Brought to you by Pacific Group

ADA: EEOC Guidance on Health Risk Assessments

In March 2009, the Equal Employment Opportunity Commission (EEOC) issued an informal discussion letter regarding health risk assessments (HRAs). In this letter, the EEOC addressed whether requiring employees to participate in an HRA as a condition for health plan eligibility violated the Americans with Disabilities Act (ADA).

The EEOC informally concluded that:

- Requiring all employees to take an HRA that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance coverage would violate the ADA because the requirement does not appear to be job-related and consistent with business necessity; and
- Although disability-related inquiries and medical examinations are permitted under the ADA as part of a voluntary wellness program, the HRA would not qualify as a voluntary wellness program since employees are penalized for nonparticipation.

This Legislative Brief provides an overview of the EEOC's informal guidance.

ADA REQUIREMENTS

Title I of the ADA limits when an employer may obtain medical information from applicants and employees.

- Before a job offer is made, the ADA prohibits all disability-related inquiries (that is, questions likely to elicit information about a disability) and medical examinations, even if they are related to the job.
- After a conditional job offer is made, an employer may ask disability-related questions and require medical examinations as long as it does so for all entering employees in the same job category.
- Once employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

However, an employer may conduct disability-related inquiries and require medical examinations as part of a **voluntary wellness program** without violating the ADA. A wellness program is voluntary if employees are not required to participate and they are not penalized if they decide not to participate.

EEOC INFORMAL POSITION

Health Risk Assessments

In the HRA considered by the EEOC, employees were asked to participate in an HRA that included answering a short health-related questionnaire, taking a blood pressure test and providing blood for use in a blood panel screen. Personalized information from the HRA went directly and exclusively to the employee, while the employer only received information in the aggregate. Employees who declined to participate in the HRA became ineligible for coverage under the employer's health plan.

ADA: EEOC Guidance on Health Risk Assessments

EEOC Conclusions

The EEOC informally concluded that requiring employees to complete an HRA that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance coverage does not appear to be job-related and consistent with business necessity, and therefore would violate the ADA.

A disability-related inquiry or medical examination may be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.

As mentioned above, disability-related inquiries and medical examinations are also permitted as part of a voluntary wellness program. However, when an employee's decision to not participate in an HRA results in the loss of the opportunity to obtain health coverage through the employer's plan, it is no longer voluntary. Thus, according to the EEOC, even if the HRA could be considered part of a wellness program, the program would not be voluntary because individuals who do not participate in the assessment are denied a benefit (that is, health plan coverage) as compared to employees who participate in the assessment.

Earlier, the EEOC informally stated that a wellness program would be considered voluntary and any disability-related inquiries or medical examinations conducted in connection with it would not violate the ADA, as long as the inducement to participate in the program did not exceed twenty percent of the cost of employee-only or employee-and-dependent coverage under the plan, consistent with the Health Insurance Portability and Accountability Act (HIPAA). *The EEOC continues to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA.*

The EEOC notes that this guidance is an informal discussion of the above issues and does not constitute an official opinion of the EEOC.

COURT DECISION

On April 11, 2011, a federal district court in Florida held that an employer's wellness program, which contained a penalty for nonparticipation, did not violate the ADA because the program fell under the ADA's safe harbor for bona fide benefit plans (*Seff v. Broward County)*. On Aug. 20, 2012, the Eleventh Circuit Court of Appeals upheld the district court's decision.

This case is not binding on courts outside of the Eleventh Circuit, which includes Alabama, Florida and Georgia. Also, the EEOC has not formally addressed whether wellness programs that require participation or penalize employees for nonparticipation may fall under the ADA safe harbor exception for bona fide benefit plans. Thus, it is unclear whether the EEOC agrees with the court's ruling.