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The Affordable Care Act—Countdown to Compliance for Employers, Week 4: EEOC v. Honeywell and the Future of Wellness Programs

Article By:

Employment Labor and Benefits at Mintz

While my entries have focused principally on the employer shared responsibility rules of the *Affordable Care Act (ACA)*, every once in a while an item comes along that nevertheless grabs my attention. The treatment of wellness plans at the hands of the *Equal Employment Opportunity Commission (EEOC)* is such an item.

The problem, put simply, is that without telling anyone what the rules are, the EEOC has begun to challenge a subset of popular wellness programs, the design of which is expressly sanctioned by the ACA. Of course, simply because a wellness program satisfies one Federal law does not mean that another may not also apply. A pension plan that satisfies ERISA, for example, may nevertheless fail to satisfy the tax qualification requirements of the *Internal Revenue Code* (the “Code”). What is different here is the insistence of the EEOC to push ahead with enforcement compliance while at the same time obstinately refusing (following a deluge of requests from industry and other groups as well as damning adverse judicial precedent) to issue regulations.

For a while it seemed that the EEOC, perhaps sensing that the lack of guidance put us at a disadvantage, limited its enforcement efforts to a handful of egregious cases, hoping perhaps that bad facts might make good law. But then came *EEOC v. Honeywell*, No. 0:14-04517 (D. Minn. 2014), where the EEOC took on a mainstream wellness program sponsored by Honeywell International, Inc. One can only imagine their surprise when Honeywell failed to roll over and instead decided to fight back. (We explain the particulars of these cases in previous posts available here and here.

Spoiler alert: things did not go well (at least so far) for the EEOC. And, despite that the case is only getting started, our sense is that the outcome will not fit the EEOC’s picture of a raging success. In making this prediction, we don’t for a moment claim that wellness programs raise no legitimate ADA issues. They do. Nor do we claim that the ACA’s wellness program imprimatur should require the EEOC to abdicate its role as the ADA’s principal enforcer. The EEOC shouldn’t. But the EEOC’s attempts to randomly enforce its views of how wellness programs should be regulated without telling anyone what the rules are strikes us as irresponsible—reminiscent of Dean Wormer’s “double secret probation” imposed on the members of the Delta Tau Chi fraternity of *Animal House* fame.

Background

Wellness Programs Under the ACA

Wellness programs, at least those that form part of employer-sponsored group health plans, have become commonplace. While wellness programs can take a number of forms, and there are any number of programs, arrangements and schemes that fall under the heading of "wellness," the Affordable Care Act codified and expanded particular kinds of wellness plans that are the subject of a comprehensive final regulation issued by the Departments of Health and Human Services, Labor and Treasury/IRS.

The final regulations generally divide wellness programs into two categories. First, programs that do not require an individual to meet a standard related to a health factor in order to obtain a reward are not considered to discriminate under the HIPAA nondiscrimination regulations and therefore, are permissible without conditions under such rules ("participatory wellness programs"). Examples in the regulations include a (i) fitness center reimbursement program, (ii) diagnostic testing program that does not base rewards on test outcomes, (iii) program that waives cost-sharing for prenatal or well-baby visits, (iv) program that reimburses employees for the cost of smoking cessation aids regardless of whether the employee quits smoking, and (v) program that provides rewards for attending health education seminars.

The second category of wellness programs under the final rules consists of health-contingent wellness programs, which may be either activity-only or outcome-based. Examples of health-contingent wellness programs include programs that (i) provide a reward to those who do not use, or decrease their use of, tobacco, or (ii) reward those who achieve a specified health-related goal, such as a specified cholesterol level, weight, or body mass index, as well as those who fail to meet such goals but take certain other healthy actions.

Wellness Programs Under the ADA

The ADA generally provides that it is unlawful for an employer "to discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Under the ADA, it is unlawful for an employer to discriminate on the basis of disability in the provision of health insurance to their employees. According to the EEOC, decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan. Moreover, employees with disabilities must be accorded "equal access" to whatever health insurance the employer provides to employees without disabilities.

The ADA also imposes limits on when an employer may make disability-related inquiries of employees or ask them to take medical examinations. In general, disability-related inquiries and medical examinations are permitted as part of a *voluntary* wellness program. According to the EEOC, *a wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate*. At issue is whether a wellness program reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary. The EEOC has not taken a position on this question.

If a wellness program is voluntary, and if an employer requires participants to meet certain health outcomes or to engage in certain activities in order to remain in the program or to earn rewards, the ADA imposes on the employer a requirement to provide a reasonable accommodation, absent undue hardship, to those individuals who are unable to meet the outcomes or engage in specific activities due to a disability. A reasonable accommodation usually includes modifications and adjustments that enable employees to enjoy "equal benefits and privileges of employment."

In addition to the above-described rules governing voluntary benefit programs, the ADA contains a*separate* exception that permits employers, insurers, and plan administrators to establish and/or observe the terms of a group health plan that is "bona fide," based on "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law," and that is not being used as a "subterfuge" to evade the purposes of the ADA. The EEOC claims that only insurance carriers do underwriting. Thus, only fully-insured plans may qualify. Statutory support for this proposition eludes us.

EEOC v Honeywell

On October 27, 2014, the EEOC filed for an injunction against Honeywell asserting that Honeywell violated the ADA by requiring participation in medical exams associated with Honeywell's group health plan and wellness program, which included a self-funded health reimbursement arrangement, when it provided financial inducements to incentivize participation. The wellness program that was the subject of the suit was pretty straightforward. Honeywell imposed a surcharge on an employee in instances in which the employee or the employee's spouse declined to undergo limited biometric testing associated with the wellness program. The EEOC claimed that the financial inducements violated both the ADA and, by including spouses, the Genetic Information Nondiscrimination Act ("GINA"). On November 3, 2014, the court denied the EEOC's motion based on the EEOC's failure to show any irreparable harm.

NOTE: With respect to GINA, the EEOC is taking the position that a spouse's personal medical history is family medical history with respect to the employee. As a result, the personal medical history of the spouse is "genetic information" for purposes of Title II of GINA. According to the EEOC's brief in Honeywell, "[u]nder GINA, employers are prohibited from offering incentives to an employee in order to obtain family medical history in connection with a wellness program."

Previous EEOC enforcement actions

Earlier this year, EEOC filed two lawsuits involving wellness programs, *EEOC v. Flambeau*, Inc., No. 3:14-00638 (W.D. Wis. 2014), and *EEOC v. Orion Energy Systems, Inc.*, No. 1:14-01019 (E.D. Wis. 2014). In both cases, the EEOC claimed that the wellness programs at issue violated Title I of the ADA because they required employees to submit to involuntary medical examinations that were neither job-related nor consistent with business necessity. Without going into the particulars, suffice it to say that the wellness programs in these latter two cases seemed excessive. For example, in Orion's case, employees who participated in a wellness program that required completion of a health risk assessment (including blood work) had coverage provided free of any cost, while those who failed to do so were required to pay the full cost of the premiums plus an additional penalty.

Seff v. Broward County

While the EEOC was not a party, a case arising in Florida decided by the U.S. Court of Appeals for the Eleventh Circuit vastly complicates the EEOC's efforts. The case, *Seff v. Broward County*, 692 F.3d 1221 (11th Cir. 2012), involved a wellness program maintained by Broward County, Florida, which offered a bimonthly $20 premium discount to employees who completed a health risk assessment that included a “finger-stick” blood test. The Court held that this Broward County arrangement did not violate the ADA. Specifically, the court concluded that the program fit within the ADA safe harbor for plans that are based on sound underwriting and classifying of risk principles and that were not otherwise a “subterfuge” for disability discrimination. This holding is significant as a plan that fits under this exception need not worry about meeting any standards relating to voluntariness.

NOTE: In its brief, the EEOC claimed that Broward was wrongly decided since there was no evidence of underwriting. This looks right to us. But Honeywell does not appear to have made this mistake. Thus, in *Honeywell*, the EEOC was pretty much forced to argue, as we note above, that only insurers do underwriting.

What’s Wrong with this Picture?

With the ACA, Congress sought to encourage the use of wellness programs through financial incentives. With the ADA, Congress sought to limit the extent to which employers are permitted to make disability-related inquiries of their employees. While the ACA rules don’t inform the enforcement of the ADA, it makes little sense to read these rules as entirely contradictory. Continuing on the pension example, the Code does not bar the adoption and maintenance of an ERISA-regulated pension plan; rather, it adds a layer of tax requirements intended to broaden participation and place a cap on the net pension tax expenditure.

It seems to us that the best way to reconcile the ADA and the ACA is to use the ADA exceptions either for “voluntary” wellness programs or for those that are bona fide in nature and that satisfy basic underwriting standards. As the courts strive to read the two statutes consistently to the extent reasonably possible, we fully expect that they will take this route.

We understand that the EEOC has opened up a formal investigation of the Honeywell wellness program, which will likely take some time to resolve. The EEOC has also announced that it will issue proposed regulations “implementing the final [HIPAA] rules concerning wellness program incentives” as early as February 2015. While the prospect of rulemaking is a welcome development, we fully expect that the Honeywell matter will end up back in Federal Court, absent a change of heart on the part of the EEOC. Frank C. Morris, Jr., August Emil Huelle, and Adam C. Solander of Epstein Becker & Green, P.C. have penned a thoughtful analysis of how employers might proceed in the interim.

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