

August 23, 2012

New Life: The Eleventh Circuit Turns Back ADA Challenge to Employer's Wellness Program

By Russell Chapman

An Eleventh Circuit Court of Appeals panel recently held that a governmental employer's wellness program, established as part of its insured group health plan, did not violate the Americans with Disabilities Act (ADA) because the program was exempt by virtue of the ADA's "bona fide plan" exception. This article discusses the recent decision and explores its implications for employer wellness programs.

Background

Even as the popularity of employer-sponsored mandatory wellness programs continues to soar, legal uncertainties surrounding these programs have presented potential obstacles to their continued growth. Chief among these are the ADA, as amended by the ADA Amendments Act (ADAAA), and the Genetic Information Nondiscrimination Act (GINA), imposing restrictions that lead many employers to water down wellness programs or avoid them altogether.¹

Where a wellness program bases an incentive on a condition related to a "health factor," Health Insurance Portability and Accountability Act (HIPAA) wellness regulations may limit some desired wellness program designs. Examples of such a condition would be a wellness program conditioning the incentive on the participant remaining tobacco-free, maintaining a certain blood pressure level, or other "outcome-based" stipulation. Among other requirements, HIPAA regulations limit the available wellness incentive for compliance with such a program to 20% of the applicable premium for coverage.²

HIPAA regulations do not place any such restrictions on the incentive or disincentive that a wellness program may impose on a so-called "participation-only" program. For example, HIPAA wellness regulations specifically sanction a program in which eligibility to participate in a group health plan is conditioned on an employee's completion of a health risk assessment prior to enrollment. However, the EEOC has ruled that such a program would violate the ADA's prohibitions

1 See Russell Chapman and Andrea Jackson, *Double Whammy – EEOC ADA Opinion Letter and GINA Interim Final Regulations Restrict Health Risk Assessments in Wellness Initiatives*, Littler Insight (Dec. 2, 2009), <http://www.littler.com/publication-press/publication/double-whammy-%E2%80%93-eeoc-ada-opinion-letter-and-gina-interim-final-regulat>.

2 Effective in 2014, a provision in the Patient Protection and Affordable Care Act of 2010 (PPACA) will codify HIPAA wellness regulations, increase the available wellness incentives from 20% to 30% of applicable premiums, and authorize the U.S. Department of Health and Human Services to issue regulations permitting wellness incentives of up to 50% of such premiums.

on disability-related inquiries, discussed below. The EEOC's position has discouraged many employers from imposing more generous incentives for compliance, or stringent disincentives for noncompliance, with wellness requirements, or has dissuaded them from establishing any form of wellness program.

Thus, independent of HIPAA regulations, the ADA continues to be a frustrating complication for employer wellness programs. Employers contemplating wellness programs, but concerned about challenges under the ADA, may be encouraged by the Eleventh Circuit's decision in *Seff v. Broward County*, which may breathe new life into these programs.

The Bottleneck: ADA and “Disability-Related” Inquiries

The ADA prohibits employers from making disability-related inquiries or requiring medical examinations of prospective or current employees unless they are job-related or subject to a business necessity exception. An inquiry is “disability-related” if an individual's response to the inquiry could reasonably be expected to disclose the presence of a protected disability.³ Of course, generalized medical exams or checkups, health risk assessments, or health screens, are an integral part of most wellness programs. These types of assessments and screens will never be job-related or subject to business necessity because they do not focus on the specific job functions of the individual employee. Under the ADA such generalized disability-related inquiries may be permitted only if they are completely voluntary (meaning that the employee cannot be penalized for non-compliance nor rewarded for compliance), or if the questions are not “disability-related.”⁴

The ADA Statutory Exemption for Bona Fide Benefit Plans

The ADA also includes a statutory exemption that generally exempts from the ADA:

- an insurer, medical provider, HMO, agent, third party benefit plan administrator, or similar organization, in underwriting risks, classifying risks, or administering risks based on or consistent with State law; or
- a covered person or organization in establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering risks based on or consistent with State law; or
- a covered person or organization in establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

The exemption does not apply if the program, or a provision in it, is used as a “subterfuge” to avoid the purposes of the ADA.⁵ The defendant in *Seff v. Broward County* maintained an insured group health benefit plan subject to state law, and thus asserted paragraph (2) of the exemption in its defense against the ADA challenge.

The EEOC has taken the informal position that the safe harbor is extremely narrow, and will only apply when the plan has significant data showing that the offending provision is necessary as a cost saving tool, and that the plan would need to curtail benefits – or risk insolvency – if the provision were not included. As demonstrated by the *Seff* case, the courts have taken a more reasoned approach to the ADA safe harbor.

The Latest Battle in the Wellness Wars

The governmental group health insurance plan involved in *Seff v. Broward County* required participants to complete a health risk assessment and undergo a health screen, including a “finger-stick” blood test, to obtain a \$20 premium discount for each twice-monthly paycheck. The screening and assessment were intended to identify participants who had one or more of five conditions: asthma; hypertension; diabetes; congestive heart failure; or kidney disease. Those identified became eligible to participate in disease management programs and for additional benefits aimed at treating and managing care for those conditions. The program was challenged in a class action lawsuit filed in the U.S.

³ Inquiries that are not “disability-related” are not covered by the ADA. Examples of such “non-disability-related” inquiries cited by the EEOC include a health risk assessment posing only such innocuous questions as, how many servings of fruits and vegetables does the person eat, how much sleep does the person get, does the individual have a personal physician, does the person take a vitamin supplements, and the like. EEOC Op. Ltr., *ADA: Health Risk Assessments* (Aug. 10, 2009).

⁴ The EEOC has steadfastly declined to provide guidance on the question of what level of financial wellness incentive would render a wellness program “non-voluntary,” maintaining that the determination of voluntariness is a facts-and-circumstances determination.

⁵ 42 U.S.C. § 12201(c).

District Court for the Southern District of Florida, claiming that the program violated the ADA's prohibitions on disability-related inquiries and medical examinations.

The District Court's Ruling

The district court had this to say about the County's wellness program:

The wellness program falls under the [ADA's] safe harbor provision because it is designed to develop and administer present and future benefits plans using accepted principles of risk assessment. The program renders aggregate data to the County that it may analyze when developing future benefit plans. The County uses this information to classify various risks and decide what type of benefits plans will be needed in the future in light of these risks. The County is thus determining what kind of coverage will need to be provided. Though it is not underwriting or classifying risks on an individual basis, it is underwriting and classifying risks on a macroscopic level so it may form economically sound benefits plans for the future. Furthermore, the wellness program is an initiative designed to mitigate risks. It is based on the theory that encouraging employees to get involved in their own healthcare leads to a more healthy population that costs less to insure. In other words, the program is based on underwriting, classifying, and administering risks because its ultimate goal is to sponsor insurance plans that maintain or lower its participant's premiums.⁶

The plaintiffs did not allege that the wellness program was a "subterfuge" for avoiding the purposes of the ADA, and the court determined that it was not, noting that the program was "enormously beneficial to all employees of Broward County—disabled and non-disabled alike."⁷

Holding that the wellness program was part of the County's group health plan, and that it need not address the "voluntariness" issue, the court rendered summary judgment for Broward County.

The Eleventh Circuit's Decision – Was the Wellness Program a "Term" of the Benefit Plan?

On appeal, the parties briefed both the "voluntariness" and the "bona fide benefit plan" exemption issues, but the plaintiff then conceded in oral argument that the only issue remaining on appeal was whether the wellness program was a "term" of the County's health plan. A unanimous panel of the Eleventh Circuit, in a discussion spanning only four pages, held that the wellness program was indeed a term of the group health plan, and affirmed the district court's decision granting summary judgment to the County.

In her deposition, the County's benefits manager testified that the wellness program was not contained within the four corners of the group health insurance plan documents. This, the plaintiffs argued, caused the program to fall outside the ADA's safe harbor because it was not a "term" of the group health insurance plan. The court reasoned that the "term" reference did not require that the program be set out in the benefit plan document itself. Rather, the court held that the program was a "term" of the plan, noting that the same insurer provided both the wellness program and the group health insurance plan, and under the same contract; the wellness program was available only to enrollees in the plan, and the wellness program was presented as part of the plan in at least two employee handouts.

On these facts, the Eleventh Circuit affirmed the district court's summary judgment in favor of Broward County, and held that the wellness program was a "term" of the County's group health insurance plan. Therefore, the wellness program came within the ADA's safe harbor exemption.

What Employers Should Do Now

This case has been closely watched by employers offering or contemplating wellness programs, along with their advisors, and providers. The victory for Broward County and its wellness program certainly should prove encouraging to any employer who has been sitting on the sidelines awaiting its outcome. However, it also sounds a warning that employers must take particular care regarding the structure of any wellness program.

⁶ *Seff v. Broward County*, 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011).

⁷ *Id.* at 1375.

Many employers establish “stand-alone” wellness programs that may implicate the ADA’s prohibitions on “disability-related” inquiries. As a first step, employers should take care that any wellness program that is not “completely voluntary” as viewed by the EEOC, or meets another exemption, is clearly a “term” of the employer’s group health plan.

The wellness program should be contracted by a plan official, it should be described in summary plan descriptions and other official communications, and should be described as constituting a part of the group health plan. It should not be made available to persons who are not participants in the group health plan. Not all wellness programs are provided under the same contract as for health insurance – but if that arrangement is possible, then it should be part of the structure.

In designing, establishing and administering wellness programs, employers must also consider GINA issues independently of the ADA. This is particularly true considering that GINA contains no blanket exemption for wellness programs similar to that found in the ADA. Rather, GINA includes a separate set of rules applicable to employee benefit plans. Those rules must be taken in to account even if the ADA exemption applies.

Even though the Broward County plan was relatively modest, the analysis laid out by the Eleventh Circuit provides support to employers wishing to implement or strengthen a wellness program. Clearly, employers have new ammunition to resist challenges to their wellness programs, but they should still proceed with caution in designing and implementing those programs.

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