Court Upholds Financial Penalties in Wellness Programs Under the ADA

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Kathryn R. Paradise
Nancy C. Brower

A recent case decided in Florida, *Seff v. Broward County*, held that an employer-sponsored wellness program which imposed financial penalties on employees who refused to complete a health assessment did not violate the Americans with Disabilities Act (ADA) because the program was based on principles of insurance and risk management. This decision is noteworthy because employers have been uncertain whether the ADA's requirement that participation be "voluntary" permits employers to impose penalties for noncompliance.

The employer, Broward County, implemented a wellness program which imposed a $20 per paycheck health plan premium surcharge on employees who failed to complete a health questionnaire and biometric screening, which included a blood test to measure glucose and cholesterol levels. A former employee filed a class action complaint alleging that the wellness program violated the ADA because it imposed a penalty for failure to submit to a medical examination and respond to medical inquiries.

The court dismissed the complaint, holding that Broward County's wellness program fell under the ADA's safe harbor provision, which permits an employer to develop "bona fide benefit plan[s] that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." The court reasoned that the wellness program, which generated only aggregate data, was designed to help Broward County develop and administer

"economically sound" present and future benefit plans. The court further reasoned that since the program encouraged employees to get involved in their own health care, the medical screenings would lead to a healthier population that was less costly to insure.

The court failed to address the issue of whether the $20 per pay period surcharge rendered the program involuntary under Equal Employment Opportunity Commission (EEOC) guidelines, another potential avenue for future litigation.

Although this decision may still be appealed and is not binding outside of the Eleventh Circuit, the *Seff* case indicates that at least some level of financial penalty may be permissible in employer-sponsored wellness plans. Notably, the Equal Employment Opportunity Commission ("EEOC"), which enforces the ADA, has not commented on this issue and is not bound by the *Seff* decision. Plan sponsors should continue to monitor EEOC guidance and carefully consider plan designs which implement punitive measures for noncompliance.

301 Fayetteville St., Suite 1900, Raleigh, NC 27601/P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075