Bond

INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

OCTOBER 2014

EEOC Files Two Recent Lawsuits Challenging Employer Wellness Programs

The Affordable Care Act creates new incentives to promote employer wellness programs. However, employers should not rush to establish such programs without first considering the implications of the Americans with Disabilities Act. Why? The Equal Employment Opportunity Commission has not yet issued guidance on how employers may structure their wellness programs to avoid violations of the ADA, despite placing this issue on its Semiannual Regulatory Agenda in May 2014. In fact, the EEOC does not anticipate that any administrative direction on this issue will be forthcoming in the immediate future. Despite a lack of guidance, the EEOC is actively pursuing litigation in this area. In this regard, the EEOC recently filed two cases against employers, claiming that their wellness programs violated the ADA.

In the first case, the EEOC filed a complaint against Orion Energy Systems, Inc., alleging that through its voluntary wellness program, Orion required an employee to submit to medical examinations and inquiries that were not job-related or consistent with business necessity in violation of the ADA. According to the EEOC, Orion's wellness program required employees to complete multiple medical history forms and submit to blood work. One employee, Wendy Schobert, objected to participation in the wellness program. She asked whether participation was voluntary and whether the medical information would be maintained in a confidential file. The EEOC claims that Orion's personnel director and Ms. Schobert's supervisor told Ms. Schobert not to express any opinions about the wellness program to her co-workers. Ultimately, Ms. Schobert decided to opt out of Orion's wellness program. As a result, the EEOC asserts that Orion failed to pay Ms. Schobert's insurance premium costs because she did not participate in the wellness program and subsequently terminated her employment.

In the second case, the EEOC filed a complaint against Flambeau, Inc. Similar to the Orion case, the EEOC alleges that the employer's wellness program violated the ADA by requiring employees to submit to medical examinations and inquiries that were neither job-related nor consistent with business necessity. Specifically, Flambeau's wellness program required employees to complete biometric testing and a health risk assessment. As part of this process, employees needed to disclose their medical histories and submit to blood work and measurements. Flambeau covered approximately 75% of the health insurance premiums for employees who completed this voluntary process. One employee, Dale Arnold, was not able to complete the biometric testing and health risk assessment as scheduled because he was on a medical leave of absence. According to the EEOC, Mr. Arnold tried to complete the biometric testing and health risk assessment when he returned from his medical leave, but Flambeau did not permit him to do so and instead terminated his health insurance coverage. Since Mr. Arnold could not afford to pay the entire premium cost for his health insurance under COBRA, his health insurance was canceled.

Until the EEOC provides further guidance on this issue, employers should ensure that their wellness programs are truly voluntary. Moreover, employers should make sure to avoid either significant penalties for employees who choose not to participate and/or significant rewards for employees who do participate in these programs. Finally, any medical information that employers obtain through a wellness program should be kept confidential and should not be used as a basis for making employment decisions involving the employee.

To learn more, contact Katherine S. McClung at (585) 362-4703 or kmcclung@bsk.com.

BOND SCHOENECK & KING ATTORNEYS

Commitment · Service · Value · Our Bond