Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

EEOC Cracks Down on Wellness Programs

Many employers, especially in light of regulations promulgated under the Affordable Care Act ("ACA"), have instituted "participatory wellness programs" and "health-contingent wellness programs." The former may include programs that reward employees for attending a monthly, no-cost health education seminars, or for completing health risk assessments. The latter may include programs that, for example, reward the non-use or reduced use of tobacco products, or the attainment of specified cholesterol level or weight targets. Three times in the past three months, the United States Equal Opportunity Commission ("EEOC") has challenged the legality of employer wellness programs.

The first such challenge was initiated against Wisconsin-based Orion Energy Systems Inc. ("Orion") in August 2014. The suit, which was filed in the U.S. District Court for the Eastern District of Wisconsin, alleges that Orion, which has implemented a voluntary wellness program, forced an employee who opted out of the program to cover her entire employee health care premium. Subsequently, when the employee objected to the medical and disability-related inquiries that were required of her as under the program, she was terminated.

The EEOC alleges that Orion's wellness program violated the employee's rights under the Americans with Disabilities Act ("ADA"); that Orion retaliated against the employee for voicing good-faith objections to its wellness program; and that it interfered with the

employee's exercise of her federally protected right to not be subjected to unlawful medical examinations and disability-related inquiries.

Two months later, in early October of this year, the EEOC filed a similar suit against another Wisconsin-based company, Flambeau, Inc. ("Flambeau"), in the U.S. District Court for the Western District of Wisconsin. The EEOC alleges that, under Flambeau's wellness program, employees are required to undergo biometric testing and health risk assessments. If they refuse, their medical insurance is cancelled, they are required to pay full insurance premiums in order to remain covered, and face unspecified disciplinary consequences. The penalties an employee must endure if he or she opts not to participate in Flambeau's wellness program, the EEOC contends, violate the ADA. In effect, the EEOC argues, the severity of the penalties for non-participation render the program involuntary, as employees are, practically speaking, compelled to respond to disability-related inquiries. Such compulsion violates of rights of Flambeau's employees, under the ADA, to be free of disability discrimination in employment.

Most recently, on October 28, the EEOC petitioned a federal judge in Minnesota for an injunction against Honeywell International, Inc. ("Honeywell"). If granted, the injunction would enjoin Honeywell from presenting employees (or their spouses) with the choice of either undergoing biometric testing or accepting penalties and reduced company contributions to an employer-sponsored health plan. It would also require Honeywell to contact all of its employees to notify them that no penalty or other cost will be assessed against them if they decline to undergo testing.

At hearings conducted by the EEOC earlier this year, the Commission found that 94 percent of employers with over 200 workers, and 63 percent of employers with fewer than 200 employees, offer wellness programs. These programs, according to a regional attorney for the EEOC's Chicago District, are not uniformly violative of the ADA. "Employers may certainly have voluntary wellness programs," the aforementioned regional attorney John Hendrickson explains. "But they have to actually be voluntary. They can't compel participation in medical tests or questions that are not job-related and consistent with business necessity by cancelling coverage or imposing enormous penalties such as shifting 100 percent of the premium cost onto the back of the employee who chooses not to participate. Having to choose between complying which such medical exams and inquiries, on the one hand, or getting hit with cancellation or a penalty, on the other hand, is not voluntary and not a choice at all."

The positions taken by the EEOC in its suits against Orion, Flambeau, and Honeywell arguably conflict with the ACA regulations that were jointly promulgated by the

Departments of Health and Human Services, Labor, and Treasury in 2013. If its recent legal action against Orion, Flambeau, and Honeywell is any indication, the EEOC may view some of the programs that would be permissible under the ACA, as violative of the ADA. Such programs, the EEOC might argue, would unlawfully "penalize" those employees who opt not to participate in voluntary wellness programs, by denying them the rewards granted to participants.

Tips for Employers

In light of the EEOC's heightened scrutiny of wellness programs, employers that currently have, or that plan to implement, participatory and health-contingent programs, should carefully review such programs immediately. If employers are uncertain whether their current or anticipated program complies with the ADA, they should consult counsel and obtain guidance on how to properly craft such a program.

If you have any questions regarding creating or assessing wellness programs based on the information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor & Author
Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Damon W. Silver, Esq.
Client Alert Author
Associate, Employment and Labor Practice Group
dsilver@sillscummis.com | (973) 643-6197