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EEOC Lawsuits - Implications for Wellness Programs

Many employers offer compliant wellness programs under their group health plans, and use health risk assessment (HRA) and biometric screening incentives to engage employees in these programs. The financial incentives are intended to maintain and improve the health of employees and their families and not to penalize them. These wellness programs are intended to promote health, and not to discriminate in employment or health coverage which is prohibited by the Americans with Disability (ADA) and the Genetic Information Nondiscrimination Act (GINA). These programs are also specifically designed to comply with the Health Insurance Portability and Accountability Act (HIPAA) and the Patient Protection and Affordable Care Act (ACA).

The ACA includes provisions encouraging wellness programs aimed at controlling healthcare costs by reducing smoking, obesity, hypertension, and other risk factors that can lead to expensive illnesses. Both the ACA and HIPAA specifically allow employers to reward workers who participate in wellness programs and penalize those who don't. Even prior to passage of the ACA, employers have sought guidance from the Equal Employment Opportunity Commission (EEOC) regarding how the ADA and GINA apply to wellness programs. Notwithstanding numerous opportunities for the EEOC to provide that guidance, it has failed to do so. The EEOC has now filed three recent lawsuits challenging employer-sponsored wellness programs (against Honeywell, Flambeau, Inc., and Orion Energy Systems). The EEOC is seeking to block the implementation of any penalty or cost imposed on employees who decline participation in biometric testing, claiming the imposition of any such costs or the loss of incentives related to biometric screenings violates both the ADA and GINA. The EEOC is generally objecting to wellness program financial incentives, which include account based plan contributions and premium surcharges for employees and spouses to take biometric screenings (including nicotine tests).

The ADA prohibits requiring medical tests as part of employment. Employers can't make medical inquiries unless it's consistent with job-necessity, or part of a voluntary wellness program. One of the EEOC arguments is that requiring medical tests (such as HRA questionnaires, medical screenings, weight-loss or smoking-cessation programs) violates the ADA, based on the view that it is no longer voluntary if employees face thousand of dollars in penalties or loss of insurance for non-participation. Another argument is that the testing imposes penalties on employees whose spouses do not provide their medical information, and therefore violates GINA.

The EEOC legal action and their historic lack of clear guidance conflicts with the message of HIPAA and the ACA which encourages the adoption and expansion of wellness programs

designed to benefit the health of employees and their families. Employers are concerned about the impact of the EEOC's action on any employer that offers wellness programs with incentives for biometric screenings. The EEOC's legal action has the potential to jeopardize incentives for employees who have benefited from them, adversely impacting employees' health and the broader adoption and expansion of wellness programs. Many employers believe that wellness programs that comply with HIPAA and the ACA should be considered compliant with the ADA and GINA.

The EEOC has announced that it intends to soon issue guidance addressing wellness programs under the ADA and GINA. Specifically, regulations will address "whether, and to what extent, Title I of ADA allows employers to offer financial inducements and/or impose financial penalties as part of wellness programs offered through their health plans, and to address other aspects of wellness programs that may be subject to the ADA's nondiscrimination provisions." Additionally, EEOC intends to issue a proposed rule to amend GINA regulations "to resolve whether employers may offer inducements to employees' spouses or other family members who answer questions about their current medical conditions on a health risk assessment."

Employers are encouraged to carefully monitor developments and confer with legal counsel to assess any risks associated with their wellness program designs. Please contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 with any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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