EEOC Scrutinizes Employer Wellness Plans

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In recent years, encouraged by provisions of the Affordable Care Act and the rising costs of health care, there has been an increase in the number of employers that implement wellness programs. Wellness programs are voluntary, employer-sponsored programs that allow workers to assess their current health levels, set health goals and make choices that will allow them to prevent illness and increase their overall wellness levels.

Employers that use wellness programs must be aware of a number of legal requirements. The Equal Employment Opportunity Commission (EEOC) has filed lawsuits against a number of employers alleging that their wellness programs violate provisions of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

This Legislative Brief provides an overview of three pending EEOC lawsuits. Employers can use this document to evaluate whether their wellness programs could also be subject to EEOC scrutiny.

Legal Requirements

Employer-sponsored wellness programs are subject to a number of legal requirements and restrictions, including the ADA and GINA. Many of these restrictions relate ensuring that programs are not discriminatory. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against employees based on certain factors, including disability and genetic information.

- **The Americans with Disabilities Act (ADA).** The ADA prohibits discrimination based on disability with respect to any aspect of employment. It also limits an employer’s ability to request medical information from employees or require a medical exam. Employers may make such requests in connection with a voluntary wellness program. According to EEOC guidance, a wellness program is voluntary if employees are not required to participate and the employer does not penalize nonparticipating employees. It is not clear how this guidance interacts with other guidance related to wellness programs.

- **The Genetic Information Nondiscrimination Act (GINA).** GINA prohibits employment discrimination on the basis of genetic information. In general, employers with 15 or more employees may not discriminate against an employee, individual or member based on genetic information. GINA defines “genetic information” to mean information about an individual’s genetic tests, the genetic tests of the individual’s family members and the manifestation of a disease or disorder in the individual or the individual’s family members. A spouse is a family member within the meaning of GINA.

**Orion Energy Systems**

On Aug. 20, 2014, the EEOC filed a lawsuit against Orion Energy Systems, Inc. (Orion) alleging Orion’s wellness program violated the ADA and retaliated against an employee who refused to participate in the wellness program. As part of its wellness program, Orion required employees to complete a health risk assessment and a fitness component by using a range of motion machine in Orion’s physical fitness room. The health risk assessment required employees to submit to a blood draw and to fill out a medical history form to complete the fitness assessment.
Only one employee refused to participate in this program. The employee questioned whether the health risk assessment was voluntary and whether the medical information obtained in the screenings and assessments would remain confidential. As a result, the employee was called into a meeting with Orion’s personnel director and with the employee’s supervisor. The employee was told that the purpose of the meeting was to “quash any potential attitude” and she was forbidden from expressing her opinion about the program with her co-workers.

In addition, the nonparticipating employee was required to cover 100 percent of her health insurance premiums if she wished to retain her coverage under Orion’s health care insurance policy. In contrast, Orion would pay 100 percent of the same costs for participating employees. Shortly thereafter, the nonparticipating employee was terminated.

In the EEOC’s view, Orion’s program violated the ADA because:

- The program requested from employees disability-related information within the meaning of the ADA;
- This information was not job-related nor consistent with business necessity;
- The information requested was for preventive reasons; and
- The penalties imposed on nonparticipating employees rendered the wellness program mandatory, not voluntary.

Finally, the EEOC alleges Orion retaliated against the employee by terminating her because of her nonparticipation and interfered, coerced and intimidated the employee when she exercised her rights under the ADA.

Flambeau, Inc.

On Sept. 30, 2014, the EEOC filed a lawsuit related to a wellness program against Flambeau, Inc. (Flambeau). Flambeau’s wellness program required all participants to submit to biometric testing and a health risk assessment. The biometric testing and health risk assessment included blood work, measurement taking and disclosing medical histories. Flambeau set a specific date for employees to complete these requirements. Employees were informed that failure to satisfy these requirements would result in cancellation of their medical insurance, unspecified “disciplinary action” and a requirement to pay their full premium if they wished to remain covered under Flambeau’s health insurance policy.

One employee was unable to complete the biometric testing and health risk assessment on the day appointed by Flambeau due to health issues. Specifically, the employee was on medical leave at the time of the testing and was being treated in the hospital for cardiomyopathy and congestive heart failure. Upon returning from his medical leave, the employee tried to complete the required testing and health risk assessments, but his requests for the materials and additional time were denied.

Subsequently, the employee was informed that his health insurance coverage was canceled and that he could apply for medical coverage under Flambeau’s insurance policy, but he would be required to pay 100 percent of his single coverage at the COBRA premium rate. Had the employee been able to complete the requirements on the specified date, Flambeau would have covered 75 percent of his health insurance premium. Due to his financial situation, the employee was unable to afford paying the new rate, and his coverage under Flambeau’s employee health insurance policy remained canceled.

In the EEOC’s opinion, these tests and assessments were disability-related inquiries and medical examinations within the meaning of the ADA, and Flambeau’s wellness program violated the ADA because the disability-related information required of employees was not job-related nor consistent with business necessity. Additionally, the penalties imposed on nonparticipating employees rendered the program mandatory.

Honeywell International, Inc.

Finally, on Oct. 10, 2014, the EEOC filed a petition for a preliminary injunction against Honeywell International, Inc. to prevent Honeywell from implementing a wellness program that, in the EEOC’s opinion, would violate both the ADA and GINA.

In 2014, Honeywell announced to its employees that, to participate in the employer’s wellness program, they—and their spouses, if applicable—would have to submit to biometric testing for the 2015 health benefit year. Biometric testing would include height, weight and waist circumference measurements as well as a blood draw to screen for blood pressure, cholesterol levels and glucose. The blood draw would also be used for nicotine and cotinine screening.
Honeywell informed its employees it would use the information gathered during the screenings to set goals for the employees. As a result, employees would be required to lower their health risk factors or they would lose the contributions Honeywell made to their health savings accounts (HSA).

Employees who refused to participate in the program and undergo these screenings would be required to pay additional fines or penalties. The fines and penalties included a $500 surcharge for nonparticipation, applied to their medical plan costs, a $1,000 “tobacco surcharge” applied to the employee’s account if the employee refused to submit to the blood draw and an additional $1,000 “tobacco surcharge” if the employee’s spouse refused to submit to the blood draw. The tobacco surcharges would be applied even if the employee or the employee’s spouse refused to participate in the blood draw for reasons other than smoking. The total combination of penalties could be up to $4,000.

The EEOC is of the opinion that, if implemented, Honeywell’s plan would violate the ADA because:

- The program requests from employees disability-related information within the meaning of the ADA;
- This information is not job-related nor consistent with business necessity;
- The information requested is for preventive reasons; and
- The penalties imposed on nonparticipating employees rendered the wellness program mandatory, not voluntary.

The EEOC is also of the opinion that Honeywell’s plans violate GINA because:

- The information required by Honeywell includes genetic information within the meaning of GINA;
- It imposes penalties on nonparticipating spouses;
- It offers inducements to persuade employees and their spouses to provide information related to manifested conditions such as hypertension and diabetes; and
- Employees lose the inducements and face steep charges if their spouses do not participate in the medical testing.

Impact on Employers

The lack of clear EEOC guidance regarding wellness programs has drawn significant attention. The EEOC has stated that it plans to issue proposed regulations regarding wellness programs and the types of incentives that employers could provide. Legislation has also been introduced that would coordinate the wellness program provisions found in the Affordable Care Act with the ADA and GINA.

Until more clear guidance is available, employers should take note of the issues highlighted in the EEOC cases. Specifically, employers should review their wellness plans to ensure that participation is voluntary and that employees are not excessively penalized for refusing to participate. In addition, when employers collect employee private or medical information, employers should evaluate whether this information is protected under the ADA, GINA or any other employment benefit law.