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Another Court Rejects EEOC Position on ADA and Wellness Programs

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Subject to only limited exceptions, the Americans with Disabilities Act ("ADA") forbids an employer from requiring that employees submit to a medical inquiry or examination. However, the statute also contains a "safe-harbor" *exemption* under which an employer may observe "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks." Some employers rely on this safe harbor to justify aspects of employee wellness programs that would otherwise violate the ADA prohibition. Although the Equal Employment Opportunity Commission ("EEOC") disagrees with this approach, courts are beginning to side with the employers. The latest court to do so, in *EEOC v. Flambeau, Inc.*, is a federal trial court based in Wisconsin.

Although this benefit-plan safe harbor has long been a part of the ADA, the first reported decision in which it was used to defend a wellness program came in 2011. As reported in our May 13, 2011, article, the case of *Seff v. Broward County* involved a county's assessment of a $20 bi-weekly penalty against any health plan participant who refused to complete a health risk assessment ("HRA") and submit to a biometric screening. Citing this benefit-plan safe harbor, a Florida federal trial court upheld the county's wellness program against an ADA challenge. That decision was then upheld by the Eleventh U.S. Circuit Court of Appeals.

The *Flambeau* court is apparently the first to address this question since the Eleventh Circuit's decision in *Seff*. The Wisconsin court was not bound to follow the Eleventh Circuit's lead. Moreover, in April of 2015, the EEOC had issued proposed regulations under the ADA. And in a footnote to those regulations, the EEOC specifically disagreed with the *Seff* decision.

Nonetheless, the *Flambeau* court held that the benefit-plan safe harbor did apply in this context. In addition to noting that the EEOC regulations were merely *proposed*, the court went on to disagree with the EEOC's position.

The facts underlying the *Flambeau* decision were as follows. The employer had established a fairly typical wellness program. It required the completion of an HRA, as well as a biometric screening (height and weight measurements, a blood pressure test, and a blood draw). During the program's initial year, employees who participated received a $600 annual credit against their health plan premiums. During subsequent years, however, the credit was eliminated. Instead, employees could obtain coverage under the employer's health plan *only* by participating in the wellness program. (Because employees were not required to have health coverage, participation in the wellness program was not a condition of employment.)

The EEOC's proposed regulations would expressly prohibit the conditioning of coverage under a health plan (or any *option* within such a plan) on an employee's participation in a wellness program. By upholding this employer's wellness program, the *Flambeau* court expressly rejected this aspect of the EEOC regulations.

Of course, the *Flambeau* decision is limited to wellness programs that fall within the benefit-plan safe harbor. For instance, this safe harbor requires that any medical examination constitute a "term" of the underlying health plan. The *Flambeau* court found it significant that there was a direct connection between the employer's wellness program and participation in its health plan. Moreover, the employer used the aggregate information learned from the HRAs and biometric screenings to estimate the cost of providing health coverage, thereby allowing it to set the level of employee premiums, evaluate the need for stop-loss insurance coverage, and adjust co-pays for certain services and prescription drugs. The court therefore found that the wellness program (including its required medical examinations) was a "term" of the employer's health plan.

On this point, the *Flambeau* court did struggle with the fact that the wellness program was not referenced in either

AUTHORS

- Kenneth A. (Ken) Mason

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the health plan document or its summary plan description. Although the court was ultimately persuaded that this failure was not fatal to the employer's reliance on the safe harbor (in view of other employee communications on the topic), any employer wishing to rely on this safe harbor would be well-advised to describe the wellness program's terms in the health plan's SPD.

Under the *Flambeau* court's analysis, wellness programs that are *not* directly tied to an employer's health plan could fall *outside* this safe harbor. For instance, an employer should not simply require that *all* employees complete a health risk assessment or biometric screening – without regard to their participation in the employer's health plan. Nor should an employer attempt to use the information gained in this way for purposes unrelated to that plan.

This decision is far from the final word on the subject. Although all of the courts presented with this question have thus far ruled against the EEOC, there is no guarantee that other courts will do likewise. Moreover, should the EEOC finalize its proposed regulations in essentially their current form, courts could feel more bound to follow that EEOC guidance. In short, although the *Flambeau* decision should provide *some* additional comfort to employers wishing to condition health plan participation on an employee's completion of an HRA or biometric screening, there is still no *guarantee* that doing so will pass muster under the ADA.

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