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ALL IS WELL FOR EMPLOYERS: THREE THINGS YOU NEED TO KNOW ABOUT COURT RULING IN WELLNESS PROGRAM LAWSUIT

Insights
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A federal judge in Wisconsin just issued a key ruling upholding an employer's wellness program despite a challenge from the Equal Employment Opportunity Commission (EEOC). The decision, published on December 31, 2015, is a definite win for those employers across the country that have established or want to establish such programs (*EEOC v. Flambeau, Inc.*, Western District of Wisconsin.)

Here are three things you should take away from this ruling:

1. THIS COULD BE A SIGN OF VERY GOOD THINGS TO COME

This decision could set off a chain of victories for employers in this area of the law. A quick examination of the background facts helps to demonstrate why this decision is positive news for businesses and why it could be the start of something good.

Flambeau, Inc., which manufactures and sells plastic products, established a wellness program for its workers in 2011. At first, the program offered the additional benefit of a $600 credit to any worker who participated. But by 2012, the company required any employee who wanted to obtain health insurance to complete the wellness program requirements.

Its wellness program had two requirements: a health risk assessment, which required participants to complete a questionnaire about medical history, diet, mental health,

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social wellbeing, and job satisfaction; and a biometric test, which amounted to a routine physical examination (height, weight, blood pressure, blood draw).

The information gathered by the program administrators was used to identify health risks and medical conditions common among the workforce. However, the company did not receive any specific results about any of the individual employees who submitted to the requirements. Instead, the administrators reported the information to the employer in aggregate, allowing the company to estimate insurance costs and set premium levels.

One worker refused to complete the requirements and was dropped from insurance coverage. The EEOC filed a lawsuit on his behalf, claiming that the program violated the Americans with Disabilities Act's (ADA) ban on employer-mandated medical examinations.

The federal district court judge who heard the case rejected the EEOC's challenge and upheld Flambeau's wellness program. She ruled that the program fell squarely into the ADA's "safe harbor" for insurance benefit plans. Because this was a matter of first impression in Wisconsin, she looked favorably to a 2012 case from the 11th Circuit Court of Appeals, *Seff v. Broward County*, which also upheld an employer's wellness program that sought worker's medical information as part of its group health coverage.

Employers should feel buoyed by the fact that this decision so clearly places this wellness program into the protections of the ADA's safe harbor. Although an appeal by the EEOC is likely, many remain hopeful that the judge's decision in this case starts a chain reaction that sees other similar wellness programs cleared as legally compliant.

2. EMPLOYER PLANS MUST STILL COMPLY WITH CERTAIN RULES TO BENEFIT FROM SAFE HARBOR

But in order to stay on the right side of the law, you would do well to heed some lessons from the *Flambeau* decision when establishing your wellness program. The court examined the program at issue from various angles to make sure it satisfied a number of conditions.

First, the court said that the wellness program requirement has to be a "term" of an employer's insurance benefit plan in

order to qualify under the ADA's safe harbor. In other words, an employer could run the risk of an ADA violation if it sets up a wellness program that collected such data outside the realm of its insurance benefits offerings. In this case, the court looked to the fact that Flambeau's wellness program was only required if workers wanted to enroll in the plan. It was also deemed critical by the court that the employer provided adequate advance notice of the wellness program requirements to workers through educational handouts, and that the assessment and testing coincided with the open enrollment period.

Second, the court found that the wellness program requirement was clearly intended to assist the employer with underwriting, classifying, or administering risks associated with the insurance plan. As noted above, the information was collected in aggregate and then directly used to classify health risks so that the company could calculate its projected insurance costs for the benefit year. The court said that although the employer could have potentially designed and administered an insurance plan without gathering this data, the fact that it decided to collect the information does not render its actions illegal.

The court also specified that the wellness program was not a condition of employment, and workers could refuse to participate and remain employed with the company. Although they would then have to obtain health insurance elsewhere, the program was not seen as mandatory because of this option.

Finally, the court concluded that there was no evidence that the employer's actions in setting up the plan were actually a subterfuge for discrimination. The EEOC did not show that the employer made any disability-based distinctions that were used to discriminate against any specific workers or group of employees, or that it used the data collected to treat any single worker differently.

Interestingly, the court noted that the employer failed to explicitly include the wellness program requirements in either the insurance plan's summary plan description or the collective bargaining agreement that governed the worker's employment. The judge concluded that such an omission was irrelevant for the purpose of her decision, since the summary plan description does not establish the terms of the actual benefit plan.

3. STAY TUNED FOR FINAL EEOC REGULATIONS

This decision comes at an interesting time for the EEOC. The agency recently proposed new regulatory rules that will govern employee health programs, and the EEOC argued that one of its proposed rules rejects the reasoning used by the *Broward County* decision in determining the contours of the ADA's safe harbor provision.

In the *Flambeau* case, the court dismissed the applicability of the proposed regulation for two reasons. First, the rules are still in the formative stages, and have not yet been finalized and adopted. Second, even if they were in place, the court found that the proposed rule in question speaks only to the safe harbor's applicability to "wellness program incentives." In other words, the court believed that the proposed regulation would restrict an employer's ability to develop a stand-alone wellness program unrelated to the administration of a health insurance plan, but would not impact a wellness program designed as part of insurance coverage.

This decision could lead the EEOC to go back to the drawing board and rework its proposed regulations, which remain in administrative limbo at the start of the new year. We expect the regulations to become finalized at some point in 2016, at which point you may need to adjust to a new normal when it comes to wellness plans.

Until then, employers should remain heartened by this decision. Although the specific law on the ADA's safe harbor and the administration of health insurance plans could be different in your local jurisdiction, and you should check with your counsel to ensure any plan you develop is compliant, this case is welcome news at the beginning of the new year.

If you have any questions about this case, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.