

JUST WHAT THE DOCTOR ORDERED? TIPS FOR EMPLOYEE WELLNESS PROGRAMS

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Workplace wellness programs have gained popularity over the past several years. According to the Equal Employment Opportunity Commission (“EEOC”), 94 percent of employers with more than 200 employees and 63 percent of companies with fewer employees have some sort of wellness program.¹ These programs take many forms. Employers promote health for their employees in many ways, including subsidizing gym memberships or healthcare premiums, providing access to weight-loss or smoking-cessation programs, and improving healthful snack selections in break rooms.

Employers can conduct voluntary medical examinations and activities to further a voluntary wellness program.² A wellness program is voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate.” *Id.* However, there is very little guidance about what constitutes a reward or penalty. In 2013, the EEOC stated in an informal guidance letter that it “has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary.”³

Amid the uncertainty, wellness programs have come under fire by the EEOC in recent months. In late 2014, the EEOC filed three lawsuits alleging that companies violated various federal statutes with their wellness programs. Accordingly, companies wishing to implement wellness programs must be aware of the risks.



CHALLENGES BY THE EEOC

The first of the EEOC’s lawsuits concerning wellness programs was *EEOC v. Orion Energy Systems*. In that case, the EEOC alleges that an employee was required to undergo a medical examination and answer inquiries related to possible disabilities. The EEOC alleges those requirements violate the Americans with Disabilities Act (“ADA”) because they are medical examinations not related to the employee’s job, and the examinations are not voluntary. The medical examination included a fitness component that required the use of a range-of-motion machine, a disclosure of medical history, and a blood draw. When the employee refused to participate in the wellness program, the company declined to pay any portion of her insurance premium, even

though the company paid the full premiums for employees who participated in the wellness program. The EEOC alleges the employee was soon terminated in retaliation for attempting to exercise her rights under the ADA.

In late September, the EEOC filed *EEOC v. Flambeau, Inc.* That case also involves an alleged violation of the ADA as well. The EEOC alleges that an employee on medical leave was unable to complete biometric testing and a health-risk assessment, which included a blood draw and medical history. Because the employee was unable to complete the testing, the EEOC alleges that Flambeau terminated the employee’s health insurance, even though Flambeau paid 75 percent of an employee’s insurance premium if that employee participated in the wellness program.

In *EEOC v. Honeywell International*, the EEOC alleged that the company’s wellness program violates Title VII of the Civil Rights Act (“Title VII”), the ADA, and the Genetic Information Nondiscrimination Act (“GINA”). According to the complaint, the company’s wellness program was not voluntary because employees and their spouses were being required to undergo biometric testing. The biometric testing included a blood draw and would test for blood pressure, HDL cholesterol, total cholesterol, height, weight, waist circumference, nicotine, and cotinine. The complaint further alleges that if the employee or spouse refuses to participate in the biometric testing, the employee will lose HSA contributions from Honeywell and that the employee will be charged up to \$2500 in surcharges.

The EEOC is expected to publish some guidance regarding workplace wellness programs in early 2015. In the meantime, these

three cases bring significant uncertainty to the world of wellness programs. Until courts provide some clarity on the issues in *Orion*, *Flambeau*, and *Honeywell*, it is imperative that companies understand how wellness programs interact with various federal laws when they have or are considering these programs.

THE AFFORDABLE CARE ACT AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

The Affordable Care Act (“ACA”) specifies that one of its objectives is to promote “participatory wellness programs.” The ACA and the Health Insurance Portability and Accountability Act (“HIPPA”) set out the rules for two categories of corporate wellness programs – (1) those available without regard to an individual’s health status, and (2) “health-contingent wellness programs.” The former is known as a participatory wellness program and may include programs that subsidize health club memberships, rewards for attendance at company-sponsored health education, or completion of a health risk assessment without requiring them to take further action. “Health-contingent wellness programs” may require individuals to meet a specific standard to obtain a reward. Examples of health-contingent wellness programs include rewarding non-smokers or quitters, or persons who achieve specified cholesterol level or weight as well as to those who fail to meet that biometric target but take certain additional required actions.

As to the incentives allowed by the ACA for employee participation in such programs, they are flexible but would not appear to include the shifting of all premium to an employee who declines to participate. The rule which has been jointly proposed by six federal agencies, “Incentives for Nondiscriminatory Wellness Programs in Group Health Plans,” states: “[T]hese proposed regulations would continue to permit rewards to 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, the value of a benefit that otherwise would not be provided under the plan, or other financial or nonfinancial incentives or disincentives.”

THE AMERICANS WITH DISABILITIES ACT AND THE GENETIC INFORMATION NONDISCRIMINATION ACT

The ADA and GINA also each authorize employers to obtain medical and family health history information as part of a *voluntary wellness program*, if certain requirements are met. The individual receiving the services must give prior, voluntary, knowing, and written authorization. Under the ADA, an employer is otherwise barred from inquiring into health conditions unless they are job-related and consistent with business necessity. Under GINA, an employer is barred from using individuals’ genetic information when making employment decisions. GINA also prevents the request or purchasing of genetic information, and strictly limits the disclosure of such information. Further, GINA prohibits “offering inducements” to obtain family medical histories from employees.

However, GINA does allow employers to offer financial inducements for participation in disease management programs or other programs that encourage healthy lifestyles, such as programs that provide coaching to employees attempting to meet particular health goals (e.g., achieving a certain weight, cholesterol level, or blood pressure).

WHAT CAN EMPLOYERS DO?

So, then, under the ACA, ADA, HIPPA and GINA, employers are expressly authorized to offer wellness programs in which they may obtain employee health information and to provide rewards or incentives. As noted at the beginning of this article, sometime in 2015, the EEOC is expected to finally issue some guidance to employers as to what the agency deems to be a penalty rather than a reward. In the meantime, employers are not without guidance from other agencies. In particular, the Department of Labor has published FAQ sheets which do provide guidance, and they are the same guidance currently in the proposed rules for the ACA.

Reward, Don’t Penalize

Do not penalize employees for declining participation by refusing to pay any part of their insurance premiums. As to health-contingent programs, the rules would allow a maximum reward of 20 percent to 30 per-

cent of the cost of health coverage, and increase the maximum reward to as much as 50 percent for programs designed to prevent or reduce tobacco use. Adherence to these limits should afford protection from enforcement by the EEOC, as the agency tasked to consider whether incentives constitute discrimination under the ADA’s standards.

Protect Privacy

As to programs in which employees consent to any collection or disclosure of health information (blood tests, biometric screening, blood pressure, family history), the employer should ensure that the program scrupulously safeguards the privacy of that information. Who has access to that information and for what purpose? Is it available to any individual who could conceivably affect the employee’s employment? Such access, when the information is not job-related and consistent with business necessity, could be another source for a claim under the ADA.

Do Not Require Family Participation

Regardless of whether GINA is intended to protect an employee from disclosure of his or her spouse’s health information, programs requiring the participation of a spouse are especially dangerous, in the opinion of the authors. This is because that crosses over to requiring the participation of a third party as a condition of the employee obtaining a benefit to which he or she would otherwise be entitled based solely on their own consent, as authorized by the ADA, GINA, HIPPA and the ACA.



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¹ “EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee,” <http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm>.

² “Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act,” <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

³ “ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations” (January 18, 2013) http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.