Business Horizons (2016) 59, 267—272

Available online at www.sciencedirect.com

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ORGANIZATIONAL PERFORMANCE

New legal pitfalls surrounding wellness programs and their implications for financial risk

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KEYWORDS
Wellness programs;
Legality;
ADA;
EEOC;
Discrimination;
Regulations;
Employment

Abstract In a 2013 *Business Horizons* article, we described the serious legal problems that can arise when companies develop corporate wellness programs, and outlined ways in which companies can minimize their financial risk. Recently, the landscape changed: For the first time, the Equal Employment Opportunity Commission asserted that several wellness programs violate the Americans with Disabilities Act. In this installment of Organizational Performance, we explain the battles that are taking place along this new legal front and suggest steps companies can take to best ensure that their financial positions are not undermined by their wellness programs. In particular, we recommend (1) ensuring that wellness programs actually improve employee health; (2) revisiting whether programs are truly voluntary; (3) being cautious about including dependents in wellness programs; (4) collaborating with disabled employees to meet their needs; (5) providing clear, written explanations when asking for medical information; and (6) taking extra precautions to ensure that medical information is confidential.

1. Corporate wellness programs: An introduction

Corporate wellness programs—defined by Wolfe, Parker, and Napier (1994) as employer-funded initiatives designed to prevent disease and improve employee health—have exploded in popularity in recent years (Mattke, Schnyer, & Van Busum, 2012). A study by the Kaiser Family Foundation (2014) found that 73% of small and 98% of large U.S. companies offer some type of wellness program. The attractiveness of wellness programs to employers is not surprising given the escalating cost of healthcare and the financial benefits associated with improving employee health.

As we explained in a 2013 *Business Horizons* article, a daunting challenge surrounding wellness programs is that these programs must be crafted in

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0007-6813/$ — see front matter
http://dx.doi.org/10.1016/j.bushor.2016.02.002

ways that steer clear of violating a lengthy list of federal anti-discrimination and employment laws (Plump & Ketchen, 2013). The relevant laws include the Civil Rights Act, the Age Discrimination in Employment Act, the Health Insurance Portability and Accountability Act, the Patient Protection and Affordable Care Act, the Employee Retirement Income Security Act, the Genetic Information Nondiscrimination Act, the Fair Labor Standards Act, and the Americans with Disabilities Act. The latter is particularly vexing because physical movement is central to many wellness programs but disabled employees often struggle with exercise.

The Americans with Disabilities Act of 1990 (ADA) requires that employers refrain from disability discrimination in all aspects of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and other terms and conditions of employment (ADA, 2009). The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities such as eating, sleeping, walking, lifting, and bending. The ADA protects multiple categories of applicants and employees from discrimination—specifically, individuals with an *actual* disability; individuals with a *history* of a disability (e.g., cancer in remission); individuals with a *perceived* disability, even if the person is not disabled; and individuals *associated* (e.g., marriage) with a disabled person. The broad definition of the term 'disability' and the expansive categories protected reflect the comprehensive nature of the ADA's coverage.

2. Recent ADA-based challenges to wellness programs

In 2013, Pennsylvania State University tried to implement a health initiative that required employees to complete a questionnaire administered by an outside health management company (Singer, 2013a). The form contained questions regarding workplace stress, marital problems, and pregnancy plans. Employees who declined to fill out the form were charged a penalty of $100 per month. The university's faculty objected to the intimate questions as an invasion of privacy and viewed the financial punishment for failing to answer such questions as a "strong—arm tactic" (Singer, 2013b). Following the outcry, the university announced it would suspend its monthly $100 non-compliance fee.

Days later, U.S. Representative Louise M. Slaughter called on the EEOC to investigate employer wellness programs that seek intimate health information from employees and to issue guidelines preventing employers from using such information to discriminate against employees (Singer, 2013b). Despite pressure from Capitol Hill, issuing guidelines was not the EEOC's first move. Instead, the agency filed three cases in rapid-fire succession in 2014 alleging that employers' wellness programs violated the ADA.

2.1. EEOC v. Orion Energy Systems Inc. (August 2014)

Orion Energy Systems (Orion) is a Wisconsin-based company that provides energy retrofit solutions and services. As part of Orion's wellness program, employees were asked to have their blood drawn and to complete a health risk assessment disclosing their medical history (EEOC v. Orion Energy Systems Inc., 2014). Orion paid 100% of an employee's health insurance premium if the employee participated in the wellness program but charged an employee the full amount of the health insurance premium if the employee refused to participate.

One Orion employee, Wendy Schobert, questioned whether the assessment was voluntary and whether the information from her assessment would be confidential. Following her refusal to participate in the wellness program, Orion required Schobert to pay her entire health insurance premium and, less than two months later, fired her. Schobert was the only employee who declined to participate in the health risk assessment.

The EEOC asserts that Orion's wellness program is unlawful under the ADA because it subjects Schobert to medical examinations and disability-related inquiries that are not part of a voluntary wellness program. Similarly, the EEOC contends Orion's action in firing Schobert is unlawful under the ADA because it retaliated against her for good-faith objections to the wellness program. According to the EEOC, "having to choose between responding to medical exams and inquiries—which are not job-related—in a wellness program, on the one hand, or being fired, on the other hand, is no choice at all" (EEOC Orion Press Release, 2014). As of January 2016, the Orion case remains pending.

2.2. EEOC v. Flambeau Inc. (September 2014)

The EEOC filed its second lawsuit against Flambeau Inc. (Flambeau), a Wisconsin—based plastics manufacturing company (EEOC v. Flambeau Inc., 2014). The EEOC declared that Flambeau's wellness program violated the ADA because it imposed severe consequences on employees who did not submit to medical tests as part of its corporate wellness