



## Wellness Alert

### ***EEOC Wellness Program Lawsuits: What Employers Need to Know***

December 9, 2014

#### **Executive summary**

Recently there has been much discussion in the benefits community about the fate of wellness plans because of a recent lawsuit against Honeywell International (Honeywell) by the Equal Employment Opportunity Commission's (EEOC). The EEOC lawsuit alleges that Honeywell's employee wellness program design violates the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA).

Honeywell's wellness program is structured similar to the designs of many other employer sponsored wellness programs, and does not appear to be out of compliance with the ADA, GINA or other federal regulations, including the Affordable Care Act (ACA) regulations regarding incentives. Consequently, the Honeywell program has raised concern for some wellness program sponsors that offer similar plans.

The purpose of this article is to explain the impact of the Honeywell case, [\*EEOC v. Honeywell International, Inc. 14-cv-4517, U.S. District Court, District of Minnesota\*](#) on employer wellness programs and to provide EPIC's perspective, including useful actions for wellness plan sponsors.

In sum, EPIC believes that program changes are not needed based on the Honeywell lawsuit if an employer wellness program meets current federal regulations. However, the case raises some issues that can guide employers to further limit compliance exposure and also, provides an opportunity to consider updates to wellness plan designs that may improve viability and overall value.

#### **EEOC and employer wellness programs**

The EEOC regulates and enforces Title I of the ADA, which prohibits employment discrimination on the basis of disability, including disability-related inquiries or medical examinations. Such activities are not permitted unless they are job-related and necessary for business reasons.

However, the ADA provides an exception for disability-related inquiries or medical examinations (e.g., Health Risk Assessments and biometric screenings) that are part of a "voluntary" wellness program. Current guidelines indicate a wellness program is voluntary if it "neither requires participation nor penalizes employees who do not participate." Unfortunately, the EEOC has not provided definitive guidance on the financial amount of incentives that could make a wellness program "involuntary."



The EEOC also enforces Title II of the Genetic Information Nondiscrimination Act (GINA). Title II generally prohibits employers from obtaining an employee’s genetic information, which includes family medical history – including tobacco use by an employee or a spouse. In addition, employers may not induce employees or their family members to provide the information as part of a wellness program. GINA also includes an exception for information collected as part of a voluntary wellness program.

### **Three EEOC “wellness program” lawsuits in three months**

In August 2014, the EEOC filed a complaint against the wellness program of Orion Energy Systems, Inc. (Orion), followed in September by a complaint against a similar program at Flambeau, Inc. (Flambeau).

The common factors between these two programs are evident from the EEOC allegations:

- Both programs penalized employees who did not complete program requirements by removing all employer health plan contributions. Employees that do not participate pay the full cost of coverage.
- Employees were subject to disciplinary action for not participating in the wellness program. In the case of Orion, an employee was fired, allegedly for refusing to participate.

Since these extreme penalties are rare in employer wellness programs, few employers or wellness plan consultants were concerned about these first two EEOC actions.

The third EEOC complaint was filed in October 2014, against Honeywell International, Inc., alleging that its proposed wellness plan design violates the ADA and GINA. In contrast to the Orion and Flambeau complaints, the Honeywell lawsuit has caught the attention of many benefits professionals because the program features are common components of many programs – which appear to comply with current regulations such as the ACA and HIPAA nondiscrimination rules.

### ***EEOC v. Honeywell***

The EEOC complaint alleges that the Honeywell wellness program violates the ADA because it is not truly “voluntary.” The EEOC contends that because the program requires employees to undergo biometric testing in order to receive substantial incentives, it is not voluntary. If employees (or their spouses) do not complete the biometric testing – or if they test positive for tobacco use –the employee may be assessed surcharges or denied incentives that could total up to \$4,000. The high dollar amount of incentives under the proposed Honeywell program appears to be the trigger for the EEOC allegation that the program is not voluntary.

The EEOC complaint also alleges that the Honeywell wellness program violates GINA by requiring employees’ spouses to undergo medical testing and imposing surcharges or eliminating employee rewards based on a spouse’s failure to participate.



The Honeywell wellness program design is not unusual, although most programs do not provide such high financial incentives. Honeywell defends its wellness program, contending it is voluntary. In addition, Honeywell also asserts that the screening results are used as part of its annual underwriting process, which is permitted under GINA.

A federal judge rejected the EEOC's request for a Temporary Restraining Order to halt the implementation of the proposed Honeywell plan. Therefore, the program is not prohibited from implementation, pending a conclusion to the lawsuit.

Many legal experts believe that the future of the EEOC's lawsuit against Honeywell is in doubt because the EEOC's allegations do not have a strong legal basis. However, while the EEOC may decide not to pursue the Honeywell case any further, it is likely that the first two complaints described above will move ahead.

### **Action steps for employers**

The EEOC's actions, especially the complaint against Honeywell, are worrisome for many employers that are concerned about compliance and EEOC action. Hopefully, the EEOC will provide specific guidelines on how a program may operate and comply with the ADA and GINA.

To remain compliant with federal regulations and be successful, below are some key considerations for wellness program designs:

- **Set wellness program goals.** This fundamental first step allows an employer to focus on which program components should be included in the wellness plan. For example, biometric screenings and health risk appraisals are not necessary for every wellness plan. Consider whether to impose surcharges or incentives at all—note that there is scant evidence that financial incentives lead to long-term changes in lifestyle choices.
- **Monitor compliance with federal regulations.** Ensure that your plan is voluntary, in compliance with ADA and GINA. Keep the Honeywell lawsuit in mind when establishing dollar incentives (if any). Comply with the ACA and HIPAA nondiscrimination rules for plans that provide incentives. Ensure that your program safeguards the Protected Health Information (PHI) of plan participants to comply with the HIPAA privacy and security rules. Using a third party vendor to administer an employer wellness program may reduce potential legal exposure for unauthorized access to PHI and other confidential information. (For more information, see the EPIC Compliance Alert, [“Is Your Wellness Program Healthy? Is it time for a check-up?”](#))
- **Consider making the wellness program part of your group health plan.** A wellness program that is part of an employer's group health plan has additional protection under ADA and GINA. If participation is restricted to health plan participants, and if the reward is directly tied to the health plan (for example, through lower premium contributions), the program may be additionally protected from EEOC charges.



- **Reward participation, not just athletic accomplishment.** Some employers reward challenges, such as weight loss or walking challenges, with gift cards or other prizes that are outside the incentive structure of the wellness program. For such challenges, employers should consider either offering the same reward for everyone who participates, or enter all participants into a raffle to win the major prizes.
- **Communicate clearly.** Employee communications should state the wellness program is voluntary and provide notice about reasonable alternative standards, if applicable. Wellness programs that clearly communicate the program's goals, assure confidentiality, and are consistent with the company's culture tend to be more successful.

### **In closing**

With a thoughtfully designed and executed program, employers can offer effective wellness plans while minimizing the potential for legal challenges. At this time, there is no need to change plans that are compliant with current regulations. However, employers should stay informed on wellness compliance issues, and be thoughtful in designing wellness programs. For further information about employer wellness programs, please contact your EPIC benefits consulting team.

For further information on this or any other topics, please contact your EPIC benefits consulting team.

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