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EEOC Targets Incentive-Based Wellness Programs as Violating the ADA and GINA

By Maria Tavano

Employer-sponsored wellness programs have been increasing in popularity and are now a common way for employers to manage rising healthcare costs. Congress first endorsed the use of incentive-based wellness programs over eighteen years ago in the Healthcare Insurance Portability and Accountability Act ("HIPAA") and, more recently, through its passage of the Affordable Care Act ("ACA"), which amended relevant provisions of HIPAA to allow for larger incentives in exchange for employees' participation in employer-sponsored wellness programs. The Departments of the Treasury, Labor, and Health and Human Services have also published joint regulations and proposed rules regarding these programs. The EEOC, however, has generally remained on the sidelines of the issue - that is, until its recent filing of three actions in what appears to be a targeted effort against the use of incentive-based wellness programs.

In the most recent of the three actions, *EEOC v. Honeywell International, Inc.*, the EEOC asked a Minnesota federal district judge to issue a temporary restraining order enjoining Honeywell International, Inc. ("Honeywell") from assessing penalties against employees who refused to undergo biometric testing in conjunction with Honeywell's wellness program. The EEOC argued, among other things, that the significant penalties assessed against employees for nonparticipation in the program's medical testing (up to $4,000 annually, inclusive of surcharges and contributions, according to the

EEOC) renders the program involuntary and that the testing, therefore, constitutes a non-job-related involuntary medical examination in violation of the Americans with Disabilities Act ("ADA"). The EEOC also argued the program violates the Genetic Information Nondiscrimination Act of 2008 ("GINA") because it collects genetic information from covered employees' spouses.

Honeywell provides its eligible employees and their families the option of participating in its High Deductible Health Plan ("HDHP"), a self-insured group plan. Employees that are enrolled in the HDHP may separately choose to participate in Honeywell's wellness program, which is designed to inform participants about their health status and encourage improvement of specific health goals, as well as reduce claim costs. Employees who choose to participate in the wellness program must undergo biometric testing, performed by a third-party laboratory, that includes a blood sample and obtains information on blood pressure, height, weight, waist circumference, cholesterol, glucose, and nicotine use. Alternatively, employees may choose to have their personal physicians provide the required information through submission of plan forms. Employees who earn less than $100,000 and participate in the program become eligible for a Heath Savings Account ("HSA"). Honeywell then makes annual contributions to the HSAs of qualified employees in amounts ranging from $250 to $1,500.

On the other hand, employees who forgo participation in the wellness program do not qualify for an HSA and instead must pay a $500 surcharge toward their annual health insurance contribution. Additionally, Honeywell employees or their spouses who are tobacco users are subject to a $1,000 nicotine surcharge per person. Individuals who refuse to undergo the biometric testing are presumed tobacco users and are assessed the surcharge, regardless of actual use, though the program does delineates three methods by which an employee can avoid the default surcharge without submitting to the testing.

Honeywell defended its wellness program as fully compliant with the ADA, GINA, and the ACA. With regard to the EEOC's argument that the program is involuntary and therefore violates the ADA, Honeywell countered on two grounds. First, it argued its program is covered under the ADA's safe harbor provision as part of a self-insured health plan. The ADA's so-called "safe harbor provision" waives application of subchapters I through III of the ADA against entities "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 not inconsistent with state law." Alternatively, Honeywell argued that its wellness program complies with the ADA and that the EEOC's ADA guidance deserves no deference in light of Congress' approval of incentive-based wellness programs, as most recently expressed in

the ACA and its related regulations.

As to GINA, Honeywell argued the biometric testing does not constitute "genetic testing," which is defined in the statute as "analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations or chromosomal changes." 29 U.S.C. § 1191b(d)(7).

In reply, the EEOC argued the ADA allows only "nominal" incentives and GINA prohibits all incentives intended to encourage biometric screening involving genetic information. The EEOC's position effectively renders meaningless the ACA and HIPAA provisions and regulations, which expressly permit incentive-based wellness programs. The EEOC indirectly acknowledged as much and responded only that compliance with the ACA or HIPAA does not demonstrate compliance with the ADA.

On November 3, 2014, the federal judge denied the EEOC's request for a preliminary injunction. The Court found, among other findings, "great uncertainty persists in regard to how the ACA, ADA and other federal statutes such as GINA are intended to interact," noted the tension between the ACA and the ADA, highlighted by the EEOC's recent filing of three separate cases on the issue, and called for clarity in the law. The judge's denial of the EEOC's request does not end the matter, however. The EEOC requested the injunction during its ongoing investigation into two charges of discrimination relating to the wellness program, and given the EEOC's arguments, it is likely these issues will continue to be litigated, with an ultimate determination of their legality left for another day.

Currently, there is a dearth of case law regarding the propriety of wellness programs and none interpreting whether financial incentives may render a program involuntary under the ADA. The limited guidance on the issue and somewhat inconsistent federal law has made it difficult for employers to implement wellness programs fully confident of their compliance with all relevant statutes and regulations. The merits of the EEOC's position challenging incentive-based programs as involuntary remains to be seen. In the meantime, however, the *Honeywell* decision serves as an important reminder that employers should routinely review their corporate wellness programs for compliance, particularly as the courts begin to confront the issue and healthcare reform legislation continues to take effect.

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