Triple Threat to Employers: Wellness Programs, Background Checks and Employee Pregnancy Issues

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The Equal Employment Opportunity Commission (EEOC) has been issuing guidelines and paying close attention to how employers are handling wellness programs, background checks and employee pregnancy issues. Case law and legislation have also been rapidly developing. However, the myriad of laws that must be considered by employers when addressing these issues can sometimes conflict, leaving employers with a threat of litigation even when they believe they have complied with EEOC guidelines.

Wellness Programs

Employer-offered wellness programs are on the rise. Designed to improve an employee's health, these types of programs can prove financially beneficial for employers. However, employers must proceed with caution.

Employers are limited with regard to: (a) the inquiries they can make of their employees in order to participate in wellness programs; (b) what incentives they can offer; and (c) what they may do to those who do not wish to participate in the wellness programs. Title I, The Americans with Disabilities Act (ADA), places significant limits on an employer's ability to make disability-related inquiries and require medical examinations. Prior to April of 2015, the EEOC, even though it is the agency responsible for enforcing the ADA, provided little guidance to employers as to what they could ask of employees in order to maintain an effective wellness program.

In April 2015, the EEOC proposed a rule that provided employers with some guidance regarding disability-related inquiries and/or medical examinations, and the extent to which employers may use incentives to encourage employees to participate in wellness programs. While the rule was a welcome and important first step, many questions still remain unanswered.

According to the EEOC's proposed rule, an employer is permitted to "conduct *voluntary* medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site." Employers may also provide incentives of up to 30 percent of the cost of coverage and still fall within the category of being a voluntary program.

As far as the EEOC is concerned, the key question is whether the program is "voluntary," and the rule proposed by the EEOC attempts to clarify what types of wellness programs would qualify as such. The starting point, of course, is whether the employee is required to participate. The employer may also not deny coverage under any of its group health plans or limit the extent of such coverage (with few exceptions) if the employee chooses not to participate. The employer is also prohibited from taking retaliatory action or in any way intimidating, coercing or threatening an employee who does not want to participate.

The proposed rule would also require that employers who offer wellness programs as part of their group health plans provide employees with written notice in a manner that the employee is reasonably likely to understand. This is a requirement that many employers may simply overlook. For example, employers may forget to provide notices in Spanish when they are aware that a portion of the company's employees read Spanish only.

HIPAA Rules Still Apply

When appropriate, employers must also describe the medical information that will be collected, how it will be used and restrictions on the disclosure of such information. The Health Insurance Portability and Accountability Act (HIPAA) and other laws cannot be ignored—doing so leaves employers vulnerable to the threat of litigation. While the EEOC has proposed a rule that allows a 30 percent incentive, nowhere is there a description as to how that 30 percent is to be calculated. HIPAA, for example, places the 30 percent limit as to the total costs of the employee's coverage, which may include the employee's spouse or dependents. The EEOC does not include dependents or spouses in its calculations.

Pursuant to the Patient Protection and Affordable Care Act, that limit could be raised to 50 percent of the costs of total coverage. This is far above the amount allowed for by the EEOC.

The ADA also requires that a participatory wellness program provide a reasonable accommodation for participants with disabilities, which HIPAA does not. This could include providing notice in large print or even providing a sign-language interpreter.

The EEOC's proposed rule on wellness programs does not address the Genetic Information Nondiscrimination Act of 2008 (GINA), which restricts the ability of an employer to obtain and use genetic information. An exception does exist to GINA for voluntary wellness programs offered outside a group health plan. An employer may offer an incentive (nonmonetary) for completing a health assessment that would include genetic information, as long as it is made clear that the inducement is available even if the employee does not make the genetic information available.

However, the EEOC recently took legal action against an employer for allegedly asking an employee's spouse for the family medical history. The EEOC's proposed rule does not address the extent to which GINA affects the ability of an employer to condition participation by a family member by requiring them to complete a health assessment. That issue, the EEOC states, will be addressed in the future.

Employee Pregnancy Issues

The Pregnant Worker's Fairness Act (PWFA) was signed into law in New Jersey in January of 2014 and went into effect immediately. The PWFA applies to all New Jersey employers and amends the New Jersey Law Against Discrimination (LAD) to include pregnancy as a protected category. The PWFA also requires an employer to provide reasonable accommodations to pregnant employees who request an accommodation upon the advice of their physician, unless undue hardship on the business operations of the employer would result. This could include, for example, a request for light duty.

It can be argued that New Jersey was ahead of the EEOC on this issue and even the Supreme Court. It was not until July 14, 2014, that the EEOC issued Enforcement Guidance on Pregnancy Discrimination and Related Issues. In the guidance, the EEOC stated that An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a

policy of providing light duty only to workers injured on the job).

In other words, employers may not refuse to treat pregnant women as they do other employees who require an accommodation such as light duty.

In March 2015, in *Young v. United Parcel Service*, the United States Supreme Court refused to give the EEOC Guidelines any deference. The court decided instead to provide a framework for pregnant employees challenging workplace accommodation policies and practices under Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA).

In its 6-3 decision, the court held that a pregnant employee can establish a prima facie case of discrimination by alleging that the employer denied a request for an accommodation and the employer accommodated others similar in their ability or inability to work. The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The reason could not be, however, that it was more expensive. The burden then shifts to the employee to demonstrate that the reason proffered by the employer was pretextual—a modified version of the *McDonnell Douglas* test.

For a New Jersey employer the message is clear—provide a reasonable accommodation requested by a pregnant employee. In light of the *Young* decision, the employer better have an argument stronger than the expense of the accommodation and keep in mind what accommodations have been provided to other employees.

Background Searches

New Jersey, like a majority of states, has what is commonly referred to as a "ban-the-box" law. Formally known as The Opportunity to Compete Act, this law prohibits employers from inquiring about an applicant's criminal background during the initial stages of the application process. The law, which became effective in New Jersey on March 1, prohibits qualifying employers from requiring an applicant to complete any employment application that makes any inquiries regarding the applicant's criminal record, or making any oral or written inquiry regarding an applicant's criminal record during the initial employment application process. The "initial employment application process" begins when an applicant or employer first makes an inquiry to the other party about a prospective position and concludes when the employer has conducted a first interview. There are certain employments, such as positions in law enforcement, which are exempt because of laws that require passage of a background check.

Once again, in these circumstances employers must look at other laws and regulations—not just the local or state ban-the-box laws. Both state and federal Fair Credit Reporting Acts (FCRA) impose a number of restrictions on the use of background checks. Employers may find themselves in violation of the FCRA and facing charges by the EEOC.

FCRA statutes contain many requirements, and one of the most often violated provisions of the FCRA is the notice provision. How a potential employee is notified that a credit check will be performed is critical. If, for example, notice and agreement to the performance of a credit check is not separate and apart from the employment application, litigation in the form of class actions has been known to ensue. Many retailers with online employment forms have found themselves embroiled in costly class action litigation for failing to have the FCRA release separate and conspicuous from the employment application. Given the number of online applications that retailers receive, class-action settlement amounts have been in the seven figures.

Employers must also remember that the EEOC has been very aggressive in pursuing employers who deny jobs to applicants with a criminal background history. The EEOC has been a driving force in the spread of ban-the-box legislation and continues to pursue claims that a potential employee was denied a job because of the employee's criminal history.

It is a fast and changing world for employers. Reading the EEOC Guidelines and proposed rules and familiarizing yourself with the local laws are not enough. An employer needs to ascertain and review all laws that may apply. The threat of litigation is very real, and the conflicting rules and regulations increase that threat. Given the recent decisions and positions by the EEOC on pregnancy, background checks and wellness programs, employers would best be served by seeking experienced counsel who can guide them through these issues and minimize the threat of litigation. Even though an employer thinks he or she has complied with the EEOC Guidelines, another law that needs to be considered may have been violated.

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