



Judge Dismisses Lawsuit Alleging Wellness Program Violated ADA

On April 11, a Federal Judge dismissed a class action lawsuit alleging that a wellness program sponsored by Broward County, Florida (the "County") violated the Americans with Disabilities Act ("ADA"). In *Seff v. Broward County*, a former employee of the County, Bradley Seff, filed a class action complaint against the County alleging that it had violated the ADA by requiring employees to undergo a medical examination and making medical inquiries of its employees. United States District Judge K. Michael Moore of the United States District Court for the Southern District of Florida granted the County's Motion for Summary Judgment, finding that the wellness program was not designed to evade the purposes of the ADA.

BACKGROUND OF THE LAWSUIT

In 2009, straddled with an aging workforce, the County implemented a wellness program to address rapidly rising healthcare costs. The wellness program had two components: a health risk assessment questionnaire and a biometric screening. The questionnaire was confidential and conducted online. The biometric screening was also confidential and consisted of a finger stick blood test. The wellness program was paid for and administered by the County's insurer. The County did not receive any personal information about individual participants. It only received de-identified aggregate data. Employees exhibiting certain risk factors were invited to participate in a disease management coaching program and became eligible to receive certain medications at no additional cost.

Because of a lack of participation in the wellness program, in 2010, the County decided to use a financial incentive to increase participation. Employees not completing the questionnaire or biometric screening would be assessed a \$20 penalty on each bi-weekly paycheck. Employees refusing to participate in the wellness program were charged the penalty beginning in June 2010. In August 2010, Mr. Seff sued the County alleging that the wellness program violated the ADA by requiring employees to undergo a medical examination and making medical inquiries of employees. The County defended its actions, claiming that the wellness program was covered by the ADA's safe harbor provisions.

ADA ANALYSIS

The ADA generally prohibits employment discrimination against disabled individuals. It provides that:

a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A).

However, the ADA contains a safe harbor provision designed to protect the sponsors of employee benefit plans from various parts of the ADA. Specifically, it states that the ADA shall not be construed to prohibit or restrict "a person or organization covered by this chapter from establishing, sponsoring, observing, 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." 42 U.S.C. § 12201(c).

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The Court viewed the wellness program as a term of the County's group health plan and thus within the safe harbor noted above. The County's health insurer administered and paid for the wellness program; only participants in the group health plan could participate in the wellness program; and handouts relating to the group health plan indicated that the wellness program was part of the group health plan. The Court further found that the wellness program was designed to develop and administer present and future benefit plans using accepted principles of risk assessment and was itself a tool designed to mitigate risks.

THE EEOC AND OTHER CONSIDERATIONS

While the dismissal of *Seff v. Broward County* offers affirmation for public and private-sector employers sponsoring wellness programs, the case may be appealed. There is also no guarantee that other courts will follow this court's line of reasoning.

Employers must be mindful of the limits of wellness programs in the context of the ADA. The U.S. Equal Employment Opportunity Commission ("EEOC"), charged with enforcing the ADA, has issued informal discussion letters relating to wellness programs and the parameters in which wellness programs may operate. In those letters, the EEOC took the position that the arrangements analyzed in those letters could violate the ADA. The EEOC has also issued enforcement guidance on disability-related inquiries and medical examinations of employees under the ADA that applies to wellness programs (including health risk assessments). Before implementing a wellness program, an employer should ensure that the wellness program designed does not violate the ADA.

The court in *Seff v. Broward County* chose not to address whether the County's wellness program fit within the ADA exception for "voluntary" medical examinations and inquiries. Wellness program designs that are voluntary do not violate the ADA. Much of the EEOC's guidance and professional commentary on wellness programs has focused on this exception. As a result of the court's analysis, the EEOC may issue further guidance regarding wellness program design.

In addition to the ADA concerns, employers must also consider whether their wellness programs violate the Genetic Information Nondiscrimination Act of 2008 ("GINA") or the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Wellness programs must operate within the parameters of the HIPAA wellness program regulations issued in December 2006. GINA is especially significant for wellness program designs incorporating health risk assessments. GINA regulates the collection and use of genetic information (including family medical history). Questions like, "Does your family have a history of heart disease?" and even the timing of asking such questions bring the prohibitions of GINA into play.

If you have any questions about this case or wellness programs generally, please do not hesitate to contact [Jay Turner](#) or one of the other attorneys in the [Employee Benefits & Executive Compensation Group](#) of Bradley Arant Boulton Cummings LLP.

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