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The Latest Win for Wellness Programs May Be More of a Win for the EEOC

Although the U.S. District Court for the Eastern District of Wisconsin held that the employer wellness program at issue in *EEOC v. Orion Energy Systems* did not violate the ADA, the EEOC may find much it likes in this court's rationale. The Americans with Disabilities Act (ADA) prohibits employers from requiring employees to undergo medical examinations or answer disability-related questions, but provides certain exceptions that relate to benefit plans or wellness programs. There have been several recent cases interpreting these exceptions, many of which had been clear wins for employer wellness programs.

In this case, Orion (the employer) waived the employee premium for its self-funded group health plan for those employees who participated in its wellness program, but charged the full cost of the coverage to employees who chose not to participate. Orion's wellness program involved a questionnaire, biometric screening and blood draw. The employer received only aggregated data from the vendors administering the program which allowed it to review the percentage of participants with particular health risks; participants received their specific results.

The EEOC filed suit, claiming this program violated the ADA. Orion, in response, claimed the wellness program was lawful under the "safe harbor" provision under the ADA which allows an employer to establish, sponsor and observe the terms of a bona fide benefit program or, alternatively, that it was permissible as a voluntary wellness program. Unlike other recent cases, including one from the Western District of Wisconsin, the court concluded that the safe harbor provision does not apply in this situation, but that it was a permissible, voluntary wellness program (see below for regulatory developments that would now alter this conclusion). The EEOC also claimed that Orion impermissibly retaliated against the sole employee who opted out of the wellness program by terminating her employment after she complained, and Orion countered that the ADA anti-retaliation rules do not apply because the program was lawful.

After other courts had concluded that similar wellness programs were acceptable under the safe harbor provision of the ADA, the EEOC countered with new regulations stating (or clarifying, depending on who you ask) that the safe harbor provision in the ADA does not apply to wellness programs. In what we view as a win for the EEOC, this court concluded that it must defer to the EEOC's interpretation of its rulemaking authority, determined that the EEOC's interpretation to be reasonable, and agreed with the EEOC that the new regulation can be applied retroactively as a clarification. Further, the court declined to adopt the holdings of *Seff* and *Flambeau*, and concluded the ADA's safe harbor did not apply in any event because wellness programs are "unrelated to basic underwriting and risk classification." In

addition, Orion's group health plan description did not include the wellness initiative, which the court used as further evidence that the program was independent from the group health plan. As a result, the ADA safe harbor was found not to apply to this wellness program.

The court then analyzed whether the program did not violate the ADA because it fell within the "voluntary" exception. [Although the penalty imposed by Orion for not participating in the program was 100% of the cost of self-only coverage, the new EEOC rules requiring voluntary programs to provide a maximum financial incentive of 30% do not apply retroactively and were not at issue in this case.] The court concluded that "even a strong incentive is still no more than an incentive; it is not compulsion." Because coverage under the medical plan was still available to those who chose not to participate in the wellness program, it was determined to be voluntary even though the cost difference made it a "hard choice".

Although summary judgment was ordered in favor of the employer on the voluntary nature of the program, the retaliation claim was determined to be an issue for the jury.

In the end, this case has more for the EEOC to be pleased with than it does for employers still looking to bolster support for the position that Congress intended for the ADA's safe harbor exception to have wide applicability to wellness programs.