Workforce

Honeywell Lawsuit Takes Aim at Biometric Screenings

Employers face uncertainty over the design of wellness programs in the face of EEOC challenges in 2014 to such programs.

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The U.S. Equal Employment Opportunity Commission recently filed a lawsuit charging Honeywell International Inc.'s wellness program with violations of both the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

According to the lawsuit, which was filed in federal district court in Minnesota, 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, high-density lipoprotein, commonly referred to as HDL, and total cholesterol, nonfasting glucose levels, body mass index and waist circumference. Blood will also be screened to determine whether the employee or spouse smokes tobacco.

The EEOC initially sought a temporary restraining order to keep Honeywell from imposing any penalty or cost upon an employee under the program. Judge Ann Montgomery denied the EEOC's request, finding that Honeywell could refund any improper penalties if she ultimately ruled in the EEOC's favor. The lawsuit will proceed without the restraining order.

Employees will be penalized (or lose incentives) if they or their spouses do not take the biometric tests, as follows:

- A $500 surcharge applied to the employee's premium cost for the medical plan.
- Loss of health savings account contributions from Honeywell of up to $1,500.

- A $1,000 tobacco surcharge even if the employee does not participate in biometric testing for reasons other than smoking.
- Another $1,000 tobacco surcharge if the employee's spouse does not take part in the testing, even if the spouse does not participate for reasons other than smoking.

Honeywell claims that its wellness incentives are permissible because they fall within the guidelines established under the Health Insurance Portability and Accountability Act as amended by the Affordable Care Act.

Under HIPAA, the total financial reward that may be given to an individual for participating in a wellness programs is limited. Beginning in 2014 the total reward cannot exceed 30 percent of the total premium cost of the employee's coverage under the employer's medical plan. The total reward can be increased to a total of 50 percent of such premium cost for a program that includes a tobacco cessation program.

The limits on awards apply only to programs (or portions of programs) that require outcomes based on a health factor, such as being tobacco free for a certain period of time or maintaining a certain BMI. There is no limit for programs that merely require participation in a program without regard to the outcome, such as incentives to undergo a biometric test without regard to the results of such test.

Regardless, the EEOC claims that Honeywell's incentives violate the ADA. Under the ADA, an employer may require employees to undergo medical examinations or respond to disability-related inquiries only if they are "job-related and consistent with business necessity." There are two possible exceptions: the "voluntary" exception and the "safe harbor" exception.

Under the voluntary exception, a 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 an employer from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting, classifying or administering risks.

The EEOC's lawsuit claims that the Honeywell program does not comply 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 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. However, an EEOC attorney stated: "employers have to respect employees' and their spouses' rights to the privacy of their medical information, and cannot seek to compel it by imposing prohibitively high penalties." The EEOC's lawsuit does not address the application of the "safe-harbor" exception.

The EEOC also claims that Honeywell's wellness program violates GINA because employees are penalized if their spouses do 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" 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 in 2014 that the agency has challenged an employer's wellness program. This challenge is noteworthy in that it involves a program that does not shift the entire premium cost to the employee, cancel coverage or subject an employee to other disciplinary action. Honeywell's program was seemingly designed to fall squarely within the HIPAA guidelines.

Employers have been seeking guidance from the EEOC for years regarding its position on when a wellness program will be considered "voluntary" for purposes of the ADA. However, the EEOC has not provided guidance or indicated an intention to do so. With this lawsuit, the EEOC has demonstrated that the ADA should not be overlooked by employers when structuring these programs.

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