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Florida Court Upholds ADA "Safe Harbor" in Broward County Wellness Program Case

In a decision filed April 11, 2011, the Southern District of Florida granted an employer health plan's motion for summary judgment in a case brought by a former plan participant who claimed that the health plan's wellness program violated the Americans with Disabilities Act ("ADA"). *Seff v. Broward County*, No. 10-61437-CIV-MOORE/SIMONTON (S.D. Fla. Apr. 11, 2011). This case is significant in that it has been unclear whether wellness programs and health risk assessments ("HRAs") that otherwise comply with the HIPAA wellness rules (particularly those that are mandatory or involve penalties) would be permitted under the ADA. Employers and insurers have long been concerned about an ADA provision that prohibits employers from imposing mandatory medical examinations and its possible application to wellness programs. The Equal Employment Opportunity Commission ("EEOC"), which administers the ADA, has questioned whether an HRA or a wellness program that is mandatory or involves a penalty for failing to participate (as opposed to a reward for participation) would be permitted under this provision. However, the EEOC has not issued formal guidance one way or the other.

As discussed below, the court in *Broward County,* a case of first impression, found that the ADA prohibition does not apply to a wellness program offered by an employer health plan where the program meets the ADA's safe harbor for bona fide benefit plans. We discuss the case and the ADA provisions below.

ADA Prohibition on Medical Examinations & Inquiries

The ADA generally prohibits employers from discriminating against employees on the basis of disability, including in the area of employee compensation and benefits. 42 USC § 12112(a); 42 CFR § 1630.4(f). The ADA specifically prohibits an employer from requiring employees to undergo a medical examination or from making medical inquiries, unless voluntary or to determine an employee's ability to perform their job: "A covered entity shall not require a medical examination and shall not make medical inquiries of an employee . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 USC § 12112(d).

The ADA itself does not address how this provision may apply to an employee benefit plan or wellness program, but a Q&A that is a part of EEOC enforcement guidance indicates employers may conduct medical examinations and inquiries if they are voluntary, and in particular, part of a "voluntary wellness program." EEOC Enforcement Guidance at Q&A 22 (July 27, 2000). The guidance goes on to say that a program is "voluntary" if the employer neither requires participation nor penalizes employees who do not participate. EEOC Enforcement Guidance at n. 78.

In 2006, the EEOC also addressed wellness programs in an informal Q&A to the American Bar Association. EEOC ABA JCEB Q&A-2 & 3 (2006). When asked whether a plan may require a participant to take an HRA to be eligible for the plan or impose a penalty for an individual's failure to participate in a coaching program, the EEOC said it had not taken a position on these issues, but pointed to its earlier enforcement guidance that says a "voluntary" wellness program is permitted and questioned whether a mandatory HRA or a "punitive trigger" in a wellness program is voluntary. The EEOC also said that it did not think compliance with the HIPAA wellness rules would necessarily ensure compliance with the ADA. EEOC ABA JCEB Q&A-1 (2006).

In a later Informal Discussion Letter to a specific health plan, the EEOC said that it had not taken a formal position on whether requiring completion of an HRA to be eligible for the health plan would violate mandatory prohibition, but that "the Commission believes that the ADA prohibits [the plan] from making disability-related inquiries or requiring a medical examination under the circumstances you have described." Letter from Peggy Mastroianni (Aug. 10, 2009) (found at www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risk_assessment.html). The letter noted that it was an "informal discussion" of the issues and not an official legal opinion of the EEOC. It did not discuss the ADA safe harbor.

ADA Safe Harbor for Bona Fide Plans

The ADA includes an exception from many of the ADA requirements, including the prohibition on medical examinations and inquiries, for "bona fide benefit plans." 42 U.S.C. § 12201(c). The safe harbor says that the prohibition should not be construed to prohibit or restrict:

> (2) 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;

42 U.S.C. § 12201(c). The provision further states that this exception "shall not be used as a subterfuge to evade the purposes of the [ADA]."

The ADA regulations provide that this "is a limited exception that is only applicable to those who establish, sponsor, observe, or administer benefit plans, such as health and life insurance plans. . . . The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment." 29 CFR § 1630.16(f) & Appendix. The regulations go on to say that the "activities permitted by this provision do not violate [the ADA] even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part." Appendix to Part 1630.

***Broward County* Case**

In the *Broward County* case, the Broward County health plan offered a wellness program that included an HRA and biometric screenings for cholesterol and glucose. As an incentive for participation, Broward County required that employees take the HRA and screenings or be subject to an additional $20 per pay period surcharge on health plan premiums. To avoid the surcharge, an individual simply had to participate in the HRA or screenings. The incentive was not based on the responses to the HRA or the results of the screenings.

The plaintiff brought a claim in federal court, arguing that the Broward County wellness program violated the ADA prohibition on mandatory medical examinations and inquiries because the program imposed a penalty for failure to participate. On December 6, 2010, the Southern District of Florida certified the case as a class action but did not commented on the merits. The health plan filed a motion for summary judgment, which the court granted on April 11, 2011, effectively dismissing the case.

In its decision, the court found that the Broward County wellness program did not violate the ADA because the program met the ADA's safe harbor for bona fide benefit plans. The court noted the two requirements of the safe harbor: (1) that the party in question be a bona fide benefit plan; and (2) that the provision in question be based on underwriting, classifying, or administering risk and not be used as a subterfuge for discrimination.
As to whether the wellness program was sponsored by a bona fide benefit plan, the court pointed out that the plan's insurer administered the program under its contract with the County and that only those enrolled in the health plan were eligible to participate in the wellness program. The court also noted that the wellness program was described in communications materials related to health plan benefits.

Regarding whether the program was based on underwriting, classifying, or administering risk, the court said that there was very little case law in this area but that one case interpreting the safe harbor defined underwriting as "the application of the various risk factors or risk classes to a particular individual or group for the purposes of determining whether to provide coverage" and risk classification as "the identification of risk factors and the groupings of those factors which pose similar risks." *Zamora-Quesada v. HealthTexas Medical Group of San Antonio*, 34 F. Supp.2d 433, 443 (W. D. Tex 1998).

The court found that the Broward County wellness program met the safe harbor because it was "designed to develop and administer present and future benefit plans using accepted principles of risk assessment." The court said that the wellness program rendered aggregate data to the County to analyze when developing future benefit plans and, though it was not underwriting or classifying risk on an individual basis, it was underwriting and classifying risk on a "macroscopic level" to create economically sound benefit plans. The court said the wellness program also was designed to "mitigate risks" so that employees would get involved in their own healthcare, which would lead to a healthier population that would cost less to insure. The court said, "Such inquiries, when not pretextual, are permissible under the safe harbor provision of the ADA."

The court also pointed out that the plaintiff did not allege any sort of subterfuge for discrimination and went on to conclude: "[I]t is hard to see how the wellness program relates to discrimination in any way. In fact, the program is enormously beneficial to all employees of Broward County – disabled and non-disabled alike. It is clear to this Court that the wellness program is not a subterfuge; it was not designed to evade the purpose of the ADA. Rather, it is a valid term of a benefits plan that falls within the ambit of the ADA's safe harbor provision."

Where We Go From Here . . . .

It is unclear how the EEOC might react to this opinion or whether it will issue additional guidance related to wellness programs. It appears that the EEOC declined to pursue the *Broward County* case under its own investigative authority and issued the plaintiff a Right to Sue letter. However, the EEOC has suggested informally that an HRA or wellness program that is mandatory or involves a penalty may violate the ADA, although it has not issued any formal guidance. In any event, the *Broward County* case is not binding on the EEOC or necessarily persuasive in other jurisdictions, so health plans should continue watch for any action by the EEOC in this area.

Meanwhile, the Departments of Labor, Health and Human Services, and Treasury have held a hearing as to whether there needs to be additional "consumer protections" over wellness programs under HIPAA. The HIPAA nondiscrimination and wellness rules apply when a wellness program provides a reward or incentive based on a health standard (such as providing a premium discount based on the responses to an HRA or results of a screening). The rules generally require that the dollar amount of any health-based incentives be limited to 20% of the cost of employee coverage (employer plus employee contributions) and that the plan provide a "reasonable alternative" so that those who are medically incapable of meeting the health-based standard can earn the same incentive. The Patient Protection Affordable Care Act increases this limit to 30% in 2014 and gives the Secretary of Health and Human Services the discretion to increase the limit to 50%. These changes would give health plans more flexibility in designing wellness programs and have prompted more plans to consider whether to create wellness programs and how to structure them. But, as seen here, plans must stay abreast of court decisions, EEOC guidance, and possible new HIPAA regulations when designing these programs. Clearly, the laws surrounding wellness programs are a moving landscape.