Inside Counsel

The importance of keeping employer-sponsored wellness programs 'voluntary'

Make sure wellness programs are legally fit under the ADA in order to avoid litigation

BY KEITH A. MARKEL, WENDY M. FIEL
OCTOBER 10, 2014

According to findings by the Equal Employment Opportunity Commission (EEOC) last year, more than 90 percent of employers with more than 200 employees, and 63 percent of smaller companies, offered some sort of employee wellness program. The importance of implementing wellness programs that are "voluntary" cannot be overemphasized, especially now that the Equal Employment Opportunities Commission (EEOC) — for the first time ever — commenced a lawsuit (*EEOC v. Orion Energy Systems*) challenging under the Americans with Disabilities Act (ADA) an employer's purported "voluntary" wellness program.

The reasons employers desire to offer wellness programs are obvious: increased employee health and productivity, decreased absenteeism and reduced health care expenses. Good intentions, however, are not enough. Wellness programs must also comply with a host of applicable statutes, regulations and laws, many of which have differing legal requirements that are often difficult to navigate and may even seem to be counterproductive. This article focuses on Title I of the ADA as it relates to "voluntary" employer wellness programs.

Under Title I of the ADA, an employer cannot require its employees to undergo medical exams or answer health and/or disability-related questions unless doing so is "shown to be job related and consistent with business necessity." One exception to this rule, however, permits such medical exams and/or health screenings if they are part of a "voluntary" wellness program. What renders a wellness program "voluntary"?

According to the EEOC a "wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." In an "informal discussion letter" released by the EEOC in January 2013, the EEOC advised that it has "not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program

involuntary." Such uncertainty may make employers uneasy especially when financial incentives — including gifts, cash awards and reduced insurance premiums — or penalties such as additional health insurance surcharges are often used to encourage employee participation. Creating more uncertainty is that the EEOC warned that its "discussion letter" does not constitute an official opinion of the EEOC.

This past August in a case of first impression, however, the EEOC appears to have finally taken a position with regard to the proper execution of wellness programs. Having been unable to effect voluntary compliance with the ADA by Orion, the EEOC brought suit against Orion alleging that its wellness program violated the ADA because Orion required its employee, Wendy Schobert, to submit to medical examinations and related inquiries that were not job related or consistent with business necessity. The EEOC further alleges that Orion retaliated against Schobert in violation of Section 503(a) of the ADA by terminating her because she voiced objections to the wellness program.

According to the EEOC's complaint, Orion required employees who wanted to participate in its wellness program to complete a health risk assessment and submit a blood sample for analysis. When Schobert questioned whether the health risk assessment was optional and whether the medical information obtained as a result would be kept confidential, Orion managers summoned her to a meeting and warned her not to express any of her opinions about the wellness program to her co-workers and told her that the purpose of the meeting was to quash any alleged "attitude" issues she had with the plan. After Schobert declined to participate in the wellness program, Orion required Schobert to pay the entire premium for her health insurance plus a $50 penalty — for a total amount of $463 per month. Had Schobert agreed to participate in the purported "voluntary" wellness program, Orion would have covered the entire amount of Schobert's health care costs. Shortly thereafter, Orion terminated Schobert because she allegedly objected to and declined to participate. The EEOC contends that by compelling Schobert to complete a health risk assessment and subjecting Schobert to financial penalties and subsequently firing her if she did not participate, Orion rendered the wellness program involuntary. By doing so, the EEOC contends that Orion's wellness program violates the ADA.

In a press release announcing the lawsuit, an attorney spokesperson for the EEOC advised that "Employers certainly may have voluntary wellness programs — there's no dispute about that — and many see such programs as a positive development. But they have to actually be voluntary. They can't compel participation by imposing enormous penalties such as shifting 100 percent of the premium cost for health benefits onto the back of the employee or by just firing the employee who chooses not to participate. 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."

Although this case is in its beginning stages and has yet to be decided, several important lessons can be learned from the position taken by the EEOC in the past and its recent complaint against Orion. First, wellness programs that reward employees for participating in a wellness related activity such as joining a gym or attending fitness classes, rather than for obtaining a health-related goal, for example lowering cholesterol or blood pressure levels, are less likely to require employees to complete a health risk assessment, undergo medical testing, or disclose a health condition that is not job-related. Employees that seek to have their employees complete medical assessments and/or testing are at risk for violating Title I of the ADA and must be make sure that their wellness program is entirely "voluntary." Second, rewards should be offered for participation rather than penalties being imposed for non-participation. Employers should nonetheless be mindful of the risks associated with over-incentivizing its wellness program until such time as the EEOC or a court provides clarification on these issues. In other words, the reward for participating should not act as a punishment for those who do not. Third, and perhaps most obvious, employers should not retaliate against employees in any fashion for objecting to or declining to participate in a wellness program.

When in doubt as to whether your wellness program is at risk to violate the ADA or any other applicable law, we recommend that you speak to an experienced employment attorney who can assist you in making sure that your wellness program is and remains legally fit.

Keith A. Markel

Keith A. Markel is a partner in the labor and employment group at Morrison Cohen LLP in New York. He has extensive trial and arbitration experience in a variety of employment matters, including the defense of ADA discrimination cases.

Wendy M. Fiel

Wendy M. Fiel is an associate in Morrison Cohen's business litigation department with a focus that includes employment-related issues.

This article first appeared in the Oct. 10, 2014, issue of InsideCounsel.com and can be accessed online: http://www.insidecounsel.com/2014/10/10/the-importance-of-keeping-employer-sponsored-welln?ref=hp