



October 15, 2012

Analysis of Recent EEOC Questions and Answers Related to Wellness Programs

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Recently, the Joint Committee on Employee Benefits of the American Bar Association released the [transcript of its annual Q&A session](#) ("Q&A Session") with the Equal Employment Opportunity Commission ("EEOC"), held on May 10, 2012. Of particular note are the EEOC's responses to two questions asked during the Q&A Session related to wellness programs.

EFFECT OF FINANCIAL INCENTIVES ON A WELLNESS PROGRAM

As background, Title I of the Americans with Disabilities Act ("ADA") allows employers to conduct voluntary medical examinations and activities, including obtaining information from voluntary medical histories as part of an employee wellness program, as long as certain criteria are satisfied. Most notably, the wellness program must be "voluntary."

Questions have arisen over the years as to what constitutes a voluntary wellness program. Existing EEOC enforcement guidelines (for use by regional offices in enforcing the ADA) merely provide that a wellness program is voluntary so long as the employer neither requires participation nor "penalizes" employees who do not participate. The EEOC's Office of Legal Counsel has not expressly taken a position as to whether, and to what extent, an employer may offer a financial incentive for participation in a wellness program and remain compliant with the ADA, including a wellness program that complies with the Health Insurance Portability and Accountability Act ("HIPAA").

The Council is of certain enforcement actions by EEOC regional offices with respect to HIPAA-compliant wellness programs. For example, the Council is aware of enforcement actions against a large multi-state employer that sponsored a HIPAA-compliant participation-based wellness plan. This employer's wellness plan provided a \$50 annual cash reward to group health plan participants who completed a simple health risk assessment ("HRA") and biometric screening. Participants who did not complete the HRA and biometric screening did not receive the cash reward and were subject to a \$100 annual premium surcharge. Measured as a whole, the aggregate incentive was well below the 20% maximum allowable reward under HIPAA. Notwithstanding this, an EEOC regional office found reasonable cause that the employer's wellness plan violated the ADA because it "penalized" participants. The regional office refused to conciliate unless the employer paid each wellness plan participant in excess of \$5,000 per participant for what it termed "pain and suffering."

Significantly, last year, the Southern District of Florida granted summary judgment to the employer in *Seff v. Broward County*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), an ADA case involving a wellness program. In that case, the action was brought by an individual on behalf of a class of claimants rather than by the EEOC (or a regional office) itself. In deciding the case, the court did not analyze whether the wellness program was "voluntary" within the meaning of Title I of the ADA, but instead relied on other provisions in the ADA that create a safe harbor for entities that administer terms of "bona fide benefit plans" based on "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." This safe harbor, principally intended to protect the insurance industry from ADA litigation, extends to certain activities undertaken by employers in connection with "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan." The district court's decision was very recently affirmed by an Eleventh Circuit panel. See *Seff v. Broward County, Florida*, No. 11-12217 (Aug. 20, 2012).

In answering Question 1 of the ABA Q&A Session, the EEOC restated its prior position that programs that include disability-related inquiries and/or require medical examinations will violate the ADA if they are involuntary. The EEOC reiterated prior informal guidance, stating that, while a program cannot require participation or penalize individuals who do not participate, the EEOC has taken no position as to whether a financial incentive provided as part of a wellness program that makes disability-related inquiries and/or requires medical examinations (such as examinations for the purpose of determining whether an employee has met certain health standards) would render the program involuntary.

Earlier informal statements made by EEOC representatives following the district court's ruling in *Seff* indicated that at least certain individuals at the EEOC believe that *Seff* was wrongly decided. The informal statements set forth in the answer to Question 1 were made prior to the Eleventh Circuit's recent decision affirming the district court's ruling.

Thus, although it is possible that the EEOC's statements in its answer to Question 1 do not represent its current thinking in light of the Eleventh Circuit's decision in *Seff*, past experience suggests this is unlikely.

The EEOC's informal position as restated in Question 1 is concerning as it signals the EEOC's continued unwillingness to state formally or otherwise that HIPAA-compliant wellness programs comply with the ADA. As a result, employers may continue to risk liability under the ADA with respect to their HIPAA-compliant wellness plans both from regional EEOC enforcement activity as well as individual and class action litigation.

PROVISION BY SPOUSE OF PERSONAL MEDICAL HISTORY AS PART OF AN HRA

Question 7 inquired as to whether the EEOC takes the position that an employee's spouse is providing family medical history on behalf of the employee where the employee's spouse provides her personal medical history to the health plan of the employee's employer by completing an HRA.

In its answer to Question 7, the EEOC states that the rules under Title II of the Genetic Information Nondiscrimination Act ("GINA") "are instructive" in answering the question and suggests that employers may violate GINA if they offer a reward in exchange for an employee's spouse providing information regarding her personal medical history as part of an HRA.

Title II of GINA prohibits employers and other covered entities from requesting, requiring, or purchasing genetic information, subject to six limited exceptions. One exception allows a covered entity to acquire genetic information about an employee or his or her family members when it offers health or genetic services, including wellness programs, on a voluntary basis. To be "voluntary," no financial incentives may be provided to the employee. Notably, for purposes of GINA, a spouse qualifies as a "family member."

The EEOC, in its response to Question 7, stated that there is generally not an issue with respect to an employee's spouse participating in an HRA, provided that the spouse's response is voluntary and there is no incentive tied to the collection of health status information about an employee's spouse. However, the EEOC stated that a potential problem arises where the employer wants to deny or reduce the level of incentive provided to an employee if the spouse (or other family member) refuses to provide medical information in an HRA and may violate the prohibition by GINA of using genetic information in making an employment decision. The EEOC did seem to take the view that the issue may be resolved by providing separate incentives for the employee and the spouse – this is an approach that has gained popularity in light of speculation about possible EEOC enforcement activity regarding the use of spousal

HRAs. In its written answer, the EEOC indicates that it is unaware of enforcement activity regarding the use of incentives with respect to spousal HRAs.

It is clear that the conceptual framework set forth in its answer to Question 7 certainly raises questions regarding the circumstances under which financial incentives may be used with spousal HRAs (and, if so, how to structure such financial incentives).

Notably, it is unclear in the fact pattern provided in Question 7 whether the spouse is a participant in the employer's group health plan. The EEOC seems to be applying the provisions of Title II (which govern employer actions) rather than the provisions of Title I (which govern group health plans), regardless of whether the spouse is a participant in the employer's group health plan. In doing so, the EEOC appears to be disregarding the "firewall" in place between Titles I and II and is expanding its jurisdiction over wellness programs.

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