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EEOC Says that Mandatory Health Risk Assessments Violate ADA

Many employers are implementing wellness programs that include health risk assessments, sometimes offering inducements to complete these assessments. In an informal letter, the EEOC said that making health risk assessments a prerequisite for health coverage would violate the Americans with Disabilities Act (ADA) but confirmed that certain voluntary wellness programs are permissible under the ADA. Although the letter does not constitute an official opinion of the EEOC, it does reflect the agency's current thinking on the issue.

Background

Under the ADA, an employer generally can only ask disability-related questions and/or require medical examinations of active employees if they are job-related and consistent with medical necessity, although these inquiries and examinations may be permissible as part of a voluntary wellness program.

On August 7, 2008, a municipal county employer asked the EEOC whether it could require employees to participate in a clinical health risk assessment (CHRA) as a condition for participating in its self-funded health plan. The CHRA included a short health-related questionnaire, a blood pressure test, and a blood test for use in a blood panel screen. Specific individualized results of the CHRA were given directly and exclusively to the employee and the county only received aggregate information. Employees that refused participation in the CHRA and their dependents were ineligible for county health coverage.

On January 6, 2009, the EEOC issued an informal letter indicating that the county's mandatory CHRA would violate the ADA although disability-related inquiries and medical examinations as part of a voluntary wellness program generally would not. The EEOC said further that a wellness program would be considered voluntary under the ADA as long as a financial inducement to participate did not exceed 20% of the cost of employee only or employee plus dependent coverage under the plan, consistent with nondiscrimination regulations under HIPAA.

EEOC Revised Letter

In March 2009, the EEOC issued a revised letter to the county. The letter confirms its position that the county's mandatory CHRA violates the ADA, but retracts its prior position on financial inducements. The EEOC says that it is continuing to look at the issue of what level, if any, of a financial inducement to participate in a wellness program would be permissible under the ADA.

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The EEOC in its letter states that disability-related inquiries and medical examinations may be permissible as part of a voluntary wellness program – i.e., where employees are neither required to participate nor penalized for non-participation. Because individuals who did not participate in the county's CHRA were penalized by being denied health coverage, the CHRA was not a voluntary wellness program under the ADA.

BUCK COMMENT. *Although not mentioned by the EEOC in the March opinion letter, employers should also consider the Genetic Information Nondiscrimination Act of 2008 (GINA) in designing their voluntary wellness programs. In proposed regulations issued earlier this year under GINA (see our March 17, 2009 For Your Information), the EEOC requested public comments specifically on the scope of the term "voluntary" in relation to voluntary wellness programs. More regulatory guidance under GINA is expected shortly.*

Conclusion

Employers should carefully consider the impact of the ADA, HIPAA, and other laws such as GINA in designing their wellness programs, especially those that include health risk assessments. Buck's consultants are available to help you review your wellness program design in light of the evolving guidance in this area, as well as to help maximize your program's potential to motivate and engage employees and their dependents to improve their health.