,000 tobacco surcharge for the employee; (3) a \$1,000 tobacco surcharge if the employee's spouse refused to complete the tests; and (4) non-receipt of a Health Savings Account (HSA) contribution up to \$1,500.

Although the TRO was spurred by charges filed with the EEOC by two employees, the memorandum states that the employees' charges included class allegations and the EEOC's investigation will focus on all of Honeywell's U.S. employees.

The EEOC's memorandum failed to note a number of salient facts. These included that the biometric testing was free, that the \$500 surcharge would be assessed incrementally during each pay period and that the potential HSA contribution actually ranged from \$250 to \$1,500. In addition, one of the two charging parties had already completed the biometrics and the other was scheduled to do so the day after EEOC filed for the TRO.

The wellness program in *Honeywell* stands apart from the wellness programs in *Orion* and *Flambeau* as it includes both incentives and penalties. While non-participation in the Honeywell wellness program results in premium surcharges and, in some cases, a bar to earning a company provided HSA contribution, failure to participate in the Flambeau program apparently resulted in health coverage cancellation, curable only by

COBRA continuation coverage at the full premium rate, and failure to participate in the Orion program triggered a full premium plus surcharge obligation allegedly followed by termination of employment.

The EEOC nevertheless attempts to tie all three proceedings together with a common ambiguous thread, alleged "involuntary" medical exams. It is noteworthy that the court denied EEOC's TRO request in *Honeywell*.

Elusive Voluntary Exception to ADA Liability

Title I of the ADA explicitly prohibits medical examinations and inquiries, subject to two exceptions. The first permits medical examinations or inquiries if they are "job-related and consistent with business necessity." The second permits "voluntary medical examinations" if the information obtained is maintained according to the confidentiality requirements of the ADA and the information is not used to discriminate against the employee.

The EEOC specifically addressed wellness programs in its July 27, 2000, enforcement guidance (145 DLR AA-1, 7/27/00), which states that a wellness program is voluntary as long as an employer does not require participation or penalize employees who do not participate but does not elaborate on what it deems to be requiring participation or penalization.

After enactment of the Affordable Care Act and twelve years after the enforcement guidance, on May 10, 2012, the American Bar Association's Joint Committee on Employee Benefits held a meeting with EEOC staff.

In this meeting, after explaining that starting in 2014 the ACA provisions of Section 2705(j) of the Public Health Service Act (PHS Act) would permit an employer to offer a financial incentive of up to 30 percent of the cost of employee-only coverage for an employee's participation in a standards-based wellness program (up to 50 percent for a tobacco cessation program), the first question asked was whether the ADA prohibits the standards-based wellness programs contemplated by Section 2705(j).

This question was followed up with: If not, are there policies or practices that the EEOC staff would recommend an employer adopt as part of its wellness program to avoid potential ADA violations when an employer offers a financial incentive of this magnitude?

The EEOC staff noted that the question was similar to questions asked in the past and that the answer was essentially the same: "Programs that include disability-related inquiries and/or require medical examinations will violate the ADA if they are involuntary."

The EEOC said 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 and/or requires medical examinations (such as examinations for the purpose of determining whether an employee has met certain health standards), would render the program involuntary.

In a Jan. 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.” (54 DLR A-6, 3/20/13)

The EEOC, which is charged with the interpretation and enforcement of Title I of the ADA, has provided no other guidance on the matter. Relying upon the definition of involuntary as set forth in the 2000 Enforcement Guidance, as being a program which requires participation or penalizes non-participation, the EEOC’s TRO memorandum in *Honeywell* and complaints in *Orion* and *Flambeau* are unable to specifically identify what constitutes “voluntary” participation in a wellness program.

What they do emphasize are the financial penalties for non-participation: (i) full premium plus a surcharge in *Orion*; (ii) full COBRA premium in *Flambeau*; and (iii) in *Honeywell*, premium surcharges and withholding of an HSA contribution (arguably a reward turned penalty upon withholding). Without a supporting definition, the EEOC merely argues these are “large” or “substantial” financial penalties and in *Honeywell*, contrasts them to a “mere nominal incentive,” leading employers to speculate that the EEOC’s understanding of the term voluntary may turn on the size or amount of a financial reward or penalty. This is despite the fact that it appears the incentives under the *Honeywell* program were carefully designed to comply and did comply with the ACA’s guidelines for incentives.

The EEOC does not allege that the wellness programs explicitly require participation; rather, the TRO memorandum and complaints attempt to argue that the participants implicitly have no choice. In all three proceedings, the EEOC argues that the threat of the above-mentioned financial “penalties” coupled with other actions by the employer creates a “requirement” to participate in the medical exams.

Sue First, Guidance Later

In commenting on the cases, John Hendrickson, EEOC Chicago Regional Attorney states that “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.” See <http://www1.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>.

This statement seems consistent with the notion that the EEOC sees as voluntary a “mere nominal incentive” for participation, but as dollar amounts increase so too does the likelihood that the EEOC will see 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 EEOC believe the scale tips?

In its spring regulatory agenda issued 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 (102 DLR C-1, 5/28/14). To date, the EEOC has yet to do so. Speaking at an Oct. 2, 2014, client 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.

On Nov. 21, 2014, the EEOC issued its fall 2014 regulatory agenda (227 DLR B-1, 11/25/14), which reflects the EEOC’s intention to release proposed rules that would amend its ADA (and GINA) regulations to address the matter. According to the fall 2014 agenda, a Notice of Proposed Rulemaking is scheduled for February 2015. As noted, however, the EEOC has not met its prior regulatory agenda so it is not certain that a proposed rule will be published in February.

With the lawsuits against wellness programs piling up and long awaited guidance still just a promise, many find the EEOC’s strategy both unfair and confusing in light of the detailed wellness program guidance provided by the EEOC’s sister agencies.

Affordable Care Act Compliance Is Not Enough

In a “tri-agency” effort to interpret and enforce the ACA and many of the laws it amended, including the Health Insurance Portability and Accountability Act (HIPAA), the departments of Health and Human Services, Labor, and Treasury have issued significant 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 (although such programs must offer alternatives to those who cannot medically meet the standards).

Final ACA regulations authorize rewards under health-contingent wellness programs up to 30 percent of the cost of health coverage, or, for programs designed to prevent or reduce tobacco use, 50 percent. No limits on rewards are imposed on “participatory” wellness programs, which generally provide rewards without regard to an individual’s health status (e.g., programs that provide a reward to employees who complete an HRA without further action).

Nonetheless, the EEOC’s *Honeywell* TRO memorandum argues that adherence to this clear tri-agency guidance does not obviate potential ADA allegation violations. The EEOC argues that a wellness program can offer rewards compliant with the ACA and HIPAA while simultaneously being an “involuntary” program violation of the ADA.

The EEOC also alleges that GINA prohibits employers from offering employees incentives to obtain family medical history information. The EEOC’s *Honeywell* TRO memorandum argues 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, although a wellness program can offer employees reward incentives in compliance with GINA and the ADA, the incentives cannot be connected to medical information related 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 “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." The EEOC does not explain how a spouse's HRA responses can be problematic given that a spouse is not genetically related to the employee.

Potential Impact: ACA's Policy Goals Are Undercut and Exposure to the Cadillac Tax Increases

Tri-agency guidance has made clear that implementing and expanding employer wellness programs offers our nation the opportunity to 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."

It is problematic that the three recent wellness program lawsuits were filed by the agency that has not provided—for 14 years—regularly requested significant guidance on 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 pushing a plethora of guidance and encouragement to implement and utilize the ACA's wellness program incentives. Not so surprising is the resulting forecast: a perfect storm that may engulf the laudable policy goals of promoting affordable healthcare and transforming America's workers into a healthier and more productive workforce, but could very easily lead to fewer healthcare benefits or more "Cadillac" taxes in 2018 due to higher health premiums.

Absent reasonable EEOC guidance, coupled with concerns over how to promote participation through reasonable incentives and costs without undue litigation risks could cripple the use of wellness programs as some employers may not want to operate wellness programs if they risk a surprise EEOC lawsuit. Alternatively, they may be forced to design wellness programs that cannot use features proven to increase participation, as in the Honeywell program.

Understanding the Impact

According to a 2014 Kaiser Family Foundation and Health Research & Educational Trust annual survey of employer-sponsored health benefits, 98 percent of employers with over 200 workers, and 73 percent of smaller employers, now offer some sort of wellness program (186 DLR A-9, 9/25/08). These data show that a majority of employers are potentially vulnerable to allegations similar to those made in the EEOC lawsuits. In addition, the EEOC lawsuits create difficulties for those who design and offer wellness programs to employers.

The EEOC's silence on what type of financial inducements turn a wellness program into a potential ADA lawsuit creates confusion and uncertainty. And, its failure to indicate whether and how it makes a difference if an incentive is styled as a reward or a penalty—when it

has the same practical and financial effect—further reflects that the EEOC has been moving in an inappropriate and unsupported direction. The impact of a \$50 reward or a \$50 penalty is identical—\$50 to the employee.

Semantics appear to carry consequential import with the EEOC. The EEOC's TRO memorandum alleges that "Honeywell violates GINA by imposing penalties" (or withholding inducements if that is the language preferred by Honeywell). This statement calls into question what little guidance the EEOC has thus far provided; namely, in its Jan. 18, 2013, informal discussion letter the EEOC stated that "the EEOC has not taken a position on whether . . . withholding of the reward from non-participants constitutes a penalty."

Given the EEOC's lawsuits, employers should ensure that health contingent wellness programs are sensitive to the ADA's reasonable accommodations provisions. In addition, it may be prudent for employers to clearly assure employees that any medical information they may disclose is *never* available to a supervisor making employment related decisions. Employers also should ensure that the consequences of a failure to participate in a wellness program do not prevent access to health coverage. And, of course, a refusal to participate should not be a factor in an employee's continued employment.

As to GINA, employers can only urge the EEOC to adopt a commonsense approach to what constitutes genetic information. Clearly, a spouse's HRA responses should not constitute genetic information because the spouse is not genetically related to the employee.

Possible Safe Harbor

Lastly, employers are well advised to review the decision in *Seff v. Broward County*, 691 F. 3d 1221, 26 AD Cases 1153 (11th Cir. 2012) (161 DLR A-1, 8/20/12), where the U.S. Court of Appeals for the Eleventh Circuit found that a wellness program that was established as a term of Broward County, Fla.'s, insured group health plan fit within the ADA's bona fide benefit plan safe harbor provision. In so ruling, the wellness program essentially bypassed the EEOC's "voluntary" analysis as it was exempt from the ADA requirements regarding medical examinations and inquiries.

Thus, the argument is that the safe harbor exception means that incentives or surcharges are not analyzed as to whether they meet EEOC's view of not interfering with an employee's voluntary choice of whether to participate in a wellness program.

Seff v. Broward County was a case of first impression and the EEOC unconvincingly argued in its *Honeywell* TRO memorandum that the "*Seff* analysis is inconsistent with the language, the legislative history and purposes of the safe harbor provision," but the fact remains that at least one circuit has determined that the ADA's bona fide benefit plan safe harbor provision can apply to wellness programs integrated into a health benefits plan. Designing a wellness program to be part of a health benefits plan, therefore, is plainly worth consideration.

Clearly, employers and wellness program providers should proceed carefully and closely watch both EEOC's wellness program litigation and proposed regulations under the ADA and GINA—when they are finally issued.