Court Decision Clears The Air (Somewhat) For Wellness Programs

Employer wellness programs face a number of potential compliance issues under a variety of Federal (e.g., HIPAA, GINA, Affordable Care Act) and State law provisions. Recently, the Equal Employment Opportunity Commission and private litigants have challenged employer sponsored wellness programs that offer incentives for providing biometric and other health-related information under the Americans with Disabilities Act. The Equal Employment Opportunity Commission is the Federal agency charged with enforcing the Americans with Disabilities Act.

COMPLIANCE EXCLUSIVE
A Newsletter from SHPS HR Solutions

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Employer wellness programs face a number of potential compliance issues under a variety of Federal (e.g., HIPAA, GINA, Affordable Care Act) and State law provisions. Recently, the Equal Employment Opportunity Commission (EEOC) and private litigants have challenged employer sponsored wellness programs that offer incentives for providing biometric and other health-related information under the Americans with Disabilities Act (ADA). The EEOC is the Federal agency charged with enforcing the ADA.

The ADA generally prohibits employers from requiring employees to undergo a medical examination or answer medical inquiries (the "ADA Prohibition"). An important exception exists for wellness programs that are considered to be voluntary under ADA guidance. Based on current informal guidance from the EEOC, a wellness program will only be considered to be voluntary if it neither requires participation nor penalizes employees who do not participate. This raises concern with respect to the vast number of employers implementing wellness programs with a financial reward (or surcharge) for participation (or non-participation) (e.g., does a participation incentive of a 20% medical premium discount essentially *force* employees to participate in the wellness program?). Nonetheless, such financial components are almost universally included as part of employer sponsored wellness programs. Earlier this Spring, a Federal district court in Florida handed down a ruling which, if followed by other courts, provides employers with some breathing room under the ADA. In this article we summarize the court's ruling and briefly discuss its potential impact on the design of employer sponsored wellness programs.

Seff vs. Broward County[1]

In 2009, Florida's Broward County adopted a wellness program as part of its consumer driven health plan's open enrollment process. Just like countless other employer plans around the country, Broward County's wellness program consisted of a confidential health risk assessment questionnaire and confidential biometric screening for glucose and cholesterol levels. Employees who completed the program and were identified as having one of five disease states – asthma, hypertension, diabetes, congestive heart failure, or kidney disease – were given the option to participate in a disease management coaching program, after which the employee was eligible to receive relevant medications at no additional cost.

[1] U.S. District Court for the Southern District of Florida, Case No. 10-61437-CIV-Moore/Simonton.

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Ruling in favor of Broward County, the court stated that the County's wellness program did not violate the ADA Prohibition because the program comes under ADA's "safe harbor" exception.

Participation in the wellness program was not required for coverage under Broward County's group health plan, and Broward County (as employer/plan sponsor) received only de-identified aggregate data that it might consider in creating future benefit plans. In mid-2010, a financial incentive component was added so that those who declined to participate in the program incurred a $20 charge on each of their bi-weekly paychecks. Just a few months later, Broward County found itself the defendant in a class action lawsuit claiming that it violated the ADA Prohibition.[2]

Ruling in favor of Broward County, the court stated that the County's wellness program did not violate the ADA Prohibition because the program comes under ADA's "safe harbor" exception to the ADA Prohibition. In other words, the court did not even need to address whether the financial incentive rendered participation in the arrangement "involuntary."

The Safe-Harbor Exception

The safe-harbor exception[3] protects employers and plan administrators (and other covered entities under the ADA) from "establishing, sponsoring, observing or administering" a wellness program if the program is:

- part of "the terms of a bona fide benefit plan";
- "based on underwriting risks, classifying risks or administering such risks"; and
- "based on or not inconsistent with State law" and is not used "as a subterfuge to evade the purposes" of the ADA Prohibition.

Applying these requirements to the Broward County wellness program, the court ruled that Broward County's wellness program was part of the County's group health plan and therefore met requirement (i) above because the insurer under the plan pays for and administers the program under its healthcare contract with the County; only those enrolled in the County's health plan may participate in the wellness program; and the County included a description of the wellness program in its benefits plan handout. The court also found that there was a "strong argument" that the wellness program itself is a bona fide benefit plan because it offers benefits – disease coaching and medication cost waivers – for certain participants.

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[2] The ADA Prohibition reads: '[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A).

[3] *See* 42 U.S.C. § 12201(c).

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The court found that the purpose of the second requirement is to permit the development and administration of benefit plan in accordance with accepted principles of risk assessment. This, requirement (ii) was met because the program's ultimate goal is to sponsor insurance plans that maintain or lower its participants' premiums. More specifically, the court stated that Broward County's wellness program renders aggregate data which the County may analyze when developing future benefit plans and uses to classify various risks on a macroscopic level so it may form economically sound benefits plans for the future.

Finally, the court stated that requirement (iii) was met because there is no Florida law that is inconsistent with the wellness program and the plaintiffs did not allege any sort of subterfuge to avoid the purposes of the ADA. Further, the court stated that it was hard to see how the wellness program relates to discrimination in any way and, rather, is "enormously beneficial" to all employers of the County.

Is the Voluntary/Involuntary Analysis Still Relevant?

Only one other court has applied the approach adopted in *Seff vs. Broward County,* and that decision was under a fully insured program. It is unclear whether the EEOC, as the ADA enforcement agency, will follow this ruling. We are aware of several EEOC challenges where the EEOC has disputed the validity of employer wellness programs that offered financial incentives based on the "voluntariness" of the arrangement. Nonetheless, *Seff vs. Broward County* provides employers some breathing room, and an alternate approach to support the validity of their wellness programs.

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About the Author

John Hickman is head of Alston & Bird's Health Benefits Practice where he leads five attorneys devoted exclusively to HIPAA privacy, flexible benefits, and other health and welfare benefit issues. He has been a pioneer in the consumer-directed healthcare arena and has worked closely with health plans, financial institutions and employers as well as the Internal Revenue Service, Treasury, and Department of Labor in developing guidance for tax-favored health reimbursement arrangements and health savings accounts. John has lectured widely and published articles on HIPAA, ERISA litigation and cafeteria and health plan issues. He is co-author of the *Cafeteria Plans Manual*, *HIPAA Portability and Privacy*, and *Consumer-Driven Health Care* (published by the Employee Benefits Institute of America). John is also an adjunct professor of law at Emory University School of Law.

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