

***Third Thursday* – What Employers
Should Know about the EEOC’s Latest
Enforcement Activity**

November 20, 2014

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



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Today's Discussion

The EEOC's Latest Enforcement Activity

- EEOC Challenges to Employer-Sponsored Wellness Programs
- EEOC Enforcement Guidance Re Pregnancy Discrimination and recent Pregnancy cases
- Update on the CVS Waiver Case
- Religious Discrimination

Background

- Wellness Programs Under Scrutiny
 - Require employees to complete health risk assessment
 - May include/require biometric screening
 - Include financial incentives/penalties relating to participation or meeting program bench marks

Overlapping Laws Implicated

- ADA
- GINA
- HIPAA
- ACA

ADA Impact on Wellness Programs

- Generally prohibits medical examinations/inquiries unless work-related and consistent with business necessity
- Exception: *Voluntary* examinations that are part of employee health program
- Insurance Safe Harbor: Wellness Program involves underwriting risks for benefit plan

GINA

- Generally prohibits discrimination based on genetic information
- Prohibits an employer from requesting genetic information
- Exception for wellness programs, but prohibits financial incentive for providing genetic information

HIPAA

- Prohibits discrimination in form of different premiums, deductibles, copays based on health factors for those similarly situated
- Exception allows employers to establish premium discounts and other financial incentives to wellness program participants

The Affordable Care Act

- Designed to encourage adoption of wellness programs
- Expanded HIPAA's exception for incentives in employer wellness programs
- As of 2014, employers may offer 30% health insurance premium discounts to wellness program participants

Prior EEOC Actions Re Wellness Programs

- General 2000 enforcement guidance
- Infamous Peggy Mastroianni letter/withdrawal
- Ad hoc Regional Enforcement through conciliation
- May 2013 Commission Hearing

The EEOC Attack on Wellness Programs

- *EEOC v. Orion Energy Systems* (W.D. Wisc. Aug. 20, 2014)
- *EEOC v. Flambeau, Inc.* (W.D. Wisc. Sept. 30, 2014)
- *EEOC v. Honeywell* (D. Minn. Oct. 27, 2014)

EEOC v. Orion Energy Systems

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- Wellness program required employees to:
 - disclose their medical history
 - submit to blood tests
 - undergo physical range of motion testing
- Employee participants 100% full paid coverage
- Employee opted out of health risk assessment paid \$400 for coverage, \$50 penalty
- EEOC – program violated ADA, not voluntary

EEOC v. Flambeau, Inc.

- Wellness program included health care assessment and biometric screening
- Participants paid 25 for health care coverage
- Employee did not complete biometric screening and health care assessment timely, so medical coverage cancelled
- Wellness program unlawful because it was required testing but was not voluntary

EEOC v. Honeywell

- Wellness program part of self-insured health care plan included required biometric screening
- Incentives:
 - \$250 to \$1,500 contribution to HSA
- Surcharges for 2015:
 - \$500 for *employees* rejecting biometric testing
 - \$1,000 for presumed tobacco users (alternatives to avoid tobacco surcharge)

EEOC v. Honeywell (cont.)

- EEOC filed for a TRO alleging:
 - ADA violation: medical inquiries in involuntary program given penalties
 - GINA violation, requesting family medical history
 - Irreparable harm
 - EEOC prevented from carrying out its mission
 - Employees coerced into taking biometric tests cannot unring the bell

EEOC v. Honeywell (cont.)

- Honeywell
 - No irreparable harm, just money
 - No likelihood of success on the merits
 - Program fails within ADA insurance safe harbor
 - Program is voluntary
 - Program well within the standards in HIPAA/ACA
- Court: No TRO because no irreparable harm; no significant guidance on the merits

Take-Aways

- No definitive answers
- Options:
 - Eliminate all surcharges and rewards
 - Only provide rewards
 - Divorce rewards from premiums entirely
- Link gathered data to risking underwriting

Pregnancy Discrimination Act (PDA)

The Basics:

- Prohibits discrimination based on pregnancy, childbirth, or related medical conditions.
- New EEOC Guidance issued on July 14, 2014
- Very Controversial

PDA Guidance Highlights

- Employers must treat pregnant women the “same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.”
- Employers must provide light duty to pregnant workers if light duty is provided to non-pregnant workers “similar in their ability or inability to work.”
- Temporary impairments associated with pregnancy may qualify as a disability.
- Lactation and Breastfeeding are “related medical conditions.”
- Parental leave must be given to women and men on an equal basis.
- An employer may not discriminate against a woman based on her decision to use contraceptives.

Fate of PDA Guidance

Young v. UPS

- Issue: Whether an employer must provide a pregnant employee with a light-duty assignment to accommodate her pregnancy-related incapacity or limitation where the employer has a policy that provides such an accommodation to non-pregnant employees.

Recent PDA Lawsuits

Recent Settlements

EEOC v. Plantium P.T.S. (\$100,000)

EEOC v. Benhar Office Interiors LLC (\$90,000)

EEOC v. Engineering Doc. Systems, Inc. (\$70,000)

EEOC v. Kenan Transport (\$27,000)

Recent Jury Verdict

Juarez v. Auto-Zone (11/18/14; Verdict **\$185 million**)

Takeaways

- What Should Employers Do Now?
 - Wait and see – unfortunately
 - Review leave policies
 - Consider whether to follow ADA accommodation framework when reviewing requests by pregnant women
 - Review job descriptions
 - Be sure you understand state law requirements

EEOC v. CVS Pharmacy, Inc. – Update

- Case dismissed on procedural grounds
- No resolution on the merits
- Expect continued EEOC attention on release agreements
 - Focus on carve-out for administrative charges

EEOC v. Abercrombie & Fitch

- Headscarf worn by applicant for a retail sales position
- Applicant was recommended for hire
- Decision reversed by regional manager because of company's "Look Policy" for 'models' working at stores

EEOC v. Abercrombie & Fitch

- Question presented (Government):
Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that an accommodation was required and the actual knowledge resulted from direct notice from the individual.

EEOC v. Abercrombie & Fitch

- Question presented (Employer): Whether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion.

EEOC v. Abercrombie & Fitch

- Legal Issues
 - Burden of proof on what triggers the duty to accommodate
 - ‘undue burden’ defense
- Implications
 - EEOC priority
 - Stereotyping concern
 - March 2014 EEOC guidance

Resources

- <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>
- <http://www.eeoc.gov/eeoc/meetings/5-8-13/transcript.cfm>
- http://www.eeoc.gov/laws/types/pregnancy_guidance.cfm
- *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), cert granted No. 14-86 Oct. 2, 2014

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