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Wellness Program Falls Within ADA Safe Harbor

In a case of first impression, the Eleventh Circuit's decision in Seff v. Broward County *offers an alternate path for analyzing whether wellness programs comply with the ADA.*

On August 20, the Eleventh Circuit upheld a ruling by the U.S. District Court for the Southern District of Florida that an employer group health plan's wellness program did not violate the Americans with Disabilities Act's (ADA's) prohibition on nonvoluntary medical examinations and disability-related inquiries because the program falls within the ADA's safe harbor for bona fide benefit plans. *Seff v. Broward County*, No. 11-12217 (11th Cir. Aug. 20, 2012).

Background

In this case, defendant Broward County offered a wellness program that consisted of a biometric screening and a confidential health risk assessment questionnaire. The County's health insurer used the information from the screening and questionnaire to identify employees who had certain diseases to offer them the opportunity to participate in a disease management coaching program and obtain co-pay waivers for certain medications. The County received aggregated, not individual, data about participants in the wellness program. To encourage participation, the County imposed a $20-per-pay-period surcharge on health plan premiums for those who did not participate in the wellness program. The plaintiff brought suit, arguing that this wellness program violated the ADA's prohibition on mandatory medical examinations and inquiries and was not voluntary because the program imposed a penalty for nonparticipation.

The District Court's Decision

On April 11, 2011, the Southern District of Florida granted summary judgment in the County's favor on the ground that the wellness program met the ADA's safe harbor for bona fide benefit plans. In so holding, the district court ruled that (1) the program was part of a bona fide benefit plan and (2) the program was based on underwriting, classifying, or administering risk and was not a subterfuge for discrimination, two qualifications necessary for a plan to fall under the ADA's safe harbor.

Part of a Bona Fide Benefit Plan

In ruling that the wellness program was part of a bona fide benefit plan, the district court pointed out that the County's insurer administered the program pursuant to its contract with the County and that only those enrolled in the health plan were eligible to participate in the wellness program. On appeal, the plaintiff argued that the wellness program was not part of a benefit plan based on testimony from the County's benefits manager that the program was not a term contained in the County's plans. The Eleventh Circuit rejected this argument because (1) the County's insurer sponsored the wellness program as part of its contract with the County to provide a group health plan, (2) the program was only available to group plan enrollees, and (3) the County presented the wellness program as part of its group plan in at least two employee handouts. The Court also noted that the written terms of the plan documents were not necessarily material to the applicability of the safe harbor provision.

Based on Underwriting, Classifying, or Administering Risk

In ruling that the program was based on underwriting, classifying, or administering risk, the district court noted that the program "was designed to develop and administer present and future benefit plans using accepted principles of risk assessment." The County used the aggregate data to underwrite and classify risk on a "macroscopic level" in order to create benefit plans and mitigate risks. The district court found no subterfuge and noted that "the program is enormously beneficial to all employees of Broward County—disabled and non-disabled alike."

The Eleventh Circuit's Decision

The Eleventh Circuit's decision to uphold the district court's ruling in *Seff* is significant because it is a case of first impression that offers an alternate path to analyze whether wellness programs comply with the ADA. The ADA prohibits involuntary medical examinations or disability-related inquiries. Until now, the challenges to wellness programs—particularly those from the Equal Employment Opportunity Commission (EEOC), which is charged with enforcing the ADA—have focused on whether a program is truly "voluntary" and whether a program poses medical inquiries that violate the ADA. Although the EEOC has waffled over the years in its response to wellness programs, the agency's current position is that a wellness program complies with the ADA if it is voluntary (i.e., if it neither requires participation nor penalizes employees who do not participate). The decision in *Seff* appears to bypass the EEOC's "voluntary" analysis by holding that a wellness program that falls within the ADA's safe harbor for bona fide benefits plans need not comply with the ADA requirements regarding medical examinations and inquiries for employees.

Implications

As *Seff* is the first appeals court decision addressing ADA's application to wellness programs offered under an employer-sponsored health plan, and the EEOC has yet to issue any definitive guidance on this issue, it is unclear whether and to what extent the EEOC will follow the *Seff* ruling beyond the boundaries of the Eleventh Circuit. However, the decision does encourage employers to closely tie their wellness programs to their group health plans.

Until the *Seff* ruling is considered by courts outside the Eleventh Circuit, it may be prudent for employers to continue to design their wellness programs to be "voluntary" by focusing on providing positive incentives for participation rather than negative consequences for nonparticipation. Even if the EEOC decides to adopt the *Seff* analysis, employers will be better protected if they design their programs to be voluntary. Therefore, if a program is later found to fall outside of the ADA safe harbor, it would arguably still be lawful because it would still satisfy the "voluntary" criterion. (For more information about wellness programs, and the impact of *Seff* on plan design and operation, see the materials from our May 21 webinar, "Wellness Programs: Legal Issues and Design Solutions," available at http://www.morganlewis.com/pubs/EB_WellnessWebinar_Presentation_21may12.pdf.)

Finally, employers should not forget that their health plans must still comply with all other applicable laws and regulations, including the privacy and nondiscrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Patient Protection and Affordable Care Act (PPACA). Certain states may have additional laws relevant to this issue, such as laws that protect employees' rights to use lawful substances during nonwork hours.

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