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ORGANIZATIONAL PERFORMANCE

New legal pitfalls surrounding wellness programs and their implications for financial risk

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Abstract In a 2013 *Business Horizons* article, we described the serious legal problems that can arise when companies develop corporate wellness programs, and outlined ways in which companies can minimize their financial risk. Recently, the landscape changed: For the first time, the Equal Employment Opportunity Commission asserted that several wellness programs violate the Americans with Disabilities Act. In this installment of Organizational Performance, we explain the battles that are taking place along this new legal front and suggest steps companies can take to best ensure that their financial positions are not undermined by their wellness programs. In particular, we recommend (1) ensuring that wellness programs actually improve employee health; (2) revisiting whether programs are truly voluntary; (3) being cautious about including dependents in wellness programs; (4) collaborating with disabled employees to meet their needs; (5) providing clear, written explanations when asking for medical information; and (6) taking extra precautions to ensure that medical information is confidential.

1. Corporate wellness programs: An introduction

Corporate wellness programs—defined by Wolfe, Parker, and Napier (1994) as employer-funded initiatives designed to prevent disease and improve employee health—have exploded in popularity in recent years (Mattke, Schnyer, & Van Busum, 2012). A study by the Kaiser Family Foundation (2014) found that 73% of small and 98% of large U.S. companies offer some type of wellness program. The attractiveness of wellness programs to employers is not surprising given the escalating cost of healthcare and the financial benefits associated with improving employee health.

As we explained in a 2013 *Business Horizons* article, a daunting challenge surrounding wellness programs is that these programs must be crafted in

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ways that steer clear of violating a lengthy list of federal anti-discrimination and employment laws (Plump & Ketchen, 2013). The relevant laws include the Civil Rights Act, the Age Discrimination in Employment Act, the Health Insurance Portability and Accountability Act, the Patient Protection and Affordable Care Act, the Employee Retirement Income Security Act, the Genetic Information Nondiscrimination Act, the Fair Labor Standards Act, and the Americans with Disabilities Act. The latter is particularly vexing because physical movement is central to many wellness programs but disabled employees often struggle with exercise.

The Americans with Disabilities Act of 1990 (ADA) requires that employers refrain from disability discrimination in all aspects of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and other terms and conditions of employment (ADA, 2009). The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities such as eating, sleeping, walking, lifting, and bending. The ADA protects multiple categories of applicants and employees from discrimination—specifically, individuals with an *actual* disability; individuals with a *history* of a disability (e.g., cancer in remission); individuals with a *perceived* disability, even if the person is not disabled; and individuals *associated* (e.g., marriage) with a disabled person. The broad definition of the term 'disability' and the expansive categories protected reflect the comprehensive nature of the ADA's coverage.

2. Recent ADA-based challenges to wellness programs

In 2013, Pennsylvania State University tried to implement a health initiative that required employees to complete a questionnaire administered by an outside health management company (Singer, 2013a). The form contained questions regarding workplace stress, marital problems, and pregnancy plans. Employees who declined to fill out the form were charged a penalty of $100 per month. The university's faculty objected to the intimate questions as an invasion of privacy and viewed the financial punishment for failing to answer such questions as a "strong—arm tactic" (Singer, 2013b). Following the outcry, the university announced it would suspend its monthly $100 non-compliance fee.

Days later, U.S. Representative Louise M. Slaughter called on the EEOC to investigate employer wellness programs that seek intimate health information from employees and to issue guidelines preventing employers from using such information to discriminate against employees (Singer, 2013b). Despite pressure from Capitol Hill, issuing guidelines was not the EEOC's first move. Instead, the agency filed three cases in rapid-fire succession in 2014 alleging that employers' wellness programs violated the ADA.

2.1. EEOC v. Orion Energy Systems Inc. (August 2014)

Orion Energy Systems (Orion) is a Wisconsin-based company that provides energy retrofit solutions and services. As part of Orion's wellness program, employees were asked to have their blood drawn and to complete a health risk assessment disclosing their medical history (EEOC v. Orion Energy Systems Inc., 2014). Orion paid 100% of an employee's health insurance premium if the employee participated in the wellness program but charged an employee the full amount of the health insurance premium if the employee refused to participate.

One Orion employee, Wendy Schobert, questioned whether the assessment was voluntary and whether the information from her assessment would be confidential. Following her refusal to participate in the wellness program, Orion required Schobert to pay her entire health insurance premium and, less than two months later, fired her. Schobert was the only employee who declined to participate in the health risk assessment.

The EEOC asserts that Orion's wellness program is unlawful under the ADA because it subjects Schobert to medical examinations and disability-related inquiries that are not part of a voluntary wellness program. Similarly, the EEOC contends Orion's action in firing Schobert is unlawful under the ADA because it retaliated against her for good-faith objections to the wellness program. According to the EEOC, "having to choose 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 no choice at all" (EEOC Orion Press Release, 2014). As of January 2016, the Orion case remains pending.

2.2. EEOC v. Flambeau Inc. (September 2014)

The EEOC filed its second lawsuit against Flambeau Inc. (Flambeau), a Wisconsin—based plastics manufacturing company (EEOC v. Flambeau Inc., 2014). The EEOC declared that Flambeau's wellness program violated the ADA because it imposed severe consequences on employees who did not submit to medical tests as part of its corporate wellness

program. Specifically, the agency's complaint alleged that Flambeau's wellness program required new and existing employees to submit to biometric testing and complete health risk questionnaires about their medical histories. Flambeau refused to provide health insurance to new employees unless they complied with these requirements. Similarly, existing employees who failed to comply with these requirements faced cancellation of medical insurance and were required to pay their full medical premium to remain insured under the Consolidated Omnibus Budget Reconciliation Act.

When Flambeau employee Dale Arnold was unable to complete the biometric testing and health risk assessment on the appointed day, Flambeau cancelled his medical insurance and shifted responsibility for paying the entire premium to him. By comparison, employees who agreed to biometric testing and completed health risk assessments retained their medical insurance coverage and were required to pay only 25% of their insurance premium expenses. As in the Orion case, the EEOC disputed whether Flambeau's wellness program is truly voluntary due to the severe consequences employees incur for not completing the testing or assessment (EEOC Flambeau Press Release, 2014).

On December 30, 2015, the court ruled in favor of the company (EEOC v. Flambeau Inc., 2015). Specifically, Judge Barbara Crabb held Flambeau's requirement that employees complete wellness program assessments and tests as a condition for enrollment in the company's health benefit plan permissible under the ADA's ''safe harbor'' provision. Generally, the ADA prohibits employers from requiring medical examinations, making inquiries as to whether an employee has a disability, or asking about the nature or severity of a disability unless such inquiries are job-related and consistent with business necessity. However, the ADA's safe harbor provision provides that the ADA ''shall not be construed to prohibit or restrict'' an employer from establishing or administering ''the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks'' (ADA, 2009). For a wellness program to fall within this definition, it must be both a term of the company's insurance benefit plan *and* based on underwriting risks, classifying risks, or administering such risks.

The court found that Flambeau's wellness program was a term of its health insurance plan because (1) employees had to complete the wellness program before they could enroll in the plan; (2) Flambeau advised employees about the wellness program requirement through handouts; and (3) the summary plan description stated employees would be required to enroll in the manner and form prescribed by the employer, thereby putting employees on notice that there may be additional enrollment requirements.

The court found Flambeau's wellness program was also based on underwriting risks, classifying risks, or administering risks because it used the aggregate health information to estimate the cost of providing insurance, set participants' premiums, adjust co-pays for certain examinations and prescription drugs, make company-wide changes targeting general nutritional deficiencies and weight loss problems, and purchase stop-loss insurance to hedge against the possibility of large claims. The court stated that it is sufficient for Flambeau to use the data to design and administer its plan even if such data is not necessary for it to do so.

2.3. EEOC v. Honeywell International Inc. (October 2014)

As part of its 2015 health benefit plan, Honeywell International Inc. (Honeywell) asked employees and their spouses to undergo biometric screening—including a blood draw—to test blood pressure, cholesterol levels, and body mass index (EEOC v. Honeywell International Inc., 2014). The biometric screening also tested for nicotine. The EEOC alleges Honeywell told employees it planned to use the results of the biometric tests to impose goals for employees to reduce their risk factors. Non-participants would be vulnerable to financial sanctions that included a $500 surcharge on their 2015 medical plan costs, loss of up to $1,500 in company contributions to health savings accounts depending on base salary and coverage type, a $1,000 tobacco surcharge, and an additional $1,000 tobacco surcharge for a non-participating spouse.

The EEOC claimed the testing violated the ADA and the Genetic Information Nondiscrimination Act. The agency sought a temporary restraining order and preliminary injunction to prevent Honeywell from imposing penalties on employees who refused to submit to biometric testing as part of its wellness program. On November 3, 2014, Judge Ann Montgomery of the U.S. District Court of Minnesota denied the EEOC's request for a temporary restraining order and a preliminary injunction. In reaching this decision, Judge Montgomery said the court was not prepared to address the public policy issues and who is likely to succeed at that early juncture. Furthermore, the court felt Honeywell was better positioned to refund any wellness program surcharges it collected if she ruled against it than it would be to collect any penalties if she ruled for it, so there was no urgency to block Honeywell's wellness program.

While the order represents a preliminary victory for Honeywell, it did not provide any indication on how the court may decide claims in the future. Indeed, unless the parties reach a settlement—which appears unlikely given Honeywell's vehement defense of its program as lawful under federal statutes—the decision is not the last word on the matter. Perhaps tellingly, Judge Montgomery remarked to the lawyers at oral argument, ''There are a number of fascinating issues for debate at a later time'' (Hawkins & Harris, 2014).

3. EEOC 2015 notice of proposed rulemaking

These cases sparked a renewed outcry for explicit direction from the EEOC on how employers can institute ADA-compliant wellness programs. On April 20, 2015, the EEOC responded by issuing a policy statement called a notice of proposed rulemaking (NPRM) that was intended to offer guidance on the interplay between the ADA and wellness programs. Specifically, the NPRM proposes changes to the existing ADA regulations and interpretive guidance regarding the ''extent to which the ADA permits employers to offer incentives to employees to promote participation in wellness programs'' (NPRM, 2015). The public comment period ended on June 19, 2015. The next steps require the EEOC to review all comments and then issue final rules. There is no set time period for these actions. While not binding, employers are well advised to use the NPRM as a guide until the final rules are issued.

The NPRM addresses three main issues related to wellness programs. The first, and perhaps most important, is defining what constitutes a voluntary wellness program. To meet the 'voluntary' standard, a wellness program must (1) be reasonably designed to promote health or prevent disease; (2) have a reasonable chance of improving the health of, or preventing disease in, participating employees; and (3) not be overly burdensome, a subterfuge for violating the ADA, or highly suspect in the method chosen to promote health or prevent disease. In contrast, a corporate wellness program is *not* voluntary if the employer (1) requires employees to participate; (2) denies or limits coverage under any of its health plans for non-participation; or (3) takes adverse employment action, retaliates against, interferes with, or threatens employees for non-participation.

It is clear that employers may offer employees incentives as part of a wellness program. Such incentives—whether termed rewards for participation or penalties for non-participation—must not exceed 30% of the total cost of employee-only coverage. For example, if an employee's total annual insurance premium is $5,000 (regardless of how much is paid by the employee or the employer), the maximum incentive the employee may offer for its wellness program is $1,500. The 30% limitation applies regardless of whether the incentives are monetary (e.g., premium discounts or gift cards) or in-kind awards (e.g., time off).

Second, to ensure that employee participation is in fact voluntary, employers must provide notice to employees about any medical information they request as part of a wellness program. In particular, employers must clearly explain (1) what medical information will be obtained; (2) who will receive the medical information; (3) how the medical information will be used; (4) the restrictions on its disclosure; and (5) the methods the employer will use to prevent any improper disclosure.

Finally, the NPRM defines the confidentiality requirements that employers must adhere to regarding use of medical information obtained as part of a wellness program. Specifically, the medical information gathered in connection with an employee health program may only be provided to an employer in aggregate form. The aggregate form may not disclose, or be reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan.

4. Suggestions for managing wellness programs

Although the EEOC's recent actions create considerable uncertainty, companies can take meaningful steps to minimize their financial risk.

4.1. Ensure wellness programs actually promote improved health

No benefits program is perfect. Regulators must weigh the pluses and minuses of a program when assessing its legal merits. Given this context, a wellness program is more likely to survive legal scrutiny to the extent that it has a reasonable chance of achieving a huge plus: improving the health of, or preventing disease in, participating employees. A wellness program that conducts health risk assessments or biometric screening of employees to alert them to health risks would meet this standard. Similarly, an employer's use of aggregate information from employee health questionnaires to design future health programs aimed at specific conditions that are prevalent in the workplace would meet this standard. Companies should treat the need to demonstrate likely benefits as a

guiding principle when designing their wellness programs. They should also strongly consider including a written statement in wellness materials explaining to employees how the program is designed to promote health or prevent disease.

4.2. Voluntary programs must truly be voluntary

The EEOC's notice of proposed rulemaking provides 'litmus tests' regarding whether a wellness program is actually voluntary. Specifically, to be regarded as a voluntary wellness program, employees cannot be (1) required to participate; (2) denied coverage or have their health benefits limited for nonparticipation; or (3) subjected to an adverse employment action such as being fired, demoted, or transferred to an undesirable assignment for refusal to participate. Furthermore, monetary and in-kind incentives (such as time off) connected with employer wellness programs must not exceed 30% of the total cost of employee-only coverage. The closer an employer's wellness incentive comes to this 30% limit, the more likely the program will be scrutinized by regulators and viewed as de facto mandatory. The specificity of these guidelines is very helpful because they make it easier than in the past for companies to design wellness programs that the EEOC will accept.

4.3. Be careful with mandatory programs

Companies wishing to use mandatory wellness programs should—at a minimum—ensure that they comply with the ADA's safe harbor requirements. In other words, such wellness programs should be part of employer-sponsored health plans and employers should use the aggregate information from their wellness programs to design and administer their health plans. Companies should be aware, however, that historically the EEOC has viewed the safe harbor exception skeptically. It is unclear whether its defeat in the recent Flambeau decision will prompt the EEOC to take a more generous approach to the exception provision in the future, but companies need to realize that relying on the provision makes it more likely that their wellness programs will attract the EEOC's scrutiny.

4.4. Consider a wait-and-see approach to dependents

At present, it is unclear how the EEOC will view requests for information about a spouse's or a child's health. It is possible that—as the EEOC argued in the Honeywell case—the collection of health information from dependents could be considered prohibited family information under the Genetic Information Nondiscrimination Act. In addition, the EEOC's notice of proposed rulemaking did not indicate whether the 30% limit for incentives extends to the cost of family coverage. Accordingly, companies might be wise to postpone making any changes to their wellness programs that extend coverage to dependents until after the EEOC releases its final rules.

4.5. Provide reasonable accommodations for the disabled

Employers must provide reasonable accommodations that do not cause undue hardship in order to enable employees with disabilities to participate in wellness programs and obtain financial incentives offered as part of wellness programs. For example, a company may be required to hire a sign language interpreter for a smoking cessation seminar to accommodate a hearing-impaired employee. Generally, it is difficult for a company to establish that it is facing an undue hardship; thus, in most situations there is probably some reasonable accommodation the employer will be required to provide. Employers should also be aware that they do not have to provide the specific accommodation the employee requests; reasonable alternatives are allowable. Perhaps the most prudent approach is for employers to engage in an interactive discussion with a disabled employee to design a reasonable accommodation that is acceptable to both sides.

4.6. Put it in writing

The EEOC notice of proposed rulemaking requires employers to provide written notice to employees about wellness programs. It is unclear, however, whether this notice is in addition to other required notices (e.g., under the Health Insurance Portability and Accountability Act) or if it may be integrated into these other notices. Accordingly, employers would be well advised to take the safe approach and provide a *separate* written notice that explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the employer will use to prevent any improper disclosure. Depending on the wording in the EEOC's final rules, employers may be able to incorporate this information into other written notices, but for the immediate future the notice should be offered in a separate and clearly worded document. Communicating with employees is cheap, but failing to communicate with them can become very expensive.

4.7. Privacy is paramount

The privacy of employees' medical information is currently a hot button issue and is likely to remain so into the future. Accordingly, employers must be extremely protective of employees' privacy. Not only is this the morally correct approach, it is the legally prudent approach. Any medical information gathered from employees should be kept in aggregate terms only so as not to identify individual employees. Similarly, wellness program information should not be kept in employee personnel files or shared with supervisors who make employment related decisions. In order to build employees' confidence in the wellness program, employers should outline in the written notice to employees the privacy measures they are taking concerning the wellness program.

5. Final thoughts

Although the above steps could keep companies on solid ground relative to the EEOC and its ADA enforcement, companies need to realize that different government entities—often with different goals—make the rules that govern wellness programs under various federal employment laws. Companies cannot assume that a wellness program's compliance with one federal law ensures compliance with another law. Instead, employers must stay abreast of evolving regulations across all relevant federal laws as well as state-level initiatives. Failure to do so could lead to a sadly ironic situation wherein a company's financial health suffers as a result of its efforts to improve employees' health.

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