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EEOC Continues to Challenge Certain Employee Wellness Programs

As employee wellness programs emerged and grew in popularity, employers tried to find creative ways of increasing employee participation. In the beginning, employers used positive, lighthearted incentives like giving away a free pedometer for completing a company "fun run." After learning how companies can save money through employee participation and earn incentives through the Affordable Care Act (ACA), some employers have attempted to use more aggressive approaches, and those actions have garnered attention from the Equal Employment Opportunity Commission. The ACA regulations specifically provide that compliance with the ACA wellness regulations does not necessarily mean that the employer is also in compliance with other federal laws, including the Americans With Disabilities Act ("ADA"), Family and Medical Leave Act ("FMLA") or the Employee Retirement Income Security Act ("ERISA"). This leaves other federal agencies, such as the EEOC, with the ability to hold that ACA compliant wellness programs are discriminatory under the ADA.

Orion Energy Systems of Wisconsin had a wellness program that required employees to disclose their medical history, submit to blood tests and do exercises on the company's own equipment in the fitness room. One employee, Wendy Schobert, refused to participate and questioned whether Orion could guarantee the confidentiality of her medical information. She chose not to disclose her medical history or to exercise at work. Schobert was told that she would be required to pay more than $400 per month to cover her own insurance premiums in addition to a $50 monthly fine for not using the range of motion machine in the company fitness room. Just one month after opting out of the program, Orion fired Schobert.

The EEOC contends that the company terminated Schobert for objecting to the wellness program and stated in the complaint it filed against Orion that the basis for firing her was "pretexual." In an August 20, 2014 statement, the EEOC reminded the public that while wellness programs are meant to be beneficial to the employee and the employer alike, they must be truly voluntary.

Just six weeks later, the EEOC filed a similar lawsuit against Flambeau, Inc. In this case, the EEOC alleged that employees who participated in biometric testing and completed a "health risk

assessment" paid 25% of the medical insurance premium while those who declined were required to pay 100% of the premium and further faced "unspecified discipline" for not attending the testing when it was scheduled for them. Requesting biometric and genetic information from employees is a potentially dangerous idea that was addressed in a previous e-alert covering the case of EEOC v Founders. That e-alert refers to the Genetic Information Nondiscrimination Act (GINA), and a company that violated the rights of employees by requesting information to which it was not entitled. In the Flambeau case, employees were threatened with discipline and cancellation of their insurance coverage if they failed to show up to their scheduled medical testing.

On November 2, 2014, U.S. District Judge Ann Montgomery in Minneapolis was asked by the EEOC to decide whether a wellness program, which Honeywell said was within the guidelines of the Affordable Care Act, conflicts with other federal laws. There, the court denied the EEOC's request to block Honeywell from assessing health insurance-related surcharges against its employees, saying that the court was not ready to make a preliminary decision and would allow the practice to continue for now. As in the other cases, Honeywell's employees are asked to complete biometric testing and they collect a $500 surcharge for the medical plan costs from those who do not complete it. Furthermore, employees who smoke can pay up to $2,000 in surcharges for smoking according to the EEOC complaint, and lose up to $1,500 per year in company contributions to health savings accounts.

These lawsuits show that the EEOC is concerned with wellness programs that appear not to be voluntary. Non-participation in each of these programs was met with "dire consequences" according to an EEOC press release. As Regional attorney for the EEOC's Chicago district, John Hendrickson said "Having to choose between responding to medical exams and inquiries, which are not job related or being fired…is no choice at all." The biometric screening and the use to which it is put may also breach a federal law prohibiting discrimination based on genetic information, according to the EEOC.

Enforcement of the ACA regulations is outside the EEOC's jurisdiction, but it is important to bear in mind the key provisions of the regulations that became effective this year for wellness programs:

- The new regulations raise the maximum permissible reward offered in connection with a health-contingent wellness program to 30 percent of the total cost of employee only coverage. This amount is raised to 50 percent for programs that seek to reduce tobacco use.

- Health contingent programs can come in two forms: "outcome based" and "activity-only."

- Outcome-based wellness programs reward employees for meeting certain goals, such as lowering their body mass index or cholesterol or quitting smoking. A reasonable alternative standard must be provided for all individuals who do not meet the outcome-based standard, to ensure that the program is reasonably designed to improve health and is not a subterfuge for underwriting or reducing benefits based on health status.

- Activity-only wellness programs require individuals to perform or complete an activity related to a health factor in order to obtain a reward, although a particular outcome is not required. Activity-only programs require that a reasonable alternative standard for obtaining the reward be provided to individuals for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to meet the existing standard.

- Program descriptions must describe the availability of the reasonable alternatives available.

- Employers should note that incentive payments generally constitute taxable income to the employee.

It is easy to unintentionally cross a line with regulations and laws changing with great frequency, as well as the EEOC's enforcement agenda. Please contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com) of The Bennett Law Firm for more information.