“Participation-Only” Wellness Program Survives ADA Challenge

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A “participation-only” wellness program established by Florida’s Broward County for its employees survived a class-action challenge by a former employee who refused to participate in the program. *Seff v. Broward County*, Case No. 10-61437-CIV-MOORE/SIMONSON (S. D. Fla. Apr. 11, 2011).

The wellness program consisted of a health risk assessment (HRA) and a finger stick to measure glucose and cholesterol levels; employees who chose not to participate could still enroll in health insurance but had to pay a $20 surcharge each pay period. The plaintiffs argued that the surcharge made the program not completely “voluntary” (as is required by regulations and guidance from the Equal Employment Opportunity Commission (EEOC)) and also that the program’s medical inquiries/exam violated the Americans with Disabilities Act (ADA).

In its opinion the District Court for the Southern District of Florida granted the County summary judgment against the plaintiffs on the grounds that the wellness program fell within a “safe harbor” under the ADA. The safe harbor is meant to allow insurance companies to hedge risks by identifying risk factors in an employee population and to design benefits that mitigate that risk, so long as the underwriting rules are not used as a “subterfuge” to discriminate against the sick or disabled. The text of the safe harbor in full can be read here; it also applies to employers who sponsor self-funded group health plans.

The court found that the wellness program was a “term” of Broward County’s group health plan, which was a “bona fide benefit plan” as required under the ADA safe harbor. The court also ruled that the wellness program was “’based on underwriting risks, classifying risks, or administering such risks,’” pointing to the fact that the wellness testing generated de-identified and aggregated data that the County could use to classify various health risks among its employee population, and modify benefits as necessary to mitigate those risks.

Because it granted summary judgment on this issue the court did not go on to address whether or not the Broward County wellness program was voluntary under EEOC standards. Applicable regulations define a voluntary wellness program as one that “neither requires employees to participate nor penalizes employees for non-participation.” In informal guidance, the EEOC has suggested that a wellness program may not be “voluntary” if it included a mandatory HRA or a “punitive trigger.” Therefore what constitutes a “voluntary” wellness program, particularly when financial incentives or penalties are involved, remains an open issue and one to be watched.

http://www.disabilityleavelaw.com/uploads/file/Ruling%20on%20MSJ%20-%20Seff%20v%20Broward%20County(1).pdf
http://www.ada.gov/pubs/adastatute08.htm#12201c