JONES DAY

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COMMENTARY

Proposed Wellness Plan Legislation Responds to Lawsuits Filed by EEOC

The United States House of Representatives' Education and the Workforce Committee will conduct a hearing on March 24, 2015 about the House version of a bill proposed to the Senate two weeks earlier—the "Preserving Employee Wellness Programs Act" (S. 620) (H.R. 1189) (the "Bill").[1]

The Bill was introduced to the Senate on March 2, 2015 by Sen. Lamar Alexander (R-Tenn.) and Rep. John Kline (R-Minn.) with Sens. Mike Enzi (R-Wyo.), Johnny Isakson (R-Ga.), Tim Scott (R-S.C.), Orrin Hatch (R-Utah), Pat Roberts (R-Kan.), and Rep. Tim Walberg (R-Mich.).[2] The Bill seeks to clarify the law relating to "nondiscriminatory employer wellness programs" in the wake of several lawsuits filed by the Equal Employment Opportunity Commission ("EEOC") that have created uncertainty about the legality of these programs.

Background

The Americans with Disabilities Act of 1990 ("ADA") authorizes employers to conduct medical examinations and to obtain employee medical histories as part of wellness programs as long as participation by employees is voluntary.[3] In addition, the ADA contains a "safe harbor" that exempts "bona fide" benefit plans from the ADA's general prohibitions when the terms of such plans "are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."[4]

Like the ADA, Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") contains an exception that permits employers to request and acquire genetic information in connection with voluntary wellness programs.[5] Congress directed the EEOC to enforce these protections. In July 2000, the EEOC stated that "a wellness program is 'voluntary'"—and therefore lawful—"as long as an employer neither requires participation nor penalizes employees who do not participate."[6]

In 2006, the U.S. Departments of the Treasury, Labor, and Health and Human Services issued regulations that exempted wellness programs from the nondiscrimination requirements of the Health Insurance Portability and Accountability Act ("HIPAA") if they met certain requirements.[7] Those regulations authorized employers to offer financial inducements to participate in wellness plans of up to 20 percent of the cost of coverage.[8] On January 6, 2009, the EEOC announced that it agreed with this 20 percent standard. The EEOC reasoned that "[b]orrowing from the HIPAA rule is appropriate because the ADA lacks specific standards on financial inducements, and

because it will help increase consistency in the implementation of wellness programs."[9] On March 6, 2009, however, the EEOC rescinded this statement and announced that it was "continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA."[10]

In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"). The ACA regulates wellness plans and says that "[a] reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan."[11] Specifically, the ACA states that the reward for a wellness program "shall not exceed 30 percent of the cost of the coverage in which an employee or individual and any dependents are enrolled. … The Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward available under this subparagraph to up to 50 percent of the cost of coverage if the Secretaries determine that such an increase is appropriate."[12]

On August 20, 2012, the U.S. Court of Appeals for the Eleventh Circuit rejected an ADA challenge to a wellness program that imposed a $20 charge on each biweekly paycheck issued to employees who refused to participate in the program.[13] The court reasoned that the ADA's "safe harbor" exempted the wellness plan from the ADA's prohibitions.[14]

On January 18, 2013, the EEOC reiterated that "[t]he EEOC has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary."[15] The EEOC held a hearing about wellness plans on May 8, 2013.[16] During the hearing, Commissioner Victoria Lipnic complained that the EEOC "has not adopted nor articulated a position on these matters, I believe leading to uncertainty and confusion and I am certain frustration."[17] The EEOC still did not clarify its position.

On June 3, 2013, the U.S. Departments of the Treasury, Labor, and Health and Human Services issued rules that permit employers to "reward" employees who participate in wellness plans, including plans that involve health-related questionnaires or biometric tests, by offering financial inducements up to 30 percent of the cost of health coverage and as high as 50 percent for "programs designed to prevent or reduce tobacco use."[18]

From August through October 2014, the EEOC filed three lawsuits that alleged that particular wellness programs violated the ADA and GINA.[19] In one case, *EEOC v. Honeywell International, Inc.*, the EEOC asserted that a wellness program violates the ADA and GINA even if the program fully complies with the standards set out in the ACA. The court in that case declined the EEOC's request for preliminary relief.

The EEOC is considering issuing regulations about wellness plans and may do so later this year.

Senate Hearing

On January 29, 2015, the Senate Committee on Health, Education, Labor and Pensions conducted a hearing on "Employer Wellness Programs: Better Health Outcomes and Lower Costs." During the hearing, both Democratic and Republican members expressed frustration with the EEOC. At the hearing, Eric Dreiband—a partner in Jones Day's Washington Office and former General Counsel of the EEOC—testified before the Committee. Mr. Dreiband explained that:

- The ADA authorizes employers to conduct medical examinations and to obtain employee medical histories as part of wellness programs as long as participation by employees is voluntary;
- The ACA specifies that the reward for a wellness program may be up to 30 percent of the cost of coverage, with the potential for that to increase to 50 percent;
- The U.S. Departments of the Treasury, Labor, and Health and Human Services have issued standards for wellness programs that likewise endorse the ACA's 30 and 50 percent standards[20]; and
- The U.S. Court of Appeals for the Eleventh Circuit has determined that the ADA may exempt wellness plans from that law.[21]

Mr. Dreiband cautioned that "compliance with the ACA may not eliminate the risk of ADA liability for employers, at least according to the U.S. Equal Employment Opportunity Commission.

Since March 2009, the Commission has declined to endorse any definition of what the ADA's 'voluntary' standard means, and in a recent court case, the EEOC asserted that the decision by the Eleventh Circuit is wrong. So employers and employees throughout the United States are left with the rather bizarre situation in which the Congress and one part of the Executive Branch of the Government have endorsed a set of standards that it says govern wellness plans and comply with the law while the EEOC has failed or refused to explain what it will treat as a lawful 'voluntary' wellness plan. The Commission's silence about this issue is perplexing, and the Congress, the EEOC, or both should clarify exactly how a wellness plan will comply with the ADA."[22]

The Proposed "Preserving Employee Wellness Programs Act"

The Bill seeks to respond to two positions taken by the EEOC: (i) that a wellness program that offers incentives or rewards in compliance with the ACA may still violate the ADA or GINA, and (ii) offering incentives for the collection of an employee's spouse's genetic information for participation in the employee's wellness program violates GINA.

Specifically, the Bill proposes that a workplace wellness program does not violate the ADA or titles I or II of GINA if the program complies with Section 2705(j) of the Public Health Service Act ("PHSA")—which was amended by the ACA to provide that an employer may offer a lawful financial incentive of "30 percent of the cost of the coverage," or up to 50 percent if approved by the Secretaries of Labor, Health and Human Services, and the Treasury. The Bill specifically finds that when Congress enacted the ACA, it "intended that employers would be permitted to implement health promotion and prevention programs that provide incentives, rewards, rebates, surcharges, penalties, or other inducements related to wellness programs, including rewards of up to 50 percent off of insurance premiums for employees participating in programs designed to encourage healthier lifestyle choices."

The Bill also provides that offering incentives for the "collection of information about the manifested disease or disorder of a family member" for use in another family member's workplace wellness program does not violate GINA.

Additionally, the Bill would allow employers to implement a deadline of up to 180 days for an employee to request and complete an alternative wellness program if it is unreasonably difficult or medically inadvisable for the employee to participate in the original wellness program.

Next Steps

The Bill has been referred to the Senate Committee on Health, Education, Labor and Pensions. The language of the proposed legislation specifically finds that "Congress has a strong tradition of protecting and preserving employee workplace wellness programs." As proposed, the Bill would be retroactive to March 23, 2010—the date that the ACA was signed into law.

The United States House of Representatives Education and the Workforce Committee will conduct a hearing on March 24, 2015 about the House version of the Senate's Bill.

And, finally, the EEOC is working on proposed regulations. Any regulations by the EEOC may or may not address compliance with the ACA, the ADA, and GINA.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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Haley A. Wojdowski, an associate in the Washington Office, assisted in the preparation of this Commentary.

Endnotes

1 http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=398555.

2 *See* https://www.congress.gov/bill/114th-congress/senate-bill/620, *See also* http://www.help.senate.gov/newsroom/press/release/?id=7d5490e3-3f7a-46d5-b812-e8acc94e4d5b&groups=Chair.

3 42 U.S.C. §§ 12112(d)(4)(B) & 12201(c)(2).

4 42 U.S.C. § 12201(c)(2).

5 42 U.S.C. § 2000ff–1(b)(2).

6 http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

7 *See* Department of Labor Regulations, 29 C.F.R. §2590.702(f).

8 *See* 78 Fed. Reg. 33158.

9 *See* EEOC Opinion Letter, Jan. 6, 2009 at 2, rescinded on March 6, 2009, http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf.

10 *See* http://www.eeoc.gov/eeoc/foia/letters/2009/ada__disability__medexam__healthrisk.html.

11 42 U.S.C. § 300gg-4(j)(3)(A).

12 *Id*.

13 *See Seff v. Broward Cnty.*, 691 F.3d 1221 (11th Cir. 2012).

14 *Id*. at 1223-24.

15 *See* http://www.eeoc.gov/eeoc/foia/letters/2013/ada__wellness__programs.html.

16 *See* http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm; http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.

17 http://www.eeoc.gov/eeoc/meetings/5-8-13/transcript.cfm.

18 *See* http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=26880&AgencyId=8&DocumentType=2.

19 *EEOC v. Orion Energy Sys., Inc.*, Case No. 14-1019 (E.D. Wis. filed Aug. 20, 2014); *EEOC v. Flambeau, Inc.*, Case No. 14-638 (W.D. Wis. filed Sept. 30, 2014); *EEOC v. Honeywell Int'l, Inc.*, Civil No. 14-4517 (D. Minn. filed Oct. 27, 2014).

20 *See* http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=26880&AgencyId=8&DocumentType=2.

21 *See Seff v. Broward Cnty.*, 691 F.3d 1221 (11th Cir. 2012).

22 http://www.help.senate.gov/imo/media/doc/Dreiband2.pdf.