Learning From Others' Mistakes: Litigation Update on Wellness Plans

(or How to Keep Your Wellness Plan Feeling Well)

Presented by Anne-Tyler Morgan

Responsive 24/7

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The Rule

On May 29, 2013, the Department of Labor, the Department of the Treasury, and the Department for Health and Human Services finalized rules regarding wellness programs offered in conjunction with group health plans.

These changes were made in light of the Affordable Care Act.

The Rule

Prior to the enactment of the Affordable Care Act, HIPAA provisions generally prohibited group health plans and group health insurance issuers from discriminating against individual participants and beneficiaries in eligibility, benefits, or premiums based on a health factor.

The exception to the general rule allows **premium discounts, rebates, or modifications** to otherwise applicable cost-sharing systems (including copayments, deductibles, or coinsurance) in return for adherence to certain programs promoting health or preventing disease.

Types of Wellness Programs

I. Participatory Wellness Programs
II. Health Contingent Wellness Programs
    1. Activity-Only
    2. Outcome Based

So far, so good…right?

The EEOC

August 20, 2014 – The Equal Employment Opportunities Commission files suit against Orion Energy Systems.

October 1, 2014 – The EEOC files suit against Flambeau, Inc.

October 27, 2014 – The EEOC files suit against Honeywell International.

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The EEOC

"'The most common intersection of these programs and the statutes EEOC enforces occurs when the programs require medical exams or ask disability-related questions, both of which would ordinarily give rise to a violation of the Americans with Disabilities Act (ADA),' EEOC Acting Associate Legal Counsel Christopher Kuczynski told the commission.

…

Some panelists also argued that EEOC's regulations under the Genetic Information Nondiscrimination Act (GINA)-which prohibits acquiring genetic information including family medical history--should provide guidance on whether spouses of employees may be asked for health information in the context of wellness programs."

- EEOC Press Release, "Employer Wellness Programs Need Guidance to Avoid Discrimination", May 8, 2013

The ADA

Prohibits employers from:

- Denying, on the basis of a disability, qualified individuals with a disability an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers.
- Making medical inquiries or requiring medical examinations unless they are job-related and consistent with business necessity.
- Taking adverse employment action based on an individual's perceived or actual disability.

GINA

Prohibits employers from:

- Incentivizing employees to provide genetic information (such as family medical history) in connection with a wellness program.
- Collecting genetic information for underwriting purposes or in connection with group health plan enrollment.

Orion Energy Systems

EEOC v. Orion Energy Systems was the first case filed by the EEOC against a company for its wellness plan. The EEOC sued over an ADA violation and contends that Orion penalized an employee in 2009 after she declined to participate in the company's wellness program.

EEOC's allegations:

- Employee required to pay her entire health care insurance premium
- Also had to pay a $50-a-month nonparticipation penalty for a fitness component
- The employee was fired – a move that the EEOC believes was retaliatory
- Orion required medical examinations and made disability-related inquiries that were not job-related or consistent with business necessity.

The bottom line is that (a) this plan is not voluntary, and (b) employee was fired as a result of good-faith objection to the plan.

Flambeau, Inc.

EEOC v. Flambeau, Inc. is another case with largely the same circumstances as *Orion*. An employee of Flambeau refused to participate in biometric screening as part of a wellness program.

EEOC's allegations:

- Employee in question had insurance canceled after failing to submit to biometric screening
- Employee then forced to pay 100% of insurance premiums himself
- Flambeau required medical examinations and made disability-related inquiries that were not job-related or consistent with business necessity.

Again, (a) this plan is not voluntary, and (b) employee faced harsh penalties as a result of failing to participate in the plan. He wasn't fired, however.

Honeywell

In late summer of 2014, Honeywell announced a new requirement for employees – they and their spouses must submit to biometric testing that includes a blood draw. If they do not take the tests, the employees will be penalized through the following measures:

- Employees lose any HSA contributions from Honeywell, up to $1500
- Employees will be charged a $500 surcharge on their medical plan
- Employees charged a $1000 "tobacco surcharge," even if they don't smoke, and their spouse will incur a penalty of $1000 as well.

Honeywell

"Honeywell wants its employees to be well-informed about their health status not only because it promotes their wellbeing, but also because we don't believe it's fair to the employees who do work to lead healthier lifestyles to subsidize the healthcare premiums for those who do not."

- Written statement from Honeywell International

Honeywell

EEOC v. Honeywell was filed on October 27, 2014. EEOC contends:

- The biometric screening is not voluntary and not business-related, so it violates the ADA as an involuntary medical examination
- The inducement of the employee's spouse to undergo biometric testing is a violation of GINA - spouse health information is family medical history/genetic information

EEOC alleges that (a) the biometric screening is an involuntary medical examination, and (b) the requirement that a spouse be tested violates GINA in inducing the employee to provide family medical history/genetic information.

Carrots v. Sticks

1. Voluntary or "mandatory"?

2. Incentive or penalty?

3. Spouse screening – prohibited family medical history?

The Long Road to Guidance

The EEOC announced at its 2015 Regulatory Agenda meeting that it plans to provide official guidance as to how wellness plans that comply with provisions of the ACA and HIPAA can intersect comfortably with the provisions of the ADA. This guidance is intended to be published in February.

Don't be Complacent

It is important to note: all of the plans at issue in EEOC litigation presumptively comport with wellness plan provisions of HIPAA as modified by the ACA.

Conclusion

When crafting a wellness program, employers should be very wary of health contingent wellness programs that:

(a) Offer high incentives or penalties *even if those incentives or penalties fall within HIPAA /ACA guidelines*
(b) Require spouse participation, as this may be a violation of GINA

If it looks coercive or mandatory, the EEOC will likely not look kindly on it.

Have questions? Contact me!

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