BEFORE THE UNITED STATES SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

Hearing on "Employer Wellness Programs: Better Health Outcomes and Lower Costs"

Thursday, January 29, 2015

10:00 a.m.

430 Dirksen Senate Office Building

I. Introduction

Good morning Chairman Alexander, Ranking Member Murray, and Members of the Committee. Thank you all for the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm Jones Day here in Washington, D.C.

I previously served as the General Counsel of the United States Equal Employment Opportunity Commission ("EEOC" or "Commission"). The EEOC is a federal law enforcement agency that is charged with enforcing very important federal laws against discrimination on the basis of race, color, sex, religion, national origin, age, disability, and genetic information, among others. As EEOC General Counsel, I directed the federal government's litigation under the federal employment antidiscrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases. I was privileged to work with many public officials who dedicated their careers to serving the public, enforcing the civil rights laws, rooting out unlawful discrimination, and working to ensure that our nation reaches the ideal of equal opportunity for everyone. These individuals continue their important work. They investigate charges of discrimination. They mediate and conciliate disputes and work with individuals, unions, and employers to resolve very difficult and often painful problems. They pursue enforcement through litigation in the federal courts, at every level up to and including the Supreme Court of the United States. And, these very able EEOC officials have the awesome power of the United States government to back them up.

It is with this background that I appear here today, at your invitation, to speak about employer wellness programs.

The Americans with Disabilities Act of 1990 ("ADA") authorizes employers to conduct medical examinations and to obtain employee medical history of employees as part of wellness programs as long as participation by employees is voluntary. The Patient Protection and Affordable Care Act ("ACA") specifies that the reward for a wellness program may be up to thirty percent of the cost of coverage, with the potential for that to increase to fifty percent. Moreover, the U.S. Department of the Treasury, the U.S. Department of Labor , and the U.S. Department of Health and Human Services ("the Departments') have issued standards for wellness programs that likewise endorse the ACA's thirty and fifty percent standards, and the U.S. Court of Appeals for the Eleventh Circuit has determined that the ADA may exempt wellness plans from that law. However, compliance with the ACA may not eliminate the risk of

ADA liability for employers, at least according to the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission"). Since March 2009, the Commission has declined to endorse any definition of what the ADA's "voluntary" standard means, and in a recent court case, the EEOC asserted that the decision by the Eleventh Circuit is wrong. So employers and employees throughout the United States are left with the rather bizarre situation in which the Congress and one part of the Executive Branch of the Government have endorsed a set of standards that it says govern wellness plans and comply with the law while the EEOC has failed or refused to explain what it will treat as a lawful "voluntary" wellness plan. The Commission's silence about this issue is perplexing, and the Congress, the EEOC, or both should clarify exactly how a wellness plan will comply with the ADA.

II. Statutory Background

Congress enacted the Americans with Disabilities Act[1] in 1990. That law permits disability-related inquiries and medical examinations that are part of a "voluntary" wellness program. Specifically, the ADA states: "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."[2] On the other hand, Section 102(d)(4)(B) of the ADA states that employers "may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."[3] Section 501(c)(2) authorizes employers to establish, sponsor, observe, and administer "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."[4]

The Health Insurance Portability and Accountability Act ("HIPAA"), enacted in 1997, did not specifically address wellness programs but rather included a general prohibition against provisions in employer group health plans that discriminated against employees with respect to their plan participation based on factors such as health status, medical conditions, or claims experience.[5] In 2006, in response to employer concerns that wellness programs could be deemed to violate these HIPAA nondiscrimination standards, the Departments issued regulations that exempted wellness programs from the HIPAA nondiscrimination rules if they met certain requirements.[6] Those regulations authorized employers to offer financial inducements to participate in wellness plans of up to twenty percent of the cost of coverage.[7]

---

[1] See 42 U.S.C. § 12101 et seq.

[2] 42 U.S.C. § 12112(d)(4)(A).

[3] 42 U.S.C. § 12112(d)(4)(B).

[4] 42 U.S.C. § 12201(c)(2). This is sometimes referred to as a "safe harbor" provision.

[5] See ERISA Section 702(a), 29 U.S.C. §1182(a).

[6] See Department of Labor Regulations, 29 C.F.R. §2590.702(f).

[7] See 78 Fed. Reg. 33158.

In 2010, Congress passed and the President signed the Patient Protection and Affordable Care Act, commonly called the Affordable Care Act or the "ACA." With respect to wellness programs, the ACA provides that "[a] reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan."[8] Specifically, the ACA states that the reward for a wellness program "shall not exceed 30 percent of the cost of the coverage in which an employee or individual and any dependents are enrolled. . . The Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward available under this subparagraph to up to 50 percent of the cost of coverage if the Secretaries determine that such an increase is appropriate."[9]

III. EEOC and Judicial Positions on Wellness Programs

According to the EEOC, a wellness program is "voluntary" if the employer "neither requires participation nor penalizes employees who do not participate."[10] In a letter dated January 6, 2009 – two weeks before President George W. Bush left office – the EEOC's Office of Legal Counsel announced that a wellness plan would be "voluntary" (and therefore lawful) if "the inducement to participate" does not "exceed twenty percent of the cost of employee only or employee and dependent coverage under the plan, consistent with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act."[11] The EEOC explained that "[b]orrowing from the HIPAA rule is appropriate because the ADA lacks specific standards on financial inducements, and because it will help increase consistency in the implementation of wellness programs."[12]

On March 6, 2009, however, the EEOC rescinded this statement and announced that it was "continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA."[13] EEOC's "examination" has continued for nearly six years, and when this examination will conclude, if it ever does, is unclear. On January 18, 2013, EEOC reiterated that "[t]he EEOC has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary."[14] EEOC held a hearing about wellness plans on May 8, 2013[15], and more

---

[8] 42 U.S.C. § 300gg-4(j)(3)(A).

[9] *Id*.

[10] See http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[11] See EEOC Opinion Letter, Jan. 6, 2009 at 2, rescinded on March 6, 2009, http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf.

[12] *Id*.

[13] See http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html.

[14] See http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.

than 18 months after that hearing, the EEOC apparently is still "continuing to examine" its position about wellness plans.

The courts and the Departments are not waiting for the EEOC. On August 20, 2012, the U.S. Court of Appeals for the Eleventh Circuit rejected a challenge to a wellness program that imposed a $20 charge on each biweekly paycheck issued to employees who enrolled in the employer's group health insurance plan and refused to participate in the employee wellness program.[16] The court reasoned that a "safe harbor" contained in the ADA permits employers to make disability-related inquiries and give medical examinations to observe the terms of a "bona fide benefit plan," and because the $20 charge was a "term" of the employer's health plan, the plan was "bona fide" and therefore lawful.[17]

On June 3, 2013, the Departments issued rules that permit employers to "reward" employees who participate in wellness plans, including plans that involve health-related questionnaires or biometric tests, by offering financial inducements up to 30 percent of the cost of health coverage and as high as 50 percent for "programs designed to prevent or reduce tobacco use."[18]

IV. EEOC Lawsuits Against Employers

Even though EEOC has yet to provide employers guidance on what is "voluntary," the agency has filed multiple lawsuits against employers for their wellness programs. In August 2014, the EEOC filed a lawsuit that alleged that a wellness program violated the ADA.[19] In its complaint, the EEOC alleged that Orion Energy Systems' wellness program was not "voluntary" and therefore violated ADA Section 102(d)(4)(A).[20] In its Answer, Orion denied that its wellness program violated the ADA and, listed as some of its affirmative defenses, stated that the program is a "bona fide benefit plan" and that the medical examinations were "voluntary."[21]

(continued…)

[15] See http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm; http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.

[16] See *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012).

[17] *Id*. at 1223-24.

[18] See http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=26880&AgencyId=8&DocumentType=2.

[19] See http://www1.eeoc.gov//eeoc/newsroom/release/8-20-14.cfm?renderforprint=1. See also *EEOC v. Orion Energy Systems, Inc.*, Case No. 14-1019 (E.D. Wis. Complaint filed Aug. 20, 2014).

[20] Plaintiff EEOC's Complaint at 5-6, *EEOC v. Orion Energy Systems, Inc.*, Case No. 14-1019 (E.D. Wis. filed Aug. 20, 2014). The EEOC also alleges that Orion retaliated against an employee for her objections against the wellness program, and that Orion "interfered, coerced, and intimidated" the employee in violation of the ADA. *Id*. at 6-7.

[21] Defendant Orion Energy Systems' Answer at 4-5, *EEOC v. Orion Energy Systems, Inc.*, Case No. 14-1019 (E.D. Wis. filed Oct. 16, 2014).

One month later, in September 2014, the EEOC brought suit against Flambeau, Inc., a plastics manufacturer, alleging that the employer violated the ADA because its wellness program "required that employees submit to biometric testing and a 'health risk assessment,' or face cancellation of medical insurance, unspecified 'disciplinary action' for failing to attend the scheduled testing, and a requirement to pay the full premium in order to stay covered."[22] In its Answer, Flambeau stated that its program was a "bona fide benefit plan" and that the biometric testing and health risk assessments were voluntary and thus deniedthat its program violated the ADA.[23]

In its third lawsuit, filed in October 2014, the EEOC pursued a different strategy by seeking a temporary restraining order and preliminary injunction against Honeywell International, Inc. for its wellness program.[24] The EEOC alleged that Honeywell's wellness program is an involuntary medical examination that was not job related and therefore in violation of the ADA.[25] Honeywell argued that its wellness program: (1) is covered under the ADA's safe harbor provision (Section 501(c)(2)); and (2) comports with the ADA's voluntary wellness program provision (Section 102(d)(4)(B)).[26] Moreover, Honeywell maintained that the ACA illustrated "Congress' express approval of surcharges used in conjunction with wellness programs."[27] In response, EEOC argued that Honeywell's wellness program was not "voluntary," the Eleventh Circuit's decision is wrong, and that "compliance with HIPAA and the ACA are not defenses to the ADA." [28]

The court in *Honeywell* ultimately rejected the EEOC's position and declined to issue a preliminary injunction. The court determined that the EEOC failed to establish the threat of irreparable harm and that additional factors weighed against an injunction.[29] The court also noted that "great uncertainty persists in regard to how the ACA, ADA and other federal statutes

---

[22] See http://www1.eeoc.gov//eeoc/newsroom/release/10-1-14b.cfm?renderforprint=1. See also Plaintiff EEOC's Complaint, *EEOC v. Flambeau, Inc.*, Case No. 14-638 (W.D. Wis. filed Sept. 30, 2014).

[23] Defendant Flambeau's Answer, *EEOC v. Flambeau, Inc.*, Case No. 14-638 (W.D. Wis. filed Nov. 24, 2014).

[24] *EEOC v. Honeywell Int'l, Inc.*, Civil No. 14-4517 (D. Minn. Oct. 27, 2014).

[25] *EEOC v. Honeywell Int'l, Inc.*, Civil No. 14-4517, 2014 U.S. Dist. LEXIS 157945, at *11 (D. Minn. Nov. 6, 2014). Under the program, Honeywell employees that choose to participate agree to undergo biometric testing and become eligible for an HSA in which Honeywell contributes $250 to $1,500 to qualified employees in a certain salary range. *Id*. at *2-4. Those employees who choose not to participate in the program do not qualify for a company-sponsored HSA and must also pay a $500 surcharge. *Id*. at *4.

[26] *Id*. at *13.

[27] *Id*. at *14.

[28] Plaintiff EEOC's Memorandum in Support of EEOC's Application for Temporary Restraining Order and an Expedited Preliminary Injunction at 13-19, *EEOC v. Honeywell Int'l, Inc*., Civil No. 14-4517, 2014 U.S. Dist. LEXIS 157945 (D. Minn. filed Oct. 27, 2014).

[29] *Honeywell Int'l, Inc.*, Civil No. 14-4517, 2014 U.S. Dist. LEXIS 157945, at *5-10.

such as [the Genetic Information Nondiscrimination Act] are intended to interact," but that "[s]hould this matter proceed on the merits, the Court will have the opportunity to consider both parties' arguments after the benefit of discovery in order to determine whether Honeywell's wellness program violates the ADA and/or GINA."[30]

V. Conclusion

All of this raises many questions. It is too soon to tell whether other courts will agree with the Eleventh Circuit. The EEOC does not agree and said so explicitly in the *Honeywell* case. Whether the EEOC will agree with the Affordable Care Act's standards remains to be seen. Employers that design and implement wellness plans that comply with the ACA may be unpleasantly surprised to find that the EEOC asserts that such plans may violate the ADA. And, the EEOC's continued and lengthy "examination" of wellness programs calls into question the EEOC's ability to enforce the law, to put the matter mildly.

And so the public is left with a sorry state of affairs when it comes to wellness plans. The EEOC's flip-flopping, ongoing and seemingly never ending "examination," and litigation perpetuate confusion and uncertainty. The public is also left with a government that has spent more than half a decade trying to figure out the meaning of the word "voluntary." None of this serves the public good, and if the Executive Branch of the Government will not end this regulatory mess, the Congress should do so by enacting appropriate legislation.

[30] *Id*. at *13-15. This paper does not address the issues involving Genetic Information Nondiscrimination Act ("GINA").