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What's on the Horizon for Employer-Sponsored Wellness Programs and the EEOC in 2016?

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Employer-sponsored wellness programs have quickly become the "in" thing in the workplace. In fact, 70 percent of U.S. employers currently offer wellness programs.[1] The programs can vary greatly, but generally include health risk assessments/questionnaires, health screenings, flu shots, health fairs and workshops, exercise groups, health and fitness classes, smoking cessation classes, participation incentives or some combination thereof.

Employers are embracing wellness programs with a 58 percent increase in the number of programs since 2008. Employers get healthier, more productive employees who miss work less often while decreasing insurance costs. Employees enjoy the programs, too. They see and feel the health benefits; many times they receive financial incentives for participating in the plan; and they perceive the benefit as evidence the employers genuinely care for their collective well-being. That warm and fuzzy feeling aids in employee retention, yet another benefit to the employer.

So, with what seems to be a win-win for both employers and employees, why has the EEOC taken issue with some programs? Two reasons – the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA).

The ADA generally prohibits disability-related inquiries or medical examinations that are not consistent with business necessity. However, the ADA permits voluntary wellness programs that do not require employee participation or penalize employees who do not participate. GINA prohibits health plans and insurers from collecting genetic information for the purpose of "providing discounts, rebates, payments in kind or other premium differential mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program." GINA, however, does have an exception for wellness programs: employers may collect genetic information as part of a wellness program if (1) the employee provides prior, knowing, voluntary and written authorization; (2) there is no penalty for not participating in the part of the program seeking genetic information; (3) only the employee and licensed health care professional or counselor receive individually identifiable information concerning the results of such services; and (4) genetic information cannot be disclosed to the employer except in aggregate terms.

In 2014, the EEOC brought multiple lawsuits challenging whether the defendants' programs were truly voluntarily under the ADA and/or complied with GINA's wellness program exception. For example, the EEOC's first lawsuit to directly challenge a wellness program under the ADA was filed against Orion Energy Systems in August 2014 (*EEOC v. Orion Energy Systems*, Eastern District of Wisconsin, Civ. Action No. 1:14cv1019). In that suit, the EEOC alleged that Orion instituted a wellness program that made disability-related inquiries and required medical examinations and that, when an employee refused to participate, the company shifted the entire premium for her health benefits to her and then ultimately fired her. Per John Hendrickson, the EEOC's Regional Attorney:

[Employers] can't compel participation [in wellness programs] by imposing enormous penalties such as shifting 100 percent of the premium cost for health benefits onto the back of the employee or by just firing the

employee who chooses not to participate. Having to choose between responding to medical exams and inquiries – which are not job-related – in a wellness program, on the one hand, or being fired, on the other hand, is no choice at all. EEOC Press Release, 8-20-2014.

Similar lawsuits against Flambeau, Inc. (*EEOC v. Flambeau, Inc.*, Eastern District of Wisconsin, Civil Action No. 3:13-cv-00638) and Honeywell International Inc. (*EEOC v. Honeywell International, Inc.*, District of Minnesota, Civil Action No. 0:14cv4517) followed. The suit against Honeywell also alleged violations of GINA in that Honeywell's employees were allegedly penalized if their spouses did not complete biometric testing.

The EEOC was heavily criticized for filing these lawsuits. The EEOC had not issued any guidance as to how the ADA and GINA apply to wellness programs, and the EEOC's stance seemed in conflict with the Affordable Care Act and the Health Insurance Portability and Accountability Act (HIPAA), both of which embrace wellness programs.

In response, the EEOC issued two proposed rules in 2015. The first Notice of Proposed Rulemaking (NPRM) was issued on April 16, 2015, to address how the ADA applies to wellness programs offered as part of group health plans. Under this NPRM, the EEOC identified five key factors in determining whether a wellness program complies with the ADA. The factors include whether the program is reasonably designed, whether it is voluntary, whether it has a maximum incentive limit of 30 percent of total cost of employee-only coverage, whether it has detailed notice and confidentiality requirements, and whether it prohibits discrimination against disabled employees, including providing reasonable accommodations. The comment period for that NPRM ended on June 19, 2015, but to date no final rule has been issued.

The second NPRM was issued on October 30, 2015, to address how GINA applies to wellness programs offered as part of group health plans. Per the EEOC's Questions and Answers page:

The proposed rule clarifies that an employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including as part of a wellness program; and (3) provides information about his or her current or past health status. Information about current or past health status usually is provided as part of a health risk assessment (HRA), which may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels.

Any health or genetic services an employer offers must be reasonably designed to promote health or prevent disease. This means that the service must have a reasonable chance of improving the health of, or preventing disease in, participating individuals. It also means that an employer-sponsored wellness program must not be overly burdensome to employees, a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.

The comment period for the GINA NPRAM has been extended until January 28, 2016. As such, we expect to see Final Rules for both NPRMs issued by the EEOC in 2016.

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[1] Unless otherwise noted, all numerical data is from *2015 Employee Benefits Study*, SHRM.