EEOC Loses Challenge to Workplace Wellness Program

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A federal district court in Wisconsin recently dismissed one of the U.S. Equal Employment Opportunity Commission's ("EEOC") well-publicized attacks on employer wellness programs. Our earlier legal updates regarding this case and some other EEOC challenges can be found here: August 2014 Legal Update and October 2014 Legal Update. In EEOC v. Flambeau, Inc., No. 14-cv-638 (W.D. Wisc. Dec. 30, 2015), the federal district court for the Western District of Wisconsin concluded that Flambeau's program was exempt from the Americans with Disabilities Act's ("ADA") prohibitions on medical examinations and dismissed the EEOC's lawsuit.

The ADA and Wellness Programs

Generally, the ADA prohibits an employer from requiring its employees to submit to medical examinations or inquiries unless participation in the program is "voluntary." However, the ADA also exempts employers from the ADA's prohibitions when establishing and administering a bona fide benefit plan based on underwriting and classifying risks, provided that the exemption is not used to avoid complying with the law.

In April 2015, the EEOC issued proposed regulations that provide further guidance as to the requirements for a "voluntary" program. Those proposed regulations are discussed in more detail here. When issuing the proposed regulations, the EEOC generally took the position that wellness programs were only permissible when meeting the ADA's "voluntary" exception, and such programs did not fall under the ADA's exemption for a bona fide employee benefit plan.

Before issuing those proposed regulations, however, the EEOC aggressively challenged some common wellness program practices by arguing that they violated the ADA.

EEOC's Attacks on Wellness Programs

In three different cases initiated between August and October 2014, the EEOC argued that the financial penalties imposed by the employers made participation in the wellness program effectively involuntary and impermissible under ADA.

- August 2014: the EEOC filed suit against Orion Energy Systems, Inc., for terminating an employee after she allegedly complained about the employer's wellness program, which required employees to complete a health risk assessment and fitness examination to obtain the employer's premium share for its health plan. Employees who did not complete the assessment and examination had to pay the full premium cost.
- September 2014: the EEOC challenged Flambeau, Inc.'s wellness program. As part of Flambeau's wellness program, employees had to complete a health risk assessment and a biometric test along the lines of a routine physical. The employer utilized the data obtained through the

wellness program in the design of its health plan, including establishing the employee premium share, the need for stop-loss coverage, and the amounts of certain co-pays. An employee missed the deadline for completing the assessment and test, and the employee subsequently lost his coverage. The EEOC filed suit and alleged that Flambeau's wellness program violated the ADA's prohibition on medical examinations.

- October 2014: the EEOC filed suit against Honeywell International, Inc., for imposing a $1,500 premium surcharge on employees who did not complete a biometric screening, in addition to a $1,000 surcharge for a spouse who did not complete the screening. Employees who did not complete the screening were also ineligible for contributions from Honeywell to the employee's health savings account. A federal district court ruled against the EEOC's request for an injunction against Honeywell.

The Flambeau Decision

The federal district court rejected the EEOC's position and issued summary judgment in favor of Flambeau. In rejecting the EEOC's position, the court said Flambeau's wellness program fit squarely within the bona fide benefit plan exemption because participation in the program was a condition to eligibility for the insurance, the employer used the data to develop its health plan, and the employer did not make any disability-related distinctions. The court reached this decision even though participation in the wellness program was not expressly referenced in the insurance contract, the collective bargaining agreement, or summary plan description.

Conclusion

While the Flambeau case can still be appealed by the EEOC, the decision is important because it is the second court decision, and the first that specifically applies to Wisconsin employers, to conclude that a wellness program can be exempt under the ADA's "bona fide benefit plan" exemption when such programs are designed and implemented properly. As the use of workplace wellness programs is on the rise, designing a program that fits within the "bona fide benefit plan" exemption may allow employers to take a more flexible approach towards such programs than following the limitations set out in the EEOC's proposed regulations.

If you have any questions about wellness programs or the design and implementation of such a program, please contact Matt Flanary at mflanary@buelowvetter.com or (262) 364-0253 or Brett Schnepper at bschnepper@buelowvetter.com or (262) 364-0262, or your Buelow Vetter attorney.

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