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EEOC Proposed Rules on Worksite
Wellness

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The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

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- prohibits discrimination with regard to health plan eligibility or contributions based on health factors
- Exception for wellness programs that meet certain requirements

The Affordable Care Act

Increased permissible financial incentives

- 30% of annual premium cost for most wellness activities
- 50% for activities related to smoking cessation

Americans with Disabilities Act (“ADA”)

- Generally prohibits discrimination against disabled individuals
- Limits circumstances in which an employer may require physical exams or answers to questions about employee medical conditions
- Permits ***voluntary*** medical exams and inquiries as part of an employee health program
- Information must be kept confidential and cannot be used for discriminatory purposes.

Seff v. Broward County

- US Court of Appeals for the 11th Circuit determined that \$20 bimonthly penalty for failing to participate in a health risk assessment did not make a wellness program involuntary under the ADA.

Have Wellness Incentives Gone to Far?

- Wrong message about value of the activity
- Represents shifting of health care costs to employees
- Not useful in generating long term changes because undermines personal autonomy

Orion Energy Systems

- Required medical exams and inquiries that were not job-related and consistent with business necessity as part of wellness program
- When employee refused, shifted entire cost of medical premium to employee
- Shortly thereafter, fired the employee

- “Having to chose between responding to medical exams and inquiries – which are not job related – in a wellness program, on the one hand, or being fired, on the other hand, is not a choice at all.”

Honeywell International, Inc.

- 2015 Wellness program requires biometric testing, which included blood draw
- Both employees and spouses were required to participate if family coverage

Honeywell International, Inc.

- Penalty for non-participation:
 - Loss of Health Savings Account contributions of up to \$1500 annually
 - \$500 Surcharge to be applied to medical plan costs
 - \$1000 “tobacco surcharge” if refused testing that confirms no nicotine
 - Additional \$1000 “tobacco surcharge” if spouse refused testing

April 20, 2015

- EEOC Proposed Rulemaking on How Title I of the Americans with Disabilities Act Applies to Employer Wellness Programs that Are Part of a Group Health Plan

Incentives

- The ADA allows employers to offer incentives of up to 30% of the cost of employee-only coverage to employees who participate in a wellness program and/or achieve health goals.

Health Risk Assessments/Screening

- Alerting employees to health risks – must provide feed back
- Collecting and using aggregate data to design and offer programs aimed at specific medical conditions prevalent in the workplace

What is Voluntary?

- May not require employees to participate
- May not deny access to health coverage or generally limit coverage for non-participants
- May not take any other adverse action or retaliate against for non-participation or failure to achieve a specific outcome

Confidentiality Requirements

- Employers may only receive medical information in aggregate
- Programs that are part of a group health plan must comply with HIPAA Privacy Rules
- Employers that are not part of HIPAA covered entities must certify that they will not use individually identifiable information for employment purposes

Confidentiality

- Practices to ensure that medical information is handled properly:
 - Encryption
 - Prompt reporting of breaches
 - Training individuals who handle medical information in maintaining confidentiality

Reasonable Accommodation

- Providing sign language interpreters if necessary to allow a deaf individual to participate
- Providing materials in Braille
- Provide an alternative to blood test if an employee's disability would make a blood draw dangerous