Insight

IN-DEPTH DISCUSSION

JANUARY 8, 2016

The Wellness Program Awakens: District Court Rejects EEOC Challenge in Flambeau

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Wellness programs, already something of a force in the group health plan industry, received a shot in the arm at the end of 2015 when a federal district court in Wisconsin ruled that an employer may require compliance with a wellness program as a condition for participation in its group health plan, without violating the Americans with Disabilities Act (ADA).[1]

In the arduous struggle for effective wellness programs as part of a well-designed group health plan, the EEOC's recent challenges to such programs as violating the ADA and the Genetic Information Nondiscrimination Act (GINA) have been particularly daunting.[2] This became particularly so in 2014 when the EEOC filed three lawsuits challenging the legality of such programs.

EEOC Challenges to Wellness Programs: A Brief History

The ADA prohibits a covered employer from making health-related inquiries or requiring medical examination of employees. In response to HIPAA, wellness programs featuring health risk assessments, questionnaires, and health screening exams emerged as a critical element of group health plan design in the 1990s. The EEOC took the position that they were subject to the ADA and, by 2009, took the position that a wellness program consisting of a health risk assessment or screening exam would comply with the ADA only if it was "voluntary." The EEOC refused, however, to take a position on what level or amount of financial incentive would render such a program non-voluntary.[3]

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1 *EEOC v. Flambeau, Inc.*, 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 30, 2015).

2 *See* Ilyse Schuman and Michael J. Lotito, *Lawmakers Introduce Legislation Providing Clarity on Employee Wellness Programs*, Littler ASAP (Mar. 3, 2015); Ilyse Schuman, *EEOC Must Provide Clarity on Wellness Programs, Senate Hearing Panelists Testify*, Littler ASAP (Jan. 29, 2015).

3 *See* Russell Chapman, *Double Whammy – EEOC ADA Opinion Letter and GINA Interim Final Regulations Restrict Health Risk Assessments in Wellness Initiatives*, Littler Insight (Dec. 2, 2009); Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler Insight (Aug. 8, 2013).

In 2014, the EEOC's assault on employer-provided wellness programs began in earnest when the agency filed a trio of lawsuits challenging employers sponsoring such initiatives.

On August 20, 2014, the EEOC filed a lawsuit against Orion Energy Systems, Inc. in the Western District of Wisconsin, alleging that the company's wellness program, which requires employees to complete a health risk questionnaire and screening, is unlawful under the ADA.[4] Failure to comply with the wellness program requirements would cause the employee to forgo any employer contributions to the health plan premium. The EEOC's lawsuit also alleged that an employee was terminated after she complained about the wellness program.

On October 27, 2014, the EEOC brought suit against Honeywell International, Inc. in a Minnesota federal court, requesting a temporary restraining order enjoining the company from continuing to operate its wellness program, which required employee participants in the group health plan and their covered spouses to complete biometric screenings, and refrain from tobacco use (or complete a tobacco cessation program). Noncompliance would result in surcharges to the employee's share of their health plan premiums. The district court denied the EEOC's request for injunctive relief on the grounds that the EEOC had not shown a threat of irreparable harm. The case was later voluntarily dismissed.

On September 30, 2014, the EEOC sued Flambeau, Inc., a plastics manufacturer, in the Western District of Wisconsin, alleging that its wellness program, which required employees to complete a health risk assessment and biometric testing in order to be eligible for participation in the company's group health plan, violated the ADA's prohibition against medical questions or examinations, unless they are voluntary, job-related or subject to business necessity.

The EEOC was criticized for filing lawsuits against employers when the agency had not provided any guidance regarding what it would consider a compliant wellness program under the ADA or GINA. In April of 2015, the EEOC issued proposed regulations setting out conditions under which a wellness program requiring that participants complete a health risk assessment or undergo a health screen in order to receive a reward under the program may comply with the ADA's voluntariness exemption.[5] On October 30, 2015, the EEOC issued a notice of proposed rulemaking proposing rules under which a wellness program as part of an employer's group health plan may avoid violating GINA.[6]

On December 30, 2015, the latest development in the saga of the mandatory wellness program went decidedly in favor of employers.

The Flambeau Wellness Program

The wellness program established by Flambeau was ordinary in its requirements, but the reward for participation pushed the limits of wellness plan design. To enroll in the Company's group health plan, employees were required to complete a medical history questionnaire and a health screening that included blood testing, blood pressure, and height and weight measurement, among other tests. The company used the aggregated data from these tests to design its group health plan, determine premium levels and adjust

4 *See* Russell Chapman, *EEOC Directly Challenges Wellness Program for the First Time*, Littler ASAP (Aug. 29, 2014).

5 *See* Ilyse Schuman, Russell Chapman and Michelle Thomas, *EEOC Issues Long-Awaited Proposed Rule on Employer Wellness Programs*, Littler Insight (May 14, 2015).

6 *See* Ilyse Schuman, Russell Chapman, and Barry Hartstein, *The EEOC Issues Proposed Rule on GINA and Wellness Programs*, Littler Insight (Nov. 17, 2015).

certain cost-sharing features of the plan. The company also used the data to design additional programs intended to promote healthy life choices.

When one employee failed to be tested and was therefore not eligible for coverage for the 2012 plan year, the company offered him COBRA coverage for that year. The company later permitted him to undergo testing and be enrolled in the plan retroactively to the first day of the plan year after he filed a union grievance and complained to the EEOC. Nevertheless, the EEOC filed suit, alleging that the wellness program violated the ADA's prohibition against mandatory physical examinations and medical questionnaires.[7] The EEOC did not allege that the company's wellness program violated GINA.

Which Exemption Applies?

The EEOC's legal position regarding wellness programs is that only the "voluntariness" standard is relevant to determining whether the program complies with – or violates – the ADA.[8] This exemption from the medical examination and inquiry prohibition is very narrow, explicitly stating that the program must be made "available to employees at that work site."

However, another exemption from the ADA is available for an employer. A separate provision exempts an employer from the ADA for establishing, sponsoring, observing or administering the terms of a bona fide benefit plan, among other requirements.[9]

Flambeau moved for summary judgment, arguing that this bona fide benefit plan "safe harbor" exempted its wellness program from the ADA. The district court agreed and dismissed the EEOC's suit, relying on the district court's opinion in the *Seff v. Broward County* case, in which the court held that a governmental employer's wellness program, established as part of its insured group health plan, did not violate ADA because the program was exempt under the ADA's "bona fide plan" exception. This decision was later affirmed by the Eleventh Circuit.[10]

The Court Rejects EEOC's "Superfluous" Argument

The EEOC argued that the "voluntariness" exception was designed specifically for wellness programs, and therefore, if the court were to apply the "safe harbor" to the company's wellness program, the voluntariness exception would effectively be nullified.[11]

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7 42 U.S.C. § 12112(d)(4)(A).

8 42 U.S.C. § 12112(d)(4)(B), which provides, in part: "A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."

9 42 U.S.C. § 12201(c)(2), which provides, in part: (c) Insurance [Subchapter I of the ADA] shall not be construed to prohibit or restrict ... (2) [a covered employer] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law .. [provided that the exemption] shall not be used as a subterfuge to evade the purposes of [Subchapter I of the ADA]."

10 *Seff v. Broward County*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), aff'd, 691 F.3d 1221 (11th Cir. 2012); *.see* Russell Chapman, *New Life: The Eleventh Circuit Turns Back ADA Challenge to Employer's Wellness Program*, Littler Insight (Aug. 23, 2012).

11 The EEOC's argument on this point is summarized in footnote 24 to the proposed ADA wellness regulations: "The Commission does not believe that the ADA's 'safe harbor' provision applicable to insurance, as interpreted by the court in *Seff v. Broward County*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), affirmed, 691 F.3d 1221 (11th Cir. 2012), is the proper basis for finding wellness program incentives permissible. The ADA contains a clear 'safe harbor' for wellness programs—the 'voluntary' provision at 42 U.S.C. 12112(d)(4)(B). See H.R. Rep. 101–485, pt. 2, at 51 ('A growing number of employers today are offering voluntary wellness programs in the workplace. These programs often include medical screening for high blood pressure, weight control, cancer detection, and the like. 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 of preventing occupational advancement, these activities would fall within the purview of accepted activities.'). Reading the insurance safe harbor as exempting these programs from coverage would render the 'voluntary' provision superfluous."

The district court rejected this argument, noting: "The § 12201(c)(2) safe harbor provides an exception for medical examinations that are tied to employers' insurance plans, while § 12112(d)(4)(B) provides an exception for medical examinations that are part of 'employee health programs' regardless whether the employer sponsors any sort of employee benefit plan at all."

The court's observation hits the mark perfectly. An employer could establish a voluntary wellness program that asks employees to fill out a health questionnaire without establishing an employee benefit plan. This would be the case even if, as a result of the answers to the questionnaire, the employer (or a wellness third party provider) provided employees with educational health information on the conditions disclosed.[12]

The bona fide benefit plan safe harbor covers programs outside the scope of a program described in the voluntariness exemption. The safe harbor requires the program to be a part of a bona fide benefit plan while the voluntariness exemption does not. Under the voluntariness exemption, the program need only be voluntary; there are no further conditions imposed, other than that the program be health-related and offered "to employees at that work site."[13] But under the safe harbor, the program must meet additional requirements, such as, in the case of a plan subject to state law requirements (such as an insured group health plan), it must be "based on underwriting risks, classifying risks, or administering such risks" in compliance with that state law, and in addition must not be a subterfuge for avoiding the substantive provisions of the ADA.

The EEOC's objection that applying the safe harbor exemption to wellness programs would "overrun entirely" the voluntariness exemption fails given the court's observation that the two exemptions "may overlap but the latter exception is rendered irrelevant only when the wellness program at issue is included as part of an employer's benefit plan." The fact that many such health risk assessment programs are established outside the bounds of a group health plan means that the voluntariness exemption and the safe harbor are not coextensive.

The court further held that a wellness program could be protected by both exemptions, and that the canon of statutory construction requiring the courts to read exceptions to remedial statutes "narrowly" did not mean that the court was allowed "to ignore the exception altogether so as to deprive a party of its protections whenever the party's conduct falls within the exception's scope."

Applying the Safe Harbor to the Flambeau Wellness Program

The court then examined Flambeau's wellness program, noting that compliance with the program was a condition for eligibility for participation in the group health plan, making it "difficult to fathom how such a condition could be anything other than a plan term." The court rejected the EEOC's argument that

12 A wellness program would not constitute an "employee welfare benefit plan" as defined in Section 3(1) of ERISA, unless it provided a welfare benefit, in this case, health or medical benefits, along with additional factors. Merely providing educational materials regarding health conditions would not ordinarily constitute health care for this purpose. A wellness program could, however, cross the line and become a standalone group health plan if it provided benefits in the form of health care. See, e.g., DOL Information Letter to Joseph Dunn (Nov. 17, 1993) ("[A] wellness program meets the standard of an 'employee welfare plan' under ERISA to the extent the program provides 'medical care' in the form of programs that are diagnostic or preventive, or that 'coach' for certain identified health risks"). A representative example of the definition of "health care" used for identifying a group health plan appears in the COBRA regulations: "[H]ealth care generally includes the diagnosis, cure, mitigation, treatment, or prevention of disease, and any other undertaking for the purpose of affecting any structure or function of the body. Health care also includes transportation primarily for and essential to health care as described in the preceding sentence." Treas. Reg. §54.4980B-2.

13 This points out another distinction between wellness programs under the "voluntariness" exemption, 42 U.S.C. § 12112(d)(4)(B), and those under the bona fide benefit plan "safe harbor," 42 U.S.C. § 12201(c)(2). The former requires the program to be offered to "employees at that work site." Group health plans, and their accompanying wellness programs, are often offered to dependents and cannot be necessarily be said to be offered "at that work site."

the wellness requirement was required to be found within the four corners of the collective bargaining agreement, the insurance document itself, or the summary plan description (SPD), which stated that plan enrollment procedures would be "prescribed" by the company.

The court then held that the wellness requirement met the risk management and underwriting provisions of the safe harbor, since they were used by the company "in the process of developing the insurance plan." The court rejected the EEOC's argument that the wellness program must be "necessary" to the company in developing the plan, emphasizing the company's ability to develop the plan in the absence of the wellness program does not defeat the safe harbor as it makes no such requirement.

As other courts have done, the Wisconsin court then determined that the wellness program did not violate the "subterfuge" provision of the safe harbor, since it did not impose a disability-based distinction for the purpose of discriminating against employees "in a non-fringe benefit aspect of employment." In other words, the program was not scheme, plan, stratagem, or artifice for the purpose of inducing disabled employees to quit the company. In fact, the court noted that because any employee, regardless of disability status, was required to complete the wellness requirements in order to enroll in the group health insurance plan, and because there was no evidence that Flambeau had used the data to discriminate against disabled employees, the wellness program did not discriminate against or even relate to the disabled "in any way."

The court dismissed the EEOC's case.

Next Steps

Employers should make sure that their wellness programs are fully compliant with the existing final wellness regulations under the Affordable Care Act. Beyond that, employers should take additional measures to help ensure that their wellness programs are compliant under other existing laws, such as the ADA and GINA.

In this regard, employers should be aware that the EEOC is not likely to reverse its position on wellness programs because of this setback. The agency has staked out its position and can be expected to continue to pursue wellness programs that do not fits the EEOC's concept of an ADA-compliant program.

This leaves employers with two basic choices.

First, the EEOC has issued proposed regulations setting out a framework that may be followed by employers designing wellness programs that will be consistent with the EEOC's views. These proposed regulations, as we have noted elsewhere, are more restrictive than wellness program regulations under the Affordable Care Act. Further, the regulations are in proposed form at this time, so not effective or binding. It is doubtful, however, that the EEOC would challenge a wellness program that is in compliance with its own proposed regulations. Once finalized, these regulations may be viewed as a further, if more restrictive, "safe harbor" from the EEOC's ADA and GINA challenges to wellness programs.

Second, an employer may design its wellness initiative outside the restrictions imposed by the EEOC in its proposed rulemaking, relying on the ADA's "safe harbor" exemption, per the *Seff* and *Flambeau* cases. An employer taking this approach should, however, be prepared for a possible challenge, particularly if the wellness program imposes a severe penalty for noncompliance, such as ineligibility for participation in the group health plan, or a requirement that the employee pay the entire cost of plan coverage. An employer

willing to accept this risk by bringing its wellness program within the ADA's "safe harbor"—but outside the EEOC's "voluntariness" exemption—should take precautions that its wellness program in fact meets all of the requirements of that provision.

Employers that currently maintain or are contemplating starting a wellness program as part of their group health plan should monitor this situation closely and stay tuned for further legal developments.