Labor and Employment Alert: Warning for Wellness Programs – EEOC Sues Over Typical Wellness Program

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Although the Internal Revenue Service (IRS) and the Department of Labor (DOL) have agreed on standards for wellness programs, and Congress seemed to have blessed those standards when it authorized higher levels of incentives in wellness programs as part of the Affordable Care Act (ACA), the Equal Employment Opportunity Commission (EEOC) has long expressed concerns about those standards. You can see our 2013 client alert, Changes for Wellness Plans, on the IRS and DOL standards and the uncertainty about the EEOC position.

The EEOC is now taking a more aggressive position against wellness programs. So far this year, the EEOC has filed three lawsuits against employers asserting that their wellness program violated the Americans with Disabilities Act (ADA).

The first two lawsuits challenged unusual wellness programs that had harsh penalties for employees who did not participate in the wellness program. For example, in one case an employee who refused to participate in the wellness program had to pay the full premium cost for health coverage and was subsequently fired for complaining about the program.

But on Monday, October 27, 2014, the EEOC took aim at a typical wellness program. The EEOC filed for a temporary restraining order (TRO) in the United States District Court for the District of Minnesota, seeking to stop Honeywell International, Inc., from enforcing the standards under its wellness program. The EEOC argues that, even though Honeywell's wellness program fully complied with the ACA, IRS and DOL standards for wellness programs, Honeywell's wellness program violated both the ADA and the Genetic Information Nondiscrimination Act (GINA). The hearing on the TRO is set for Monday, November 3, 2014.

Honeywell's wellness program for 2015 would require employees and their spouses to complete certain biometric screening tests or face higher costs (up to $4,000 per year). The biometric screenings measure

factors like blood pressure, cholesterol, glucose levels, cotinine levels (to check for tobacco use), and BMI as part of a wellness check for Honeywell employees and their spouses. The screening requires the drawing of two vials of blood.

Under Honeywell's wellness program, employees face annual surcharges of $500 if they refuse to take the tests, a $1,000 annual "tobacco surcharge" if the employee refuses to take the test (regardless of reason), and an additional $1,000 "tobacco surcharge" if the employee's spouse would be covered by the plan and refuses to take the test (regardless of reason). Employees who submitted to the testing also receive an employer contribution to their health savings accounts of up to $1,500.

The EEOC alleges that, if a medical test is not job-related and consistent with business necessity, it must be "voluntary" in the sense that the EEOC would not view the financial penalty for declining to take the test as significant.

The EEOC argues that the only case decided to date on this issue (*Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012)) had been decided incorrectly. In *Seff*, the court found that the wellness program was a legitimate exercise of the plan sponsor's administration of health plan risks and thus was permissible whether or not the medical examination was voluntary.

In addition to the ADA allegations, the EEOC also claimed that the Honeywell wellness program violated GINA. GINA prohibits employers from providing incentives for employees to disclose information related to the manifestation of a disease or disorder in family members. GINA defines "family members" to include spouses even though married couples are not blood relatives, i.e., they do not share a genetic identity.

Because the spousal biometric screening might disclose the manifestation of a disease like diabetes for the spouse, the EEOC is taking the position that the request for that information about a spouse would be an impermissible request for a disclosure about the employee's genetic information.

Note the EEOC takes this position even though there is no penalty for the spouse refusing the general biometric screening. The cotinine level check, which is the only screen for which there is any penalty for a spouse's refusal, would not be genetic information and would be permissible under GINA.

Next steps? For now, just stay tuned. Employers considering changes to their wellness program should consult counsel.

Reminder: See our client alert, Two November Deadlines for Self-Insured Health Plans**.** The deadline for application for a health plan identification number (HPID) is November 5 and the deadline for registration for payment of the reinsurance fee is November 15.

FSA COLA: The IRS just announced a $50 increase (from $2,500 to $2,550) to the limit on employee contributions to health flexible spending accounts (FSAs) for 2015.

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This alert is a summary and cannot include all details that may be relevant to your situation. As always, please contact us if you want more information on these developments or other employee benefits matters.