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EMPLOYEE BENEFITS ALERT

EEOC TAKES AIM AT BIOMETRIC SCREENINGS

Wellness programs which include biometric screenings have become very popular with employers who are seeking to promote health by incentivizing employees and their family members to understand their own health profiles. Equally as popular are wellness programs that seek to incentivize employees and their family members to quit smoking. Thus, employers are increasingly adding financial incentives (such as premium discounts on health coverage or contributions to health savings accounts) to promote employee participation in such programs.

The HIPAA nondiscrimination provisions generally prohibit a plan or issuer from charging similarly situated individuals different premiums or contributions based on a health factor. In addition, cost-sharing mechanisms such as deductibles, co-payments, and coinsurance must apply uniformly to all similarly situated individuals.

However, there is an exception to the general rule prohibiting discrimination based on a health factor if the reward, such as a premium discount or waiver of a cost-sharing requirement, is based on participation in a program of health promotion or disease prevention. This is known as the HIPAA exception for ''bona fide wellness programs.''

A wellness program must meet various requirements to be a bona fide wellness program. One such requirement is that the total financial reward that may be given to an individual under the plan for all wellness programs is limited. A reward can be in the form of a discount, a rebate of a premium or contribution, or a waiver of all or part of a cost-sharing mechanism (such as deductibles, co-payments, or coinsurance), or the absence of a surcharge. The Affordable Care Act set guidelines for the rewards beginning in 2014 at thirty percent of the total premium, or 50% of the total premium for an outcome-based program which includes a tobacco cessation program. The limited awards apply only to programs that require outcomes based on a health factor (i.e. being tobacco free or having a certain BMI); there is no limit under HIPAA or the ACA for programs that merely require participation in a program without regard to the outcome.

A requirement to undergo an biometric screening without regard to any certain outcome or result of such screening not an outcome-based program and therefore not required to be limited in terms of the amount of financial reward. A tobacco surcharge or incentive is considered outcome-based thereby requiring a limited reward.

The Americans with Disabilities Act (ADA) also regulates employer' sponsored wellness programs. Under the ADA, the general rule is that an employer may require employees to undergo medical examinations or respond to disability-related inquiries only where such examinations and/or inquiries are "job related and consistent with business necessity." There are two "exceptions" to this general rule: (1) the "voluntary" exception and (2) the "safe harbor" exception. Under the voluntary exception, a wellness program does not violate the ADA if participation by the employee is voluntary. Under the "safe harbor" exception, the rules regarding medical examinations and disability-related inquiries do not prohibit 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.

The U.S. Equal Employment Opportunity Commission (EEOC) has not provided much by way of guidance on either of these two exceptions, and in particular has not taken a position on whether a plan which meets HIPAA and ACA standards will also satisfy the ADA. In the past several years as the

popularity of wellness programs has increased, interested parties have requested that the EEOC provide such guidance. In the meantime, the Eleventh Circuit rejected an employee challenge to a wellness program with biometric screenings and limited financial rewards in *Seff v. Broward County, FL*, finding that such a program was established for the purposes of underwriting risks under an employer's group health plan, and thus applying the "safe harbor" exception of the ADA. The EEOC has not taken a formal position on whether it supports the position taken by the Eleventh Circuit in *Seff*.

The EEOC may have broken its silence on its view of both exceptions by recently filing a suit in federal district court in Minnesota charging Honeywell International, Inc.'s wellness program with violations of both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

According to the lawsuit, beginning in 2015 Honeywell's employees and their spouses may participate in a wellness program which includes a biometric screening. Such screening will include checks for blood pressure, HDL and total cholesterol, nonfasting glucose levels, body mass index (BMI) and waist circumference. Blood will also be screened to determine whether the employee or spouse smokes tobacco.

Employees will be penalized (or lose incentives) if they or their spouses do not take the biometric tests. They would be subject to:

- A $500 surcharge applied to the employee's medical plan costs.
- Loss of health savings account contributions from Honeywell of up to $1,500.
- A $1,000 "tobacco surcharge" even if the employee declines to participate in the biometric testing for reasons other than smoking.
- An additional $1,000 "tobacco surcharge" if the employee's covered spouse does not submit to the testing, even if the spouse declines to participate for reasons other than smoking.

Honeywell claims that these wellness program incentives are permissible under HIPAA because they fall within the guidelines under the Affordable Care Act (ACA). But the EEOC claims that Honeywell's incentives violate the ADA because employees are penalized for not participating in medical examinations that are not job-related or consistent with business necessity. Although recognizing that there is an exception to this rule for "voluntary" medical examinations, the EEOC claims that these exams are not voluntary because of the financial penalties. The EEOC does not specify whether lesser financial incentives would be permissible.

In addition, the EEOC claims that Honeywell's wellness programs violate GINA because employees are penalized if their spouse does not complete the biometric testing. According to the EEOC, "Honeywell is offering an inducement within the meaning of GINA to obtain medical information of its employees' spouses, including information that can show hypertension, diabetes, and potentially other conditions," and "medical information relating to manifested conditions of spouses is family medical history – or genetic information – under GINA."

The EEOC's lawsuit is the third time this year it has challenged an employer-sponsored wellness program. What is noteworthy about this particular challenge, however, is that it takes aim at a program which seemingly falls squarely within the HIPAA and ACA guidelines. Employers have been cognizant that the EEOC could view a wellness program as involuntary if financial incentives are too high (i.e. such as requiring payment of the entire premium). However, employers believed that following the HIPAA

and ACA guidelines would protect them from ADA challenges. Based on this challenge it appears that the EEOC does not agree.

Eckert Seamans will continue to monitor the progress of this litigation and will be available to assist employers with structuring wellness programs that may satisfy HIPAA, ACA and any future guidance related to the ADA.

The Employee Benefits Alert is intended to keep readers current on matters affecting employee benefits and is not intended to be legal advice. If you have any questions about this alert or any other issues relating to employee benefits, please contact ***Sandra Mihok*** *at 412.566.1903,* ***Kathryn English*** *at 412.566.1226,* ***Heather Stone Fletcher*** *at 412.566.6112,* ***Michael Herzog*** *at 412.566.6130, or* ***Paul Yenerall*** *at 412.566.1944.*