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Latest Wellness Program Litigation A Mixed Bag For Employers

Wesley Covert
09.30.2016

On September 19, 2016, in EEOC v. Orion Energy Sys., Inc., the Eastern District of Wisconsin issued an opinion offering a mixed result to employers related to wellness programs under the Americans with Disabilities Act (ADA). Orion implemented a self-insured, wellness program that, among other things, offered employees a choice between completing a health risk assessment (HRA) or paying 100% for the selected coverage. The ADA generally prohibits employers from conducting medical examinations and inquiries of employees, unless such examination or inquiry is shown to be job-related and consistent with business necessity. However, examinations that are voluntary or meet a safe harbor associated with being part of a health program do not violate the ADA. Orion claimed that its wellness program was voluntary and that it met the ADA's safe harbor related to wellness plans. The Equal Employment Opportunity Commission (EEOC) argued that the 100% premium payment penalty rendered the program involuntary. The court disagreed with the EEOC and explained that while the incentive was a strong one, it still was no more than an incentive – it did not constitute compulsion. However, the court did find that Orion's wellness program failed to meet the safe harbor under the ADA for certain "bona fide benefit plans," because Orion's wellness program was entirely independent from the health plan. This finding was contrary to previous decisions, which applied the safe harbor more expansively. While the court's finding that the Orion wellness program was not entirely exempt from the ADA under the safe harbor is not ideal for wellness program sponsors, the fact that the court found the wellness program to be

Attorneys

Wesley H. Covert

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"voluntary" is a win for employers and wellness programs alike. Nevertheless, employers should exercise caution when establishing aggressive voluntary programs and should consult with counsel to understand the various risks associated with such programs.

515 North State Street, Suite 2400, Chicago, Illinois 60654 t: 312.467.9800 f: 312.467.9479