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The State of Wellness Programs

JENNIFER A. MATTHEWS

When the Equal Employment Opportunity Commission ("EEOC") issued its recent final wellness plan rules under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), it was attempting to clarify previous rules and interpretive guidance. And clarification was needed. Even the best-intentioned employers were sometimes unsure whether their wellness programs were compliant. Given the popularity of wellness as a component of benefit offerings, this was becoming increasingly problematic. However, in attempting to settle some of the controversy, the EEOC left certain questions open. While some of the uncertainly may dissipate as case law begins to address current rather than past wellness programs, the state of the law remains unsettled.

In particular, recent case law has revealed two potential issues regarding the new EEOC rules. First, though the EEOC specifically stated that the insurance safe harbor did not apply to wellness programs, there is disagreement between courts (currently, the Seventh Circuit Court of Appeals in *EEOC v. Flambeau Inc.* and the U.S. District Court for the Eastern District of Wisconsin in *EEOC v. Orion Energy Systems, Inc.*) regarding whether it might be possible to structure a wellness program to which the insurance safe harbor applies. Second, while the EEOC provided guidance that wellness program incentives in certain limited amounts do not undermine a program's voluntariness, the EEOC's authority to make such a rule is now being challenged.

EEOC Guidance

In May, 2016, the EEOC issued final rules regarding wellness programs, in particular regarding the relationship between wellness programs, the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The date by which employers have to comply with the rules (the applicability date) is "the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under this rule." To the extent the rules describe limits on incentives, or articulate the requirement that employers provide a notice explaining what medical information will be taken and how the medical information will be used, the rules are intended to only apply prospectively. However, the EEOC considers the remainder of the rules to be just a clarification of existing regulatory framework and, as such, has stated it will also apply them retroactively to employer plans in existence prior to January 1, 2017. Please see http://www.truckerhuss.com/2016/05/eeoc-issues-final-wellness-rules-under-the-ada-and-gina/.

The general ADA rule is that an employer may not require employees to submit to physical exams or respond to inquiries regarding a disability absent a job-related reason or business necessity. However, an employer can ask for information as to its employees' health and require medical exams as part of a voluntary health program. Voluntary health programs includes wellness programs. To be voluntary, a plan must neither require employee participation nor deny coverage for non-participation. In addition, employers may not take or threaten any adverse employment action against employees for non-participation, and must provide appropriate notice regarding the medical information that will be obtained and the purpose for which it will be use. The new EEOC guidance ties the limit on inducements to the type of wellness plan. For example, incentives of no more than 30% of the cost of self-only coverage under the group health plan in which an employee enrolls, where an employer offers the wellness program only to employees enrolled in a group health plan, will not make a wellness program involuntary. It does not matter if the inducement is structured in the form of a penalty or an incentive. The new guidance also says that the insurance safe harbor is not available for wellness programs (see 29 C.F.R. 1630.14(d)(6)). The safe harbor allows collection of medical information by "organizations sponsoring, observing or administering the terms of a bona fide benefit plan that isn't subject to State laws that regulate insurance" 42 U.S.C. 12201(c).

Litigation Backdrop

While the EEOC was finalizing guidance on the application of the ADA and GINA to wellness programs, several lawsuits were brought regarding specific employer wellness programs.

A. *EEOC v. Flambeau, Inc.*

Flambeau required that employees participate in its wellness program as a condition of enrollment in its medical plan. Part of Flambeau's wellness program involved completing a health risk assessment and a biometric screening. When one employee failed to complete the assessment and biometric screening on time, he was denied coverage. The company retroactively reinstated his coverage when he subsequently completed these steps. The employee complained and the EEOC brought suit.

Flambeau moved for summary judgment, both on the ground that its wellness program was covered by the ADA's insurance safe harbor for bona fide benefit plans, and also on the ground that the provisions of its wellness program were voluntary because they were not a condition of employment. The EEOC filed a cross-motion for partial summary judgment on the basis that the insurance safe harbor did not apply. In 2015, the district court granted summary judgment for Flambeau, on the basis that the insurance safe harbor could apply to some wellness programs, including the one in question. The case was appealed.

In January, 2017, the Seventh Circuit Court of Appeals held that Flambeau was properly granted summary judgment, but did so based on the mootness of the case. In the interim, Flambeau had discontinued its wellness program, though this was not due to the ongoing litigation. Instead, the decision had been taken due to an analysis that led the company to believe the wellness program was not cost effective. In addition, the employee in question had left the company, and the Court found that he would not be entitled to recover damages. The Court of Appeals therefore declined to address the merits of the case. The Court did, however, note the fact that the EEOC

regulations had been issued after the events in the case took place. The Court also left open the possibility that the case might succeed on the theory that the safe harbor exception would apply, stating that "the EEOC's theory of discrimination assumes that the ADA's insurance safe harbor does not cover at least some wellness plans. Whether that is true, and for what kinds of wellness plans it might be true, were open questions at relevant times in 2012 and 2013. They remain open even today."

B. *EEOC v. Orion Energy Systems, Inc.*

Orion created a wellness program that, among other things, asked employees to complete a health risk assessment. The health risk assessment included a biometric screening. Those who chose not to complete the health risk assessment could still enroll in the employer-sponsored health insurance plan, but had to pay the entire monthly premium amount. Employees who did complete the health risk assessment still had to pay deductibles, co-pays, and certain out-of-pocket expenses for their medical coverage. Once Orion received the data (in anonymous, aggregated form), it used it to identify common health issues and provide employees with education or assistance in making health improvements. The company's stated reason for the program was to improve overall productivity and lower the company's health care costs. In this case, the employee in question decided not to participate in the health risk assessment and stated that she understood that she would be responsible for the entire monthly premium. Her employment was subsequently terminated, and she contacted the EEOC.

The EEOC brought suit against Orion, alleging violations of the ADA on the basis of an improper wellness program as well as a violation of anti-retaliation provisions. Orion made a motion for summary judgment on the grounds that its wellness program fell into the insurance safe harbor, and also on the grounds that it was a voluntary program. The EEOC made a cross-motion for summary judgment, saying that Orion's program violated the ADA as a matter of law, arguing that it was involuntary and also that the safe harbor rule should not apply.

In September 2016, the District Court for the Eastern District of Wisconsin agreed with the EEOC that the safe harbor rule, as a clarification of existing law, could be applied retroactively. It explicitly declined to follow the holding in *Flambeau*, found that the EEOC had the authority to interpret the ADA to exclude wellness programs from the insurance safe harbor, and held that this interpretation was reasonable. Finally, because Orion's program was not used to underwrite, classify, or administer risk, and the company did not use the information that it obtained to assess the appropriateness of the level of its insurance premiums or to determine what coverage would be offered under its health plan, the court ruled that the safe harbor provision would not apply to Orion's wellness program. However, the court did grant summary judgment for Orion on the basis that its program was voluntary. In doing so the court found that the new standard would not apply retroactively, and so did not analyze the level of incentives in the company wellness program.

C. *AARP v. EEOC*

In October 2016, the American Association of Retired Persons ("AARP") brought suit against the EEOC, alleging that the new rules represented a significant and impermissible departure from the old standard. The basis was that the new rules went too far in curtailing existing medical privacy rights, particularly for older workers. Specifically, the AARP's case alleged that wellness programs that require the provision of health information can only really be voluntary if employers can

neither require participation nor penalize employees who opt not to disclose their private information. It argues that the EEOC rule regarding incentives is too permissive, that incentives that fall within the limits may still represent double or triple an individual's existing health costs. Thus, when applied in the real world, an incentive of this sort may undercut Congressional intent to protect worker privacy and, hence, to limit employment discrimination.

In December 2016, the AARP attempted to have the District Court in the District of Columbia issue a preliminary injunction to stop the implementation of the EEOC rules that was planned for January 1, 2017. The preliminary injunction was denied and the EEOC's rules are now in effect; however, the case is still ongoing.

D. H.R. 1313

On March 2, 2017, Congresswoman Virginia Foxx introduced a bill to clarify rules relating to nondiscriminatory wellness programs. The language in the bill states that the insurance safe harbor will apply to workplace wellness programs and leaves in place the current incentive caps.

Takeaways

The limits of the EEOC guidance continue to be tested. Whether the insurance safe harbor can still exist for wellness programs (for example, those that are explicitly structured to underwrite company risks and otherwise meet the language of the statute) remains to be seen. Presuming the AARP case continues, the appropriateness of the EEOC's rule on incentives will be formally reviewed. Or, Congress may intervene and help resolve some of the controversy. Employers should continue to monitor these developments and consider how the objectives and operation of their respective wellness programs may be seen in the light of the developing law.

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EMAIL JENNIFER MATTHEWS