Insight

IN-DEPTH DISCUSSION

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Half a Loaf: Court Rejects ADA "Safe Harbor" But Approves Pre-Regulations Wellness Program as "Voluntary"

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The EEOC's attack on employee wellness programs as unlawful under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) that began in 2014 with three lawsuits, and continued with more recent regulations under these laws, has taken another turn. On September 19, 2016, a federal court in Wisconsin denied the EEOC's summary judgment motion in one of the three cases that directly challenged an employer's wellness program requiring employees who sought health plan coverage with a wellness component to undergo a medical examination or pay higher premiums. *EEOC v. Orion Energy Systems, Inc.,* Civil Action 1:14:-cv-01019 (E.D. Wis., Sept. 19, 2016).[1]

Specifically, the EEOC alleged that the employer violated the ADA by: (1) requiring employees who elected coverage under the employer's self-insured health plan to complete a health risk assessment (HRA); and (2) retaliating against an employee who complained about that requirement. The court refused to extend prior precedent and instead held that the ADA's "safe harbor" provision relating to insurance plans did not apply to the employer's wellness program.[2] In doing so, the court agreed with the EEOC's interpretation of a new regulation, effective this summer, in which the agency clarified that the "safe harbor" provision does not

1 As indicated in an earlier ASAP, the EEOC filed this action on August 20, 2014. *See* Russell Chapman, EEOC Directly Challenges Wellness Program for the First Time, Littler ASAP (Aug. 29, 2014).

2 As noted in our May 20, 2016 Insight summarizing the EEOC's final regulations on wellness programs, those rules failed to take into account the "safe harbor" provision at issue in Orion. *See* Ilyse W. Schuman, Judith Wethall, and Russell Chapman, EEOC Issues Final Rules on Wellness Programs, Littler Insight (May 20, 2016). The EEOC has since issued a regulation explicitly addressing the "safe harbor" provision.

apply to wellness programs.[3] But the court actually held in this case that the employer's wellness program was voluntary and, based upon the law in effect prior to the effective date of the EEOC's regulations, entitled the employer to judgment on that specific issue. The court, however, also determined that factual questions required that the retaliation claim move forward to trial.

The Wellness Program

In *Orion*, the employer offered a self-insured group health plan that included a wellness program. The component of the wellness program at issue required employees to complete an HRA consisting of a health history questionnaire, biometric screening and a blood draw. Employees who completed the HRA and health screen could eliminate their monthly premiums entirely, but employees who did not complete this requirement paid the entire cost of health insurance coverage. The results of the employees' HRAs were aggregated and then anonymously reported to the employer, which could then promote education or tools to address the staff's common health concerns. Employees received the results of their HRAs so that they could address any health issues identified, and all data was treated by the wellness vendors as protected health information under the HIPAA Privacy and Security Rule.

Only one employee objected to the HRA requirement. The company terminated her employment due, it claims, to legitimate non-discriminatory and non-retaliatory reasons, about three weeks after she opted out of the program. The EEOC sued, alleging that the employer violated Section 12112(d)(4)(A) of the ADA that, among other things, bars employers from requiring medical examinations of employees or making medical inquiries that could involve potential disabilities.[4] That section, however, permits "voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."[5] The employer here argued that its wellness program was voluntary within the meaning of Section 12112(d)(4)(B). It further contended that its program was lawful under the "safe harbor" provision of the ADA relating to insurance. Indeed, as the employer noted, two prior courts had concluded that the "safe harbor" provision protected similar wellness programs.[6]

Application of the "Safe Harbor" Provision and Voluntariness Requirements

The district court rejected the rationale of those earlier decisions, concluding that a broad reading of the "safe harbor" provision conflicts with the ADA's remedial purpose. The court found that the wellness program in question simply did not fall under the "safe harbor" because it was not used by the employer to underwrite, classify, or administer risk.[7] In fact, the court held that the wellness program was not a part of the employer's group health plan because the employer adopted the program "separately from the terms of [the] health benefit plan and did not amend its health benefits summary plan to include the wellness initiative."[8]

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3 That new regulation appears at 29 C.F.R. § 1630.14(d)(6). The *Orion* decision is apparently the first to substantively address the EEOC's final wellness regulations, and their application to the ADA's "safe harbor" provision, discussed *infra*.

4 *See* 42 U.S.C. § 12112(d)(4).

5 *Id.* § 12112(d)(4)(B).

6 *See*, 42 U.S.C. § 12201(c); *Seff v. Broward County*, 691 F.3d 1211 (11th Cir. 2012); *EEOC v. Flambeau, Inc.*, 131 F. Supp. 3d 849 (W.D. Wis. 2015). Flambeau is currently on appeal to the U.S. Court of Appeals for the Seventh Circuit, *EEOC v. Flambeau Inc.*, (7th Cir., No. 16-1402).

7 *EEOC v. Orion Energy Sys., Inc.*, No. 14-cv-1019, at 15–17 (E.D. Wis. Sept. 19, 2016) (discussing the scope and application of the "safe harbor" provision); see also 42 U.S.C. § 12201(c) (setting out the exception). In its discussion, it appears that the court may have applied the wrong provision of § 12201(c). Paragraph (3) of that section, which apparently applies to ERISA-governed self-insured welfare benefit plans, does not include the "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law" proviso included in paragraphs (1) and (2), because such plans are "not subject to State laws that regulate insurance." It appears undisputed that the defendant's health plan was a self-insured group health plan that would not have been subject to State laws regulating insurance under ERISA's "deemer" clause. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

8 *Orion Energy Sys., Inc.*, No. 14-cv-1019, at 15.

And while it did not find the regulation dispositive, the court also appeared persuaded by the EEOC's interpretation of the "safe harbor" in its recently issued final wellness regulation, 29 C.F.R. § 1630.14(d)(6).[9] In this new rule, the EEOC expressly states that the "safe harbor" provisions "do not apply to wellness programs, even if such plans are part of a covered entity's health plan."[10] The court granted "Chevron deference" to the EEOC's interpretation under the regulation, giving it the effect of law, holding that the question of whether the ADA's "safe harbor" applies to wellness programs presented an ambiguity that could be resolved under the EEOC's regulatory authority.

Having addressed the safe harbor question, the court then considered the voluntariness of the wellness initiative.[11] The court readily concluded that the employer's program was voluntary because it was optional. It rejected the EEOC's position that shifting 100% of the premium cost rendered the program involuntary. To the contrary, the court found that employees had a choice (albeit, a hard choice) about whether to take advantage of the program's incentive.[12] The court therefore granted judgment in favor of the employer on this claim.[13]

Finally, the court denied summary judgment as to the retaliation claim. The court held that the complaining employee's concern about the confidentiality of the wellness initiative was legitimate and, moreover, that her objection appeared to be protected. The court concluded that a jury must decide the fact issues surrounding her termination, including the suspicious timing.[14]

While the court in *Orion* ultimately ruled in favor of the employer on the wellness program question, employers must heed its warnings. Other courts may adopt *Orion's* reasoning on the "safe harbor" question—particularly in light of the EEOC's clarification in 29 C.F.R. § 1630.14(d)(6). Additionally, employers should review their wellness programs to ensure that such programs comply with the EEOC's recent guidance on what medical inquiries qualify as "voluntary" under the ADA.

Next Steps

Employers should review their wellness programs to assure that they are properly incorporated into their group health plans, if that is the intent of the program. Whether or not they are a part of the employer's group health plan, wellness programs that require health screens or ask disability-related questions should be reviewed to ensure that they are in compliance with the EEOC final wellness regulations under both the ADA and GINA. If the wellness program is part of the employer's group health plan, it must also be in compliance with the HIPAA/ACA final wellness regulations. Finally, employers should not make employment decisions based on complaints regarding the operation of a wellness program subject to the EEOC's final wellness regulations, or based on participation or non-participation in such a program.

9 *Id.* at 9–13.

10 No other court has yet had the opportunity to evaluate 29 C.F.R. § 1630.14(d)(6).

11 As mentioned by the court, Congress did not define "voluntary" for these purposes. And although another new EEOC regulation includes guidance on the issue of voluntariness, 29 C.F.R. § 1630.14(d)(2), the EEOC did not argue that the regulation applied retroactively. *Id.* (stating, for example, that an examination is voluntary so long as the employer does not require participation or deny coverage for non-participation, and financial incentives are within limits set out in the regulation).

12 *Orion Energy Sys., Inc.*, No. 14-cv-1019, at 18.

13 Note that the court's analysis regarding "voluntariness" of the wellness program relates only to plan years beginning before January 1, 2017, the effective date of the EEOC's final wellness regulations as to the voluntariness issue. *Id.*

14 *Orion Energy Sys., Inc.*, No. 14-cv-1019, at 19-21.