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EEOC Sues Alleging Employer's "So-Called Voluntary" Wellness Plan Violated ADA

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In **Equal Employment Opportunity Commission v. Orion Energy Systems, Inc.**, filed last month, the EEOC alleged that an employer violated the ADA because the employer: (1) subjected an employee to a health risk assessment and blood draw under a wellness plan that the EEOC characterized as not "voluntary;" and (2) fired the employee for objecting to and refusing to participate in the wellness program. Under the ADA, employers generally are not allowed to require employees to submit to post-employment medical examinations and inquiries that are not job-related or consistent with business necessity. The ADA does include an exception to this rule for employee participation in a wellness plan, but only for a voluntary wellness plan.

In this case, the EEOC alleged that the exception was not available because the wellness program was not "voluntary". The EEOC based its assertion on its allegation that the employee was subjected to a financial penalty and fired for not participating in the program. By not participating in the program, the employee had to pay 100% of the premium for single coverage ($413 per month), whereas had she participated, the employer would have paid the full $413 per month premium for her. Further, the employee was subject to an additional $50 per month penalty for not completing a fitness component of the program that required completion of a medical history form.

While to date the EEOC has not promulgated regulations regarding what level of financial consideration renders an employee's participation in a wellness plan in effect not voluntary, it did hold hearings where employer groups requested such guidance. This case may not provide much guidance to employers on this issue however, especially if the court determines the employee was fired for refusing to participate in the wellness plan. Nevertheless, it does serve as a reminder to employers that this issue has not yet been resolved and financial consequences that are tied to participating in health risk assessments and screenings that constitute medical inquiries or examinations could subject the employer to an ADA challenge.

The EEOC's complaint included an allegation that the employee questioned whether the information obtained through the wellness program was going to be maintained as confidential. The ADA requires that information obtained through this type of wellness plan be kept confidential and separate from personnel records and not be used to discriminate against an employee.

It will be interesting to see how the employer will defend against this case. It is possible the employer

will claim that its wellness plan is covered by an ADA safe harbor provision that is designed to protect the insurance industry from various parts of the ADA. That safe harbor provision was used successfully by an employer in the case of Seff v. Broward County.

Employers should keep in mind that there are a myriad of laws that must be analyzed when designing and implementing a wellness plan, including the Health Insurance Portability and Accountability Act (HIPAA) and the Employee Retirement Income Security Act (ERISA). Failure to comply with any one of those laws can lead to penalties, excise taxes or a lawsuit by the government or a participant.

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