

EEOC Targets Employer Wellness Programs

Labor & Employment Law Update

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The U.S. Equal Employment Opportunity Commission (EEOC) recently announced that it has filed suit against a second employer alleging the employer's wellness program is in violation of the Americans with Disabilities Act (ADA). The EEOC's first lawsuit of this kind was filed a couple months ago alleging the employer's wellness program was not voluntary and the employee was discharged for failing to participate in the program. The ADA concern is that wellness programs often require "medical examinations" and involve "disability-related inquiries," so participation in these programs must be voluntary (or job-related and consistent with business necessity).

In the latest case, the EEOC alleges that the employer imposed significant penalties on non-participating employees, which eliminated the voluntary nature of the program. The EEOC claims that employees who refused to participate faced cancellation of medical insurance or the requirement to pay the entire premium cost. Employees who participated in the program maintained coverage and only had to pay 25% of the premium cost. The EEOC acknowledged that voluntary wellness programs are lawful, but it is scrutinizing whether the program is truly voluntary. According to the EEOC, if the employer places significant penalties on employees who choose not to participate (e.g., shifting 100% of the premium cost to such employees, disciplining employees, or cancelling medical insurance), the program is not voluntary.

The EEOC previously announced that it intends to initiate rulemaking to address wellness programs, but proposed rules have yet to be published. To date, the EEOC's activity only indicates it is targeting programs that impose **significant** penalties on non-participating employees. There has been no indication that the EEOC will target wellness programs that simply offer slight incentives to encourage participation, but the forthcoming rules should help shed more light on the EEOC's enforcement plans in this important area. In the meantime, employers should review current wellness plans to ensure they are truly voluntary in nature.