Wisconsin Court Rules Wellness Program Not a Violation of the ADA

By Kristi R. Gauthier / Jan 08, 2016

In recent years, the Equal Employment Opportunity Commission ("EEOC") filed several lawsuits against employers claiming that certain wellness programs violated Title I of the Americans With Disabilities Act ("ADA"). Subsequently, in April 2015, the EEOC issued proposed rules addressing how the ADA applies to wellness programs that are part of employer sponsored group health plans. See our original e-alert on the proposed rules here.

On December 30, 2015, in the case of *Equal Employment Opportunity Commission v. Flambeau, Inc.*, the United States District Court for the Western District of Wisconsin ruled that if a wellness plan fits within the ADA's safe harbor provisions for the terms of a "bona fide benefit plan," the employer is not subject to liability under the ADA for requiring its workers to complete a health risk assessment and undergo biometric screening to participate in the employer's self-funded health benefits plan.

In *Flambeau*, the employer established a wellness program which required each employee to complete a health risk assessment questionnaire about his or her medical history, diet, mental and social health and job satisfaction. Employees were also required to submit to biometric screening testing which was similar to a routine physical examination. Under the wellness plan, completion of both the health risk assessment and biometric testing was required in order for an employee to be eligible to participate in the employer's health plan. The EEOC claimed that the employer violated the ADA by requiring its employees to complete the wellness program's health risk assessment and biometric screening tests before they could enroll in the defendant's health insurance benefit plan. The employer argued that the practice of conditioning enrollment in its benefit plan on completion of the wellness program is protected by the ADA's safe harbor for insurance benefit plans which provides that the ADA shall not be construed to prohibit or restrict an employer from administering the terms of a "bona fide benefit plan" that is based on underwriting risks, classifying risks, or administering such risks. The court, in this case, agreed with the employer's position given the information obtained by the employer under the wellness program was used by the plan for the purpose of underwriting, classifying and administering health risks.

This decision of the U.S. District Court for the Western District of Wisconsin found that the terms of the wellness program at issue fit within the "bona fide benefit plan" safe harbor under the ADA. Employers should keep in mind that the EEOC has historically focused on whether a wellness program was "voluntary" claiming that involuntary programs violated the ADA. Therefore, wellness programs that are "involuntary" in nature are still at risk of being challenged by the EEOC. Employers should also be aware that wellness programs must comply with various other laws in addition to the ADA, such as HIPAA and GINA. We recommend that plan sponsors continue to consult with legal counsel with regard to the structure of such programs to ensure compliance.

If you have any questions about the subject matter of this e-alert please contact Kristi Gauthier at kgauthier@clarkhill.com | (480) 684-1300; Doug Ellis at dellis@clarkhill.com | (412) 394-2367; Nancy Farnam at nfarnam@clarkhill.com | (248) 530-6333; Ed Hammond at ehammond@clarkhill.com | (248) 988-1821; or any other member of Clark Hill's Labor and Employment Practice Group.

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