Is EEOC's Wellness Program Litigation Making You Sick?

Law360, New York (February 11, 2015, 11:54 AM ET) -- Many employers are using wellness programs to encourage employees to achieve or maintain healthy lifestyles. Whether through a "know your numbers" campaign involving a health risk assessment and biometric screening or a "Biggest Loser" style competition, involving rewards for actual physical changes, employers are encouraging employees to get healthy.

However, the U.S. Equal Employment Opportunity Commission's Chicago district office has filed three lawsuits, all since August 2014, charging that certain wellness programs violate the Americans with Disabilities Act.

Some employers are just sick over this litigation and have a number of questions about what it means for their wellness programs.

What Wellness Programs are Being Challenged?

The complaints filed in the following cases alleged that the specified wellness program designs violated the ADA.

EEOC v. Orion Energy Systems Inc.

- The employer paid 100 percent of the cost of the health plan for employees who completed an HRA and a fitness test.
- If an employee did not complete an HRA, the employee was required to pay the full cost of the health plan premium.
- If an employee did not complete the fitness test, the employee was penalized $50.

EEOC v. Flambeau Inc.

- The employer mandated that employees complete an HRA and biometric screening to be eligible for the health plan.
- An employee who did not complete his or her HRA and biometric screening at the appointed time would be subject to disciplinary action.

EEOC v. Honeywell International Inc.

- If an employee did not complete biometric testing, the employee would be required to pay a $1,500 premium surcharge for health coverage and would not be eligible for contributions (up to $1,500) that the employer would otherwise make to the employee's health savings account.
- If an employee's spouse also did not complete the biometric testing, the employee would be required to pay another $1,000 surcharge for health coverage.

How Could these Programs Violate the ADA?

That's a good question. In fact, U.S. District Court Judge K. Michael Moore stated in Seff v. Broward County (discussed below):

> Though Plaintiff brings this claim under the ADA, it is hard to see how the wellness program relates to discrimination in any way. In fact, the program is enormously beneficial to all employees of Broward County — disabled and nondisabled alike.

From a technical perspective, the ADA generally prohibits a covered employer from making disability-related inquiries or requiring medical examinations unless they are job-related and consistent with business necessity. HRAs commonly contain disability-related inquiries and biometric screenings are generally considered medical examinations, so

the wellness programs described above could violate this portion of the ADA.

However, the ADA permits an employer to make disability-related inquiries or request medical examinations as part of a voluntary wellness program. It also contains a safe harbor that would permit medical examinations and disability-related inquiries in certain cases if done as part of a bona fide benefit plan.

Is Our Wellness Program Voluntary?

Example: "We provide small health plan premium discounts for employees who complete an HRA and biometric screening."

The definition of “voluntary” is the key issue in these cases. Neither the ADA nor the EEOC has defined the term, except to say that a wellness program is voluntary if an employer neither requires participation nor penalizes employees who do not participate.

In informal guidance, the EEOC examined a wellness program requiring completion of an HRA and biometric screening as a condition of eligibility for employer group health plan coverage. The EEOC determined that such a program was not voluntary because employees who did not participate were penalized through the loss of eligibility for health coverage.

This guidance further indicated that “[t]he [EEOC] is continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA.” In other words, the EEOC potentially could challenge a wellness program that provides health plan premium discounts or other financial incentives of any amount.

Have Any Other Cases Addressed Wellness Programs?

Only one published case has addressed application of the ADA to wellness programs. In Seff v. Broward County, an employee plaintiff complained about a program in which the employer deducted $20 per biweekly paycheck from any employee who did not complete an HRA and biometric screening.

The court sided with the employer in that case, relying on an exception under the ADA that provides that the rules on medical examinations do not prohibit employers from “establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks or administering such risks that are based on or are not inconsistent with state law.” The court reasoned that the wellness program fit within this exception because, among other reasons, the employer used aggregate data from the HRAs to classify various employee health risks and decide on the types of benefits that should be offered in the future to reduce plan costs.

Many employers have taken comfort in that decision, but it did not deter the EEOC in the lawsuits listed above. In fact, the memorandum in support of EEOC’s application for a temporary restraining order and expedited preliminary injunction in Honeywell explicitly addressed the case and its reasoning.

In that memorandum, the EEOC argued that wellness programs should not qualify for the exception because the legislative history and purpose of the exception limit its use to actuarial studies and legitimate classifications of risk:

> Although Honeywell may argue that it is seeking control future health benefit expenses [sic], that intent is not the equivalent of performing an actuarial study to make legitimate classifications of risk. An employer could cast virtually any

health-based inquiry as a cost-saving measure and seek immunity from the ADA's provisions, which is certainly not the intent of the ADA or its limited safe harbor provision.

How Can the Government Encourage Wellness Programs and Sue Employers that Use Them?

Wellness programs are subject to competing governmental interests. On the one hand, wellness programs are designed to make or keep people healthy. Keeping people healthy could drive down the costs of health care, which is a key goal of the Affordable Care Act. On the other hand, wellness programs might require employees to provide medical data that could be used by employers to discriminate against them. Preventing this type of discrimination is a key goal of the ADA.

The ACA amended rules that were issued under the Health Insurance Portability and Accountability Act to explain how employers can permissibly use wellness programs to vary group health plan premiums or benefits. The ACA increased the amount of the reward that employers can provide under the HIPAA rules from 20 percent of the cost of the health plan coverage to 30 percent, and it allowed the implementing agencies to raise that permissible amount to 50 percent.

However, the ACA is enforced by the U.S. Department of the Treasury, the U.S. Department of Labor and the U.S. Department of Health and Human Services. The ADA is enforced by the EEOC. Those agencies have different goals under the different laws and have not yet coordinated their regulatory or enforcement efforts.

Do Wellness Programs that Provide an Extra Incentive to an Employee Whose Spouse Completes a HRA Have Any Issues?

Maybe. In its Honeywell complaint, the EEOC alleged that this practice violates the Genetic Information Nondiscrimination Act, which prohibits employers from incenting employees to provide genetic information, including information about the manifested medical conditions of family members. The EEOC argued that because GINA defines the term "family member" to include a spouse, a spouse's medical information should be considered the employee's genetic information.

It seems illogical to apply GINA in this way to wellness programs. Thanks to state laws prohibiting marriage of relatives within a certain degree, the medical condition of a spouse should not truly be the genetic information of the employee. We expect that the EEOC's regulations on wellness programs might provide some relief on this issue.

Will the EEOC Issue Regulations to Provide Employers With Some Certainty on How to Administer Wellness Programs?

Although the EEOC's national office has not yet taken an official position on whether or how wellness programs can violate the ADA, the EEOC did hold hearings on this topic on May 8, 2013, and has indicated on its regulatory agenda that it will be issuing wellness program regulations.

Why Didn't the EEOC Issue Regulations Before Filing Suit?

We can only speculate the answer to this question. Regulations, of course, take time. In the meantime, employees complained about the wellness programs described above. In Orion Energy Systems and Flambeau, the employers allegedly also took negative employment action against employees who did not participate in the wellness program. Given the allegations of negative employment action, the severity of the penalties and the fact that the penalties were similar to those described in the informal guidance mentioned above, the EEOC might have felt the need to act before regulations could be issued.

The Honeywell case is a different story, however, because the financial penalties were not

consistent with the prior informal guidance and there was no allegation of negative employment action. We understand that the commissioners did not review and approve that case before it was filed.

What Can I Do to Protect My Program from EEOC Investigation or Litigation?

There is no sure-fire way to protect a wellness program from an EEOC investigation or litigation. However, employers could consider the following steps:

Couch the Wellness Program's Reward in Terms of an "Incentive" as Opposed to a "Penalty"

This approach likely has little legal significance, but it might impact the way employees think about the program. For example, an employer could tell employees that their health plan premiums will be $20 per month higher if they don't complete the wellness program. By contrast, the employer could tell employees that they will receive a $20 discount off their premiums if they complete the program.

In both cases, an employee who completes the program has $20 more take-home pay than one who doesn't. However, employees in the first scenario might feel more pressure to complete the program and might be unhappy enough to complain to the EEOC.

Ensure that the Reward for Completing the Wellness Program Is a Reasonable One

The higher the reward, the more significant the penalty for failing to complete the program. The more significant the penalty, the more likely an employee will complain or that the program will be viewed as involuntary.

Train Human Resources Staff to Respond Appropriately to Complaints About the Wellness Program

The alleged negative employment action in Orion Energy Systems appears to have stemmed from the employer's response to the employee's complaint. If the employer had addressed the employee's concerns differently, the employee might not have felt the need to complain to the EEOC, or the EEOC might not have felt the need to file suit.

Tie the Wellness Program to the Employer's Medical Plan and Use Data from the Program to Design Future Plan Benefits

This approach will put the employer in a position to make the same safe-harbor argument that was approved in Seff.

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