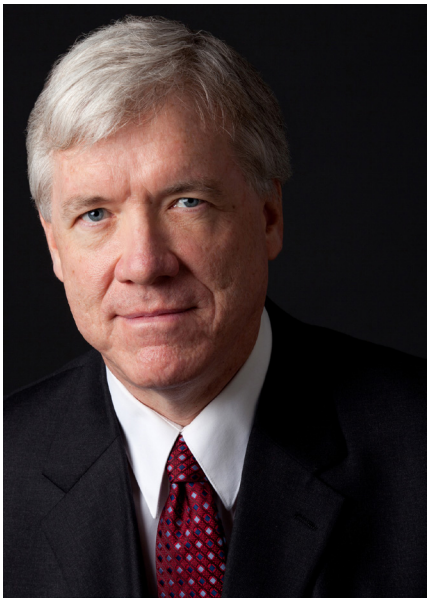
Washington Healthcare News®
wahcnews.com
Articles, Interviews and Statistics for the Healthcare Executive

Obama Administration at War with Itself over Wellness Programs

By Matt Lynch
Shareholder
Sebris Busto James



As is commonly known, over the last several decades an epidemic of "lifestyle diseases" has developed in the United States. Unhealthy lifestyle activities such as inactivity, poor nutrition, tobacco use, and frequent alcohol consumption, have caused a sharp increase in the prevalence of chronic diseases, including diabetes, heart disease, and chronic pulmonary conditions. Out of the concern for the impact of chronic disease on employee health and well-being, as well the cost of health care coverage and employee productivity, hospitals have increasingly begun implementing health promotion and disease prevention policies, commonly referred to as "wellness" programs. Even unions such as SEIU and UFCW, have endorsed wellness programs to varying degrees, and have even negotiated plan terms with several healthcare institutions. Indeed, the Affordable Care Act (ACA) creates new incentives to promote employer wellness programs. While specific wellness program procedures will vary from workplace to workplace, their primary purpose is generally the same: To establish an organization-wide policy designed to support healthy behavior and improve health outcomes while at work.

Despite the ACA's explicit endorsement of wellness programs, hospitals and other healthcare entities should take heed of recent litigation initiated by the Equal Employment Opportunity Commission (EEOC) directly challenging the legality of such programs under federal anti-discrimination laws. The most recent of these lawsuits, which was filed against Honeywell International, Inc. charges that the employer's wellness program violates both the Americans with Disabilities Act (ADA)—by requiring employees to disclose protected medical information and to undergo medical examinations—and the Genetic Information Nondiscrimination Act (GINA)—by providing inducements to employees to obtain their family medical history. The EEOC's recent and aggressive stance against wellness programs, in combination with its minimal published guidance on the issue, indicates that employers should proceed cautiously and thoughtfully before implementing any workplace wellness program.

The EEOC's Minimal Guidance on Wellness Programs.

EEOC regulations and Interpretive and Enforcement Guidance limit an employer's ability to require employees to submit to a physical examination or respond to health-related inquiries except where they are either job related or

part of a "voluntary" wellness program. In previously published guidance on the issue, the EEOC specifically stated that a wellness program is voluntary where the employer neither requires employee participation nor penalizes employees who elect not to participate. As recently as 2013, the EEOC Office of Legal Counsel reiterated this position in a discussion letter, while specifically noting that the EEOC "has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the award from non-participants constitutes a penalty, thus rendering the program involuntary." See January 18, 2013 Discussion Letter re: *ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations* (http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html).

EEOC v. Honeywell

Under Honeywell's wellness program, employees (and their families) have the option of participating to allow them to learn about their health status and to receive encouragement for improving specific health goals. Employees who participate in the program undergo biometric testing and are eligible to participate in the company's Health Savings Account ("HSA"), to which the company makes annual contributions subject to certain income-level thresholds. In contrast, employees who decline are not eligible to participate in the company-sponsored HSA and also must pay a $500 surcharge that applies towards their annual health insurance contribution. Additional nicotine surcharges may be imposed on employees and their spouses when they are unable to rebut the presumption caused by their refusal to participate in the program that they are nicotine users.

After three Honeywell employees filed complaints with the EEOC alleging that the program violated the ADA and GINA, the EEOC filed a lawsuit against Honeywell on its own behalf alleging the same. According to the EEOC, Honeywell's wellness program is not "voluntary" because of the "large" and "substantial" penalties imposed on those individuals who choose not to participate. As a result, the disability-related inquiries and medical examinations required under the program—which could reveal lifestyle and health issues of employees and their families—allegedly violate the ADA. Additionally, the EEOC alleges that the wellness program provides inducements to employees in order to obtain employee family medical history, in violation of GINA. As characterized by the EEOC, employees not participating in Honeywell's program would pay up to $2,500 in "direct surcharges," as well as lose "up to $1,500 in contributions" to the employee's HSA. Such surcharges, the EEOC claims, constitute penalties designed to induce employees to undergo medical examinations that are not job-related or consistent with business necessity.

Although the federal district court in which the lawsuit was filed denied the EEOC's request for a temporary restraining order and preliminary injunction (which would have prevented Honeywell from imposing any penalty or providing any inducement under the program—as described above—while the lawsuit proceeded), the court did not address the EEOC's likelihood of success in the litigation. Thus, while the lawsuit moves forward, confusion remains as to whether—and under what circumstances—wellness programs comply with the ADA and GINA.

Is Relief on the Way?

In response to the uncertainty created by the EEOC's actions, Republican members of the House and Senate introduced the Preserving Employee Wellness Programs Act (H.R. 1189, S. 620) on March 2, 2015, which would reaffirm that employers legally may offer financial incentives that reduce health insurance premiums for employees who participate in employer-sponsored wellness programs. In addition, the EEOC's 2015 regulatory agenda calls for new regulations aimed at providing guidance and addressing the legality of employer wellness programs under the various federal anti-discrimination laws. It is likely that, by year's end, there will more clarity on the permissible scope of wellness programs under federal law. Until then, to survive EEOC scrutiny, wellness programs must be truly "voluntary." The EEOC's position in the recent Honeywell litigation demonstrates that the EEOC is likely to consider a wellness program to be "involuntary" where expensive penalties may be imposed against individuals who "elect" not to participate. Similarly, significant rewards given to employees for their participation in the program may equally render a wellness program involuntary in the EEOC's eyes. Even where wellness

programs are deemed voluntary, to comply with applicable federal law, an employer must ensure that it does not retaliate against any employee who refuses to participate in, or is opposed to, the employer's wellness program. Furthermore, any medical information obtained through a wellness program must be kept confidential and should never be used as a basis for making any employment decisions.

I would like to thank my associate, Jennifer Parda-Aldrich of Sebris Busto James, who assisted in the preparation of this article.

Matt Lynch is a shareholder with SEBRIS BUSTO JAMES. Matt represents private and public sector employers in all aspects of labor relations, and has negotiated hundreds of collective bargaining agreements, represented management in grievances and labor arbitrations, and handled many cases in front of the National Labor Relations Board. In addition, Matt is a trusted adviser who assists employers in both day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Before joining the firm, Matt was the Director of Labor Relations Services and General Counsel for the largest employer association in the Pacific Northwest, having been with that association for over 24 years. He also served as a management trustee on a Taft-Hartley insurance trust. Matt has extensive experience in assisting employers in the healthcare, print and broadcast media, education and non-profit sectors. He can be reached at mlynch@sebrisbusto.com.