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LEGAL ALERT

August 22, 2012

Court Holds Wellness Program Does Not Violate ADA

The U.S. Court of Appeals for the Eleventh Circuit has held that a wellness program did not violate the Americans with Disabilities Act (ADA), finding that a safe harbor exempted the program from prohibitions that might otherwise apply under the ADA. *Bradley Seff v. Broward County, Florida,* ___F. 3d, (11th Cir. 2012).

Background

The Applicable Law. The ADA, which is enforced by the Equal Employment Opportunity Commission (EEOC), prohibits employers and other covered entities from requiring a medical examination, asking an employee whether he or she is disabled or inquiring about the nature or severity of any disability unless there is a business necessity for the exam or inquiry, and it is job related. There is an exception to this business necessity rule for certain voluntary arrangements, which the EEOC enforcement manual says includes a wellness program in which participation is optional, and the employer does not penalize employees who refuse to participate in it. The EEOC staff has informally questioned whether providing a financial incentive, such as a premium discount for participation in a wellness program, may cause a wellness plan to be involuntary under this standard.

Another exception to the general business necessity rule for medical exams and inquiries provides that the ADA is not to be interpreted to prohibit a covered entity from "establishing … or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." This exception is generally referred to as the insurance safe harbor.

The Broward County Program. In 2009, Broward County, Florida, implemented a wellness program under which employees would complete a confidential online health risk assessment and have a confidential blood test for glucose and cholesterol levels. These two tools were used to determine their propensity for one of five diseases, such as diabetes or hypertension, and employees who were at risk had the opportunity to enroll in disease management programs. The employees were not required to participate in the wellness program to enroll in the County's health plan; however, beginning in 2010, employees who declined to participate in the program were charged $20 per biweekly pay period.

Bradley Seff, a County employee who had refused to participate in the wellness program, brought a class action against Broward County, claiming that the program violated the ADA because it was not a voluntary wellness plan. The County maintained that the program was voluntary and that it was exempt under the insurance safe harbor. The district court granted the County's motion for summary judgment, agreeing that the program was exempt under the insurance safe harbor. The district court did not reach the issue of whether the program was a voluntary wellness plan.

Eleventh Circuit Decision

The Eleventh Circuit noted that the district court had found that the wellness program was a "term [ ] of a bona fide benefit plan" as required for the safe harbor to apply since the wellness program was part of the

County's group health plan. On appeal, the plaintiff had argued that summary judgment was not appropriate because there were issues of material fact in dispute. Specifically, he argued that the County's benefits manager had testified in a deposition that the wellness program was not a term of the written documents for the health plan and, thus, was not a term of the benefit plan. The Eleventh Circuit said that the benefits manager's testimony could be interpreted as stating her opinion on a legal issue, which would not create a factual dispute; moreover, only the courts have the authority to decide such legal issues.

Alternatively, her deposition testimony could be understood to raise a factual issue regarding the documentation that would be required for the wellness program to be considered part of the County's plan. Despite this possible interpretation of the benefits manager's deposition testimony, the Eleventh Circuit said that the plaintiff had not cited any authority supporting a conclusion that the wellness program had to be included in specific written documents to qualify as a term of a bona fide benefit plan under the ADA safe harbor and that the Court had not found any authority to support that proposition. The Court noted that the wellness program was part of Broward County's contract with Coventry Healthcare to provide a group health plan, the wellness program was only available to employees who enrolled in the group health plan, and it had been presented as part of the group health plan in at least two employee communications. Accordingly, the district court had a valid basis to find that the wellness program was a term of the plan, and the Eleventh Circuit upheld the summary judgment in favor of the County.

What the Decision Means to Employers?

To date, in speeches and letters on the applicability of the ADA to wellness programs, the EEOC staff has consistently maintained that wellness programs must meet the standards for being voluntary as outlined in the EEOC enforcement manual. The staff has not addressed the alternative exemption provided by the insurance safe harbor, nor has the staff taken a definitive position on whether the ADA permits an employer to offer financial incentives for employee participation in a wellness program that includes a medical examination or medical inquiries. While the Eleventh Circuit's decision gives significant support to employers that want greater flexibility in designing their wellness programs, it remains to be seen whether the decision will influence the EEOC staff's position or other courts that are asked to address these issues.

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