xerox®

FYI®
For Your Information®

Volume 39 | Issue 07 | January 19, 2016

Court Finds No ADA Violation When Wellness Plan Participation Is Condition of Health Plan Eligibility

A wellness program may require employees to timely complete health risk assessments and submit to biometric screenings as a condition of health plan eligibility without violating the ADA, according to a federal district court in Wisconsin. Specifically, the court determined that the ADA's safe harbor for bona fide benefit plans permits such conditional designs. The ruling is the second safe harbor win for an employer-sponsored wellness program. While this case is good news for employers with wellness programs meeting the safe harbor, this case only applies to employers in Wisconsin and likely doesn't reflect the current position of the EEOC.

The Flambeau Wellness Program

Flambeau, Inc. (Flambeau) offers its employees the opportunity to participate in a self-funded group health plan. Effective for the 2011 plan year, Flambeau introduced a wellness program consisting of a health risk assessment (HRA) and a biometric screening test. The aggregated data from the HRAs and the biometric screenings were used to estimate the cost of providing insurance, as well as to set premiums and co-pays. The company also used the information for other purposes, including to design healthy lifestyle programs.

The HRA included questions relating to medical history, diet, mental and social health and job satisfaction. The biometric screening included blood work and height and weight measurements, as well as blood pressure.

For the first year, employees who participated in the wellness programs by completing the HRA and screenings were provided a premium reduction. Thereafter, employees were required to participate in the wellness program as a condition to enroll in the health plan. For those who lost coverage because of their failure to timely participate, coverage was offered at the COBRA rate.

When a union employee was on medical leave of absence and failed to complete the HRA and screenings in a timely fashion for the 2012 plan year, he was notified that he was ineligible for the health plan and offered the option of paying the COBRA rate for 2012 coverage. The employee declined the coverage and filed a union

Volume 39 | Issue 07 | January 19, 2016

grievance and complaints with the EEOC and DOL. Thereafter, the company agreed to reinstate his insurance retroactively if he completed the HRA and screenings, which he did. Despite this compromise, the EEOC sued Flambeau alleging an Americans with Disabilities Act (ADA) violation.

> **Comment.** Neither the decision nor the EEOC complaint noted whether the HRA was designed to acquire genetic information. If the employer had requested the employee's genetic information, family medical history, or information about an employee's current health status in a way "likely to result" in obtaining genetic information, the EEOC might have also alleged a GINA violation.

EEOC Sues Flambeau

Following an attempt to reach its own settlement with Flambeau, the EEOC filed a lawsuit in September 2014 alleging that the company's wellness program violated Title I of the ADA, which prohibits disability discrimination in employment, including making disability-related inquiries and requiring medical examinations. This rule prohibits employers from asking employees about their disabilities or subjecting employees to medical examinations unless the reason falls into specifically enumerated exceptions. One exception requires that such programs be consistent with business necessity (e.g., a sight examination for a truck driver). A second exception states that "voluntary" wellness programs are permissible. According to the EEOC, the Flambeau wellness program did not meet any of the exceptions to the prohibition.

Tool for Navigating Wellness Laws and Regs

Our **December 9, 2015** *FYI In-Depth: Wellness Plans – Diagnosing Compliance Concerns* contains a comprehensive review of these rules.

In response, Flambeau argued that the ADA's "safe harbor" rule for bona fide benefit plans protects its wellness program and it need not comply with the prohibition on disability-related inquiries and medical examinations. Specifically, Flambeau noted that the wellness program is a part of a group health plan based on underwriting, classifying or administering risks (collectively, "underwriting"). Flambeau also noted that the wellness program was included as a term of such plan for underwriting purposes.

Court Finds No ADA Violation

Noting that the parties were relying on two different parts of the ADA to support their positions, the court explained that an employer may offer a wellness program protected by either (1) the ADA's safe harbor for bona fide benefit plans, or (2) the ADA's exceptions for disability-related inquires and medical examinations. And, as the court explained, if the safe harbor is satisfied, the wellness program need not satisfy the ADA's exception for disability-related inquiries and medical examinations. The court used a three step analysis to determine that the Flambeau wellness program in fact met the safe harbor and dismissed the case.

Step one: Is the program part of the health insurance plan? To determine if the Flambeau wellness program met the standards of ADA's safe harbor provisions, the court first needed to determine if the program was part of its health insurance plan. Upon review of the facts, the court affirmatively determined that the wellness program was part of the plan for a few reasons. First, enrollment in the plan was conditioned on participation in the program. Second, information regarding the wellness program and the plan's open enrollment was coordinated. Finally, the summary plan description (SPD) included language indicating that "there might be additional enrollment requirements not spelled out" in the SPD.

> **Comment.** Notably, the court did not find it problematic that neither the collective bargaining agreement nor the SPD included language conditioning plan eligibility with wellness program participation.

Step two: Is the program used for underwriting purposes? The court then noted that the wellness program was used by Flambeau's consultants for underwriting purposes, by using the program data to classify plan participants' health risks, to calculate projected costs, to recommend charges for prescription drugs, and to set employee premiums. Importantly, the court noted that Flambeau need not establish that the data from the wellness program was "necessary" for underwriting purposes. Instead, "the safe harbor applies to any plan term so long as it is 'based on' classifying, underwriting or administering health risks."

Step three: Does the wellness program try to evade the ADA's purpose? Lastly, the court concluded that Flambeau's wellness program was not a subterfuge to evade the ADA's purpose of "eliminating discrimination against individuals with disabilities." As the program required all employees to complete the program to participate in the plan, the court determined that the program did not involve a "disability-based distinction" to discriminate against individuals with disabilities.

What This Means for Employers

Employers with wellness programs should first confirm that their programs fully comply with the current final wellness program regulations stemming from the Affordable Care Act (ACA). (See our December 9, 2015 *FYI In-Depth* for a comprehensive review of these rules.) Beyond those rules, employers have to decide how to apply the requirements of the ADA and GINA. Employers can either choose to follow the EEOC's most recent interpretation of the ADA in its proposed regulations, which are generally more restrictive than the rules under the ACA, or design a wellness program relying on the ADA's safe harbor, but risk the chance of a possible challenge.

Together with the *Seff v. Broward County* decision by the United States Court of Appeals for the 11th Circuit, the Flambeau decision is the second case that provides employers greater comfort that wellness program may withstand EEOC scrutiny and be protected by the ADA's safe harbor rule, so long as the program meets the standards of the exception. (See our August 23, 2012 *For Your Information* for background on *Seff v. Broward County*.) However, employers should keep in mind that courts outside of Wisconsin are not bound by the Flambeau decision, and courts in other states may analyze the law differently.

> **Comment.** Despite this line of cases, it is questionable whether the EEOC will change its position on this issue. Their proposed ADA regulations reject the notion that the safe harbor is a valid exception for wellness programs and remarked that the agency didn't agree with the outcome of the *Seff* decision.

Employers that seek to rely on the Flambeau decision are encouraged to consider including in their SPDs a clear and conspicuous statement that eligibility for the health plan is dependent upon participation in the wellness program. Furthermore, employers may want to include in the SPD details on the process, procedures and timing for satisfaction of any wellness program requirement or, alternatively, to include detailed information about where to find such information. Regardless, employers are strongly encouraged to discuss these issues with their legal counsel.

Volume 39 | Issue 07 | January 19, 2016

Authors
Allison R. Klausner, JD
Tami Simon, JD

Produced by the Knowledge Resource Center of Xerox HR Consulting
The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@xerox.com.

You are welcome to distribute *FYI®* publications in their entireties. To manage your subscriptions, or to sign up to receive our mailings, visit our Subscription Center.

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.

©2016 Xerox Corporation. All rights reserved. Xerox® and Xerox and Design® are trademarks of Xerox Corporation in the United States and/or other countries. FYI® and For Your Information® are trademarks of Buck Consultants, LLC in the United States and/or other countries.

xerox®