



EEOC Targets Employer Wellness Plans

In recent months, the Equal Employment Opportunities Commission (EEOC) has filed lawsuits against two Wisconsin companies and one Minnesota company alleging violations of the Americans with Disabilities Act (ADA) in relation to the employers' administration of their employee wellness plans. In each case, the EEOC's challenge related to a requirement that employees (and in one case employees' spouses) complete health risk assessments (HRAs) and biometric screenings as part of the wellness program. These cases have led some school districts to wonder whether they face potential compliance risks in regard to their own wellness programs, particularly if those programs also involve HRAs and biometric screenings.

While these recent cases do highlight the complicated legal compliance issues that are associated with wellness plans, we do not believe that they signal that the EEOC will broadly crack down on any wellness program that involves HRAs and biometric screenings. Rather, in these three cases, the EEOC appears to be outlining the boundaries of permissible employer conduct in regard to using *penalties* and *incentives* to encourage employees to participate in wellness programs. In two of the cases, the EEOC was responding to complaints that an employer was not permitting employees to participate in its health plan (and even subjecting them to termination) if they refused to complete HRAs and biometric screenings. In the other case, the EEOC was responding to complaints that an employer's wellness plan involved penalties of up to \$4,000 if employees and their spouses declined to complete HRAs and biometric screenings.

In our experience, school districts that have implemented wellness programs have not been refusing to enroll employees in their health plans or terminating employees for declining to participate, and the financial incentives and penalties involved, if any, are not as severe as those noted above. In addition, in most cases that we have seen, the HRA and biometric screening aspects of district wellness programs apply to employees, and not to the spouse or dependents. As such, while school districts cannot ignore the legal compliance obligations associated with their wellness programs (and may want to consider modifying their programs if they closely resemble the programs the EEOC has objected to), we do not think that these three cases should cause districts to abandon their wellness efforts. This FYI will provide further discussion on this important issue.

Background

In October 2013, our law firm authored a detailed *Legal Comment* published by the Wisconsin Association of School Boards, Inc., regarding the various legal requirements that apply to wellness plans (a copy can be found at www.wasb.org/websites/legal/File/legal-comments/C201310.pdf). As noted in that article, the use of HRAs and biometric screenings as part of a wellness program implicates the ADA because they are considered to be medical examinations and because they may also constitute disability related inquiries, both of which are regulated by the ADA.

In particular, under the ADA, an employer is generally *not* permitted to *require* current employees to submit to medical examinations or disability related inquiries unless there is a reason for doing so that is job-related and consistent with business necessity. For example, a district would violate the ADA if it required all of its employees to submit to a physical examination before being allowed to enroll in the district's health plan. On the other hand, a district could require an employee to submit to a medical examination in response to the employee's request for a disability-related reasonable accommodation.

The EEOC's three recent lawsuits are tied to this ADA prohibition against *required* medical examinations. In all three cases, the EEOC alleged that the wellness program at issue violated this prohibition because it involved HRAs and biometric screenings that were not "voluntary." It is important to note that the EEOC has not yet proven these allegations, and courts have not yet reached a final determination regarding whether the employers in these cases violated the ADA. Nevertheless, the EEOC's allegations presumably provide an indication of the type of employer conduct that the EEOC is currently seeking to address.

Analysis

HRAs and biometric screenings that are linked to incentives (or penalties) are a common feature of many wellness plans. Moreover, the use of incentives and penalties is specifically approved of under other laws that govern wellness plans, such as Health Insurance Portability and Accountability Act (HIPAA). What, then, should districts do if they currently use incentives or penalties to encourage employees to complete HRAs or biometric screenings?

Unfortunately, the EEOC has yet to take a firm position on what it considers to be “voluntary” and has not yet provided clear guidance regarding what level of incentive or penalty (if any) it would consider to be permissible. Despite this lack of clear guidance, however, we think that, while there is some risk, it is too early for districts to abandon these types of programs, provided they comply with the requirements of other applicable laws, such as HIPAA and the Genetic Information Nondiscrimination Act (GINA) (which are discussed in the October 2013 Legal Comment referenced above) and do not involve substantial penalties.

Further, despite this uncertainty, districts may take steps to minimize their risks under the ADA. For example, districts that have (or are able to) integrate their wellness programs with their group health plans may be able to rely on a “safe-harbor” provision of the ADA to allow the use of incentives or penalties tied to the completion of an HRA or a biometric screening. The ADA includes a safe-harbor provision that exempts certain group health plans from the ADA’s prohibition against required medical examinations and disability-related inquiries.

Conclusion

We will continue to monitor this issue for new developments in the law. If you have any questions about your district’s wellness plan, please be sure to contact us. If you are interested in an expanded analysis of the EEOC’s current challenges to wellness plans, including summaries of the specifics of the wellness plans being challenged, please contact Barbara Sharpee (bsharpee@boardmanclark.com).

For further assistance on any of these matters or for answers to any questions regarding the information in this FYI article, please contact Andrew DeClercq (adeclercq@boardmanclark.com) or JoAnn Hart (jhart@boardmanclark.com).

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