# Developments for Employers that Sponsor Wellness Programs

April 15, 2011

The ruling in *Seff V. Broward County* has helped to establish guidance as to what is permissible with respect to the design of wellness programs under the Americans With Disabilities Act (ADA). The U.S. District Court for the Southern District of Florida ruled that Broward County's wellness program fell within the ADA's safe harbor provision.

## Summary of Case

On April 11, the U.S. District Court for the Southern District of Florida found in favor of the defendant's (Broward County) motion for summary judgment in *Seff v. Broward County*. The plaintiff, which is made up of a class of present and former employees of Broward County, brought suit against Broward County based on the design of its wellness program claiming it violated the Americans With Disabilities Act (ADA).

Beginning in June 2010, the wellness program imposed a $20 charge on each bi-weekly paycheck for each employee who participated in the group health plan and did not complete the wellness questionnaire (health risk assessment) and undergo biometric screening. Plaintiff Seff, a former employee who incurred the $20 charge filed a class action complaint against Broward County alleging that, by requiring employees to undergo a medical examination and making medical inquiries, Broward County was in violation of the ADA because the wellness program was not voluntary.

Broward County maintained that it did not violate the ADA since its actions were covered by the ADA's safe harbor rules which permit *bona fide* benefit programs. The ADA safe harbor rules applicable in the case provide that a *bona fide* benefit program shall not be construed to prohibit or restrict -

[A] person or organization covered by this chapter from 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 that are based on or not inconsistent with State law;

[This provision] shall not be used as a subterfuge to evade the purposes of [the ADA].

The court agreed with the defendant, Broward County, and held that the wellness program was permissible as it fell within the ADA's safe harbor provision.

**Wellness Program Rules and the ADA**

The reason this case is important is that there has been limited guidance as to what is permissible with respect to the design of wellness programs under the ADA. Thus, employers that have established wellness programs in the past have typically designed those programs to comply with the rules regarding wellness programs under the Health Insurance Portability and Accountability Act (HIPAA), which are administered jointly by the Treasury Department, the Department of Labor and the Department of Health and Human Services.

The Equal Employment Opportunity Commission (EEOC), the agency charged with overseeing employer compliance with the ADA, has stated that employers may offer a voluntary wellness program to their employees promoting good health, disease prevention, medical examinations or health screening; provided certain requirements are met. Health risk assessments pursuant to voluntary wellness programs do not violate the ADA. In Enforcement Guidance issued on July 27, 2000, the EEOC indicated that a wellness program is "voluntary" only if an employer neither requires participation nor penalizes employees who do not participate. This Enforcement Guidance, coupled with informal statements of representatives of the EEOC, question whether a wellness program that imposes a penalty for failing to participate would be permitted under the ADA. However, the EEOC has not released any formal guidance on this issue.

**Case Conclusion**

Interestingly, the Broward County decision did not review whether the $20 penalty rendered the wellness program involuntary. Nor did it address the types of questions which made up the heath risk assessment. The court analyzed the required elements for satisfying the safe harbor and concluded that the Broward County wellness program is part of the County's overall group health plan and is "based on underwriting risks, classifying, risks, or administering such risks" because the program's ultimate goal is to maintain or lower premiums. The Broward County decision is not binding on the EEOC,

but may provide some comfort for employers with wellness programs that satisfy the HIPAA guidelines for wellness programs and the ADA's safe harbor.

## Next Steps

Group health plans and insurers that sponsor wellness programs should review those programs to ensure they comply with all areas of the law. Other applicable areas that should be examined include the HIPAA privacy and non-discrimination provisions, the Genetic Information Nondiscrimination Act of 2008 (GINA), the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC).