

PUBLICATION

UPDATE – What's On the Horizon for Employer-Sponsored Wellness Programs and the EEOC in 2016?

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In this [December 18, 2015, article](#), we discussed employer-sponsored wellness programs and the EEOC's apparent apprehension of them. The article referenced the EEOC's lawsuit against plastics manufacturer Flambeau, Inc. in federal district court in Wisconsin (*EEOC v. Flambeau, Inc., Eastern District of Wisconsin*, Civil Action No. 3:13-cv-00638), and there has been an interesting development in that case.

On September 30, 2014, the EEOC sued Flambeau for alleged violations of the Americans with Disabilities Act (ADA). Specifically, the EEOC alleged that the company violated the ADA by requiring employees, through its wellness program, to complete biometric testing and health risk assessments which included disability-related inquiries and medical examinations. Per the EEOC, the biometric testing and health risk assessments were not job-related or consistent with business necessity.

One of Flambeau's employees missed his appointment to complete the biometric testing and health risk assessment (because he was in the hospital for cardiomyopathy and congestive heart failure). Upon his return from medical leave, he attempted to complete the testing, but his requests were apparently denied by Flambeau. Thereafter, the employee's health insurance was cancelled for failure to complete the biometric testing and health risk assessment, and he was offered COBRA. Unable to afford the COBRA premium, the employee went without health insurance. Had he been able to complete the biometric testing and health risk assessment, Flambeau would have covered 75 percent of his health premiums. As such, the EEOC alleged that the employee had suffered a financial penalty, the wellness program was not "voluntary," and Flambeau had violated the ADA.

On July 15, 2015, Flambeau filed a motion with the district court requesting that the court dismiss the EEOC's lawsuit. Specifically, the company claimed that the biometric screening and health risk assessment were protected under the "safe harbor" provisions of the ADA; i.e., they were terms of a bona fide health benefit plan based upon "underwriting risks, classifying risks or administering such risks." Additionally, the company claimed that the wellness program was voluntary. "Employees were entirely free to choose whether to obtain benefits from the company, enroll in health insurance from a different source or forgo insurance altogether," and employees who did not have employer-sponsored health insurance were not required to complete the screening or assessment. Furthermore, those who declined the employer-sponsored health insurance remained employed.

The EEOC countered Flambeau's arguments with its position that mandating employees complete biometric screenings or health risk assessments as part of a wellness program in order to qualify for health coverage could not be "voluntary," regardless of whether the employee could remain employed.

On December 30, 2015, District Court Judge Barbara B. Crabb agreed with Flambeau and entered judgment on behalf of the company, dismissing the EEOC's lawsuit. Judge Crabb found "that the protections set forth in the ADA's safe harbor enable employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment without violating" the ADA's prohibition on non-job-related medical examinations and inquiries.

So what does this mean for employers? Not much – yet. This issue has not been addressed by the Court of Appeals for the Seventh Circuit (which hears appeals for the federal courts in Wisconsin), and the case was a matter of first impression. As such, we expect the EEOC to appeal Judge Crabb's decision.

It should also be noted that, after the employee filed a charge of discrimination with the EEOC, Flambeau agreed to reinstate his insurance if he completed the screening and assessment and paid his share of the health premiums. The employee met these conditions, and his insurance was reinstated retroactively. Nevertheless, the EEOC pursued the litigation.

Finally, as indicated in the previous article, the EEOC has proposed regulations under both the ADA and the Genetic Information Nondiscrimination Act (GINA). Until the proposed regulations are finalized and implemented, employers should be cautious of tying eligibility for health insurance to participation in wellness programs which require biometric screenings and health risk assessments.