NEXSEN | PRUET

EMPLOYMENT LAW UPDATE

February 2016
Supplemental

NLU

ANOTHER WIN FOR WELLNESS: THE EROSION OF VOLUNTARY PARTICIPATION

Consider the following wellness program scenario: A company implements a program that incentivizes employees to take a health risk assessment and undergo biometric screening. The assessment asks questions about the individual's medical history, diet, mental and social health, and job satisfaction. The screening measures the individual's height, weight, and blood pressure, and involves a blood test. To encourage employees to participate in the program, the company offers employees a $600 credit toward their premiums. Does this sound familiar?

Incentives and credits to encourage participation in wellness programs have become the customary practice with health plans since the first issuance of the Health Insurance Portability and Accountability Act of 1996, as amended (HIPAA) regulations promoting wellness programs.

The purpose of the company's assessment and screening is to enable it to identify health risks and medical conditions that are common in its workforce. The company receives only aggregate data and uses the information to determine premium contributions and adjust co-pays for preventive examinations and certain prescription drugs. It also uses the information to steer its resources toward wellness programs that target identified risks and conditions, such as implementing a company-wide weight loss competition because weight management problems were common among its workforce.

These types of wellness programs are generally considered "voluntary medical examinations," which are permitted under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12112(d)(4)(B). As detailed in our May 2015 Employment Law Update, the Equal Employment Opportunity Commission (EEOC) proposed regulations under the ADA, published April 20, 2015, defining what constitutes a "voluntary" wellness program.

Now consider this: What if the company were to go a step further in its wellness program and condition an employee's ability to obtain insurance through the company on his or her taking the health risk assessment and undergoing biometric screening? Is this legal? In one of the latest cases brought by the EEOC contesting the validity of the wellness program, the United States District Court for the Western

District of Wisconsin determined that it is legal. *EEOC v. Flambeau, Inc.*, 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 30, 2015).

Flambeau Inc., a manufacturer of plastic products, initially provided a $600 credit to employees for taking a health risk assessment and undergoing biometric screening. However, the incentive did not produce the results the company had desired. So for the 2012 and 2013 benefit years, Flambeau *required* employees to take a health risk assessment and undergo the screening before they could obtain coverage through the company's self-insured group health plan.

Notably, Flambeau discontinued health insurance coverage for an employee, Dale Arnold, who did not complete the assessment and the screening by its established deadline. The EEOC subsequently sued Flambeau, alleging that the company's wellness program violated the ADA, 42 U.S.C. § 12112(d)(4)(A), which prohibits employers from *requiring* medical examinations, unless it can be demonstrated that the examination is job-related and necessary for business. The EEOC did not address the issue of a "voluntary" program under its proposed rules, but instead viewed the health risk assessment and biometric screening as a prohibited mandatory medical examination under the ADA.

The court disagreed, however, noting that the ADA contains a specific insurance safe harbor allowing employers to establish and administer "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks . . . ." 42 U.S.C. § 12201(c)(2). The court found that Flambeau's wellness program fit squarely within this safe harbor provision.

The court's application of the safe harbor provision to Flambeau's wellness program demonstrates a willingness to support the implementation of programs that are not designed to discriminate against disabled individuals in employee benefits and largely moots the debate over whether a plan is "voluntary." If a company is permitted to require an employee's participation in a wellness program to enable it to underwrite risks, classify risks, or administer risks as a condition to receiving coverage, the EEOC's proposed regulations describing what constitutes a "voluntary" medical examination become a non-issue. It will be interesting to see if the EEOC appeals this ruling or revises its proposed regulations to address this question.

Wellness programs are evolving with the times, political changes, the rising costs of healthcare, and the implementation of healthcare mandates. Stay tuned for more on this continuing saga.

N | P Employment and Labor Law Group

CHARLESTON
843.577.9440
Cherie Blackburn
Molly Hughes Cherry
Michael Scott

CHARLOTTE
704.339.0304
John Cole
Sean Phelan
Grainger Pierce

COLUMBIA
803.771.8900
Mike Brittingham
Jimmy Byars
David Dubberly
Vickie Eslinger
William Floyd
Angus Macaulay
Susi McWilliams
Nikole Mergo
Sue Odom
Sara Svedberg

GREENVILLE
864.370.2211
Jennie Cluverius
Leon Harmon
Jamie Hedgepath

GREENSBORO
336.373.1600
Peter Pappas
Bill Wilcox

MYRTLE BEACH
843.213.5400
Cherie Blackburn
Molly Hughes Cherry
Michael Scott

RALEIGH
919.755.1800
David Garrett
Ernie Pearson
David Robinson

HILTON HEAD
843.689.6277
Molly Hughes Cherry
Michael Scott