SEBRIS BUSTO JAMES Employment Law Note January 2016

Employers' Wellness Programs Find Protection from the EEOC in the ADA's Safe Harbor

by Tina Aiken

Employee wellness programs have become more popular as companies aim to reduce their medical costs by improving employees' health. For the most part, employers have found support for implementing and expanding wellness programs from the federal government. Joint guidance issued by the Departments of Health and Human Services, Labor and the Treasury encourages appropriately designed, consumer-protective wellness programs in group health coverage.

However, the EEOC has not jumped on board with the trend to support the improvement of American workers' health and control health care spending. Despite providing only minimal guidance to employers regarding the wellness-based activities it considers illegal, the EEOC filed three lawsuits against employers in 2014, (*EEOC v. Orion Energy Systems*, *EEOC v. Flambeau, Inc.*, and *EEOC v. Honeywell International Inc.*) alleging that employees lost out on financial incentives because they declined to participate in their employers' wellness programs. In each of the lawsuits, the EEOC alleged that the wellness programs weren't truly voluntary because of dire consequences the programs imposed on workers who chose not to participate, or because of health assessments that were not job-related and consistent with business necessity. According to the EEOC, these programs violated the ADA's rules regarding employee medical exams and inquiries. In the third lawsuit against Honeywell, the EEOC also claimed that the employer's wellness program violated the Genetic Information Nondiscrimination Act (GINA) because of penalties it imposed on employees who refused to participate in its biometric screening program. In that lawsuit, the court denied the EEOC's motion for a temporary restraining order and preliminary injunction against Honeywell's wellness program, which provided a small victory for employers.

EEOC v. Flambeau. On December 31, 2015, employers saw another win when a Wisconsin district court granted an employer's motion for summary judgment, finding that the protections set forth in the ADA's safe harbor enable employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment. In *Flambeau*, the employer established a wellness program for employees who wanted to enroll in the employer's health insurance plan. The wellness program had two components—a health risk assessment and a biometric test. The information gathered through the wellness program was used to identify the health risks and medical conditions common among the plan's enrollees, estimate the cost of providing insurance, set participants' premiums, evaluate the need for stop-loss insurance and adjust co-pays. For the first year the wellness plan was in place, the employer promoted the program by giving employees a $600 credit if they participated in and completed both the health risk assessment and biometric test. For the following years, the employer eliminated the $600 credit and instead adopted a policy of offering health insurance only to those employees who completed the wellness program. Participating in the wellness program was not a condition of continued employment, but the employer offered company-subsidized health insurance under its benefit plan to wellness program participants exclusively.

The EEOC filed suit alleging that Flambeau violated a provision of the ADA that prohibits employers from requiring employees to submit to medical examinations. The EEOC argued that the biometric testing and health risk assessment constituted disability-related inquiries and medical examination that were not job-related and consistent with business necessity as defined by the ADA. The EEOC also argued that the plan was not a "voluntary" plan, and that it did not qualify for safe harbor protections.

The district court disagreed with the EEOC and extended the ADA's safe harbor to employers' wellness programs that are part of an insurance benefit plan. In reaching its conclusion, the court rejected the EEOC's contention that an Eleventh Circuit decision on which Flambeau relied was wrongly decided, and found that the EEOC's 2015 proposed amendments to regulations on wellness programs did little to further the agency's argument. The court distinguished the ADA's safe harbor exception for medical examinations tied to employers' insurance plans from the ADA exception for medical examinations that are part of "employee health programs" that may be unrelated to the administration of insurance risks. The latter exception, not at issue in *Flambeau*, has different requirements for stand-alone wellness programs that are unrelated to insurance plans. The court concluded that Flambeau's wellness program requirement was clearly intended to assist the employer with underwriting, classifying or administering risks associated with the insurance plan, and that the wellness plan requirement was a "term" of Flambeau's benefit plan, as its employees were required to complete the wellness program before they could enroll in the plan. The court also noted that Flambeau provided adequate notice to employees of the wellness program requirement. Finally, the court disagreed with the EEOC's assertion that Flambeau was using the safe harbor provision as a subterfuge for ADA bias, as the company didn't draw any disability-based distinctions.

Employers may cautiously celebrate the *Flambeau* decision. While the EEOC is likely to appeal the decision, it provides employers with hope that courts will join the progressive movement toward addressing American employees' declining health and curbing health care spending. However, employers should note that the lawsuit in *EEOC v. Orion Energy Systems* is still pending, and the EEOC is expected to publish final ADA and GINA wellness program regulations in 2016, which will likely result in increased litigation regarding wellness program requirements. In the meantime, employers should consider the following points when implementing or expanding wellness programs:

- When a wellness program is intended to be part of an employer's health plan, the employer should include the terms of the wellness program in its summary plan description, especially when those terms affect employees' eligibility to participate in the health plan
- Using aggregate information obtained from a wellness program to establish premium contributions, assess need for stop-loss insurance, adjust co-pays, etc. will help support an argument that the ADA's safe harbor exception applies
- Do not make a wellness program a condition of employment
- Proceed carefully, as the EEOC may maintain its position regarding the limited applicability of the ADA's safe harbor