MARSH & McLENNAN AGENCY

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COMPLIANCE UPDATE: EEOC V. FLAMBEAU

"I'm just a bill, yes I'm only a bill, and I'm sitting here on Capitol Hill…"

A generation of Americans first learned of the legislative process from the 1976 "Schoolhouse Rock" cartoon segment called "I'm Just a Bill." In the song, "Bill"—a fictitious bill proposed in Congress—starts as an idea by "some folks back home." A Congressman hears the call and brings Bill to Washington, where he first sits in committee and then is passed by the House of Representatives and then by the Senate. If Bill is lucky enough to get signed by the President, he becomes law. Bill reminds us near the end of the song that "it's not easy to become law." That's true. But the sequel to "I'm Just a Bill" might focus on the desire of some federal regulators to rewrite the laws after the process described in "I'm Just a Bill" is completed.

A case in point: the Equal Employment Opportunity Commission's (EEOC's) position on the use of health risk assessments, biometric screening and other wellness-related tools (collectively referred to in this Alert as "HRAs") used by employers across the country in their fight to control health insurance costs.

WHAT'S THE PROBLEM WITH HRAS?

Employers like them because they are an important first step toward healthier choices, and getting people healthy presumably reduces health care costs. Reduced health care costs lead to reduced health insurance costs. The problem with HRAs, however, is that if they are completely voluntary, there's a good chance that the people who need them the most will take them the least.

So, to encourage employees to take HRAs, employers a started requiring employees to submit to HRAs. If they refused, no adverse employment action would be taken. However, their options under the employer's group health insurance plan might be limited (they might not be allowed to participate or they might only be allowed to participate in plans that require higher out-of-pocket costs) or they may have to pay more for the coverage.

The EEOC, however, takes the position that imposing some penalties on employees who do not complete an HRA makes the request involuntary and therefore not permitted by the Americans with Disabilities Act (ADA), which, in general, prohibits employers from requiring employees to submit to medical exams.

The EEOC this year released proposed regulations that establish certain limits on the use of HRAs and we expect to see final regulations on the subject released this year. In those proposed regulations (and probably in the final regulations) the EEOC imposes a 30% of premium limit on any monetary penalty or award and specifically prohibits conditioning eligibility in a group health plan on the completion of an HRA.

The problem with these regulations is that they fail to adequately take into account a clear and unambiguous "safe harbor" under the ADA for group health plans. Under the safe harbor, actions taken in the operation of an employer-sponsored group health plan may be exempt from the ADA's inquiry prohibitions as long as they are not simply a subterfuge to avoid the law.

Two federal courts have reviewed the EEOC's position on the use of HRAs and both have come to the same conclusion: the EEOC has no business pursuing a lawsuit involving an HRA that is part of a group health plan that falls into the ADA's safe harbor, unless the EEOC can demonstrate that the use of the HRA is subterfuge to avoid the law.

The most recent case is EEOC v. Flambeau (Flambeau). In Flambeau, the EEOC argued that that the employer violated the ADA by first offering a $600 credit for the completion of an HRA and then conditioning eligibility in the group health plan on the completion of the HRA. The federal court for the Western District of Wisconsin ruled for Flambeau and against the EEOC, holding that the employer's HRA was protected by the statutory safe harbor (and there was no showing of subterfuge). The case was dismissed December 30, 2015.

Similarly, in Seff v. Broward County (Seff), a case that was decided in 2012 and in which the EEOC was not a party, a federal judge ruled that the federal statute—written by Congress and signed into law by the President—provided a safe harbor that trumped the administrative agency's view of the world.

WHERE DOES THIS LEAVE US ON THE QUESTION OF HRAS?

Employers who wish to continue to use them should consider whether they wish to follow the proposed (or final) regulations or rely on the safe harbor. Employers who are going to rely solely on the safe harbor should work with their ERISA and employment counsel to ensure that their HRA program is integrated with their group health insurance plan and meets the safe harbor. They should also know that while the federal judges in Flambeau or Seff found that the plain language of the statute supports the view that HRAs may be completely exempt from the ADA prohibition, the EEOC appears is not likely to change its view.

Employers relying on the safe harbor alone may well find themselves in a battle with the EEOC and wondering about that sequel to "I'm Just a Bill."

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