THE OKLAHOMAN

Q&A with Paula Williams

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Guidelines allow voluntary employer wellness programs

Q: A federal court recently heard a case involving a corporate wellness program. What was the basis for the Equal Employment Opportunity Commission (EEOC) lawsuit in this case?

A: Orion Energy Systems implemented a “wellness program,” which asked employees to participate in a heath assessment to improve the health of Orion's workforce and, as a result, reduce Orion's health care spending. Participation wasn't mandatory. However, if employees chose not to participate, they had to pay their own monthly health insurance premiums. The EEOC brought this lawsuit claiming Orion's program violated the Americans with Disabilities Act, (ADA), which generally prohibits employers from asking about disabilities or requiring employees to submit to medical examinations. And, because Orion terminated an employee who refused to participate in, and publicly criticized, the wellness program, the EEOC also claimed Orion retaliated in violation of the ADA.

Q: Orion claimed its program was protected under the ADA's safe-harbor provision. What's this provision and did it apply to Orion?

A: The safe-harbor provision protects employers who self-insure, allowing them to use health information to make decisions about insurability and costs of insurance. This court found that wellness programs like Orion's are generally unrelated to basic underwriting and risk classification. This was a victory for the EEOC, especially since

the court's decision departs from other federal cases permitting a broader reading of the safe-harbor provision.

Q: This summer the EEOC issued a final rule on wellness programs and the ADA. What does that rule say about how the ADA applies to wellness programs?

A: The EEOC's new rule allows employers who implement a voluntary wellness program to conduct some medical examinations, ask health-related questions and offer limited incentives to employees for their participation. The information collected must remain confidential and only may be sent to employers in an aggregate form — not linked to specific individuals. These programs also must be equally offered to similarly-situated employees, including employees with disabilities who may need a waiver or special accommodation to participate.

Q: Both sides are claiming victory in the case. Why?

A: Although Orion wasn't protected by the safe-harbor provision, Orion's program was compliant with the ADA because it was voluntary. To be voluntary, an employer may not deny coverage under the health plan or retaliate against an employee who chooses not to participate. This court determined that although Orion's employees must pay a significant premium if they fail to participate, the program still was voluntary because it afforded a choice of whether to participate, even if it was a “hard choice.” Orion's wellness program didn't violate the ADA, but the EEOC still can proceed with its claim that the employee was terminated for her criticism of the program, which may constitute retaliation in violation of the ADA.

Q: What lesson should employers take away from the Orion decision?

A: This court allows employers to attack health care costs by shifting up to 100 percent of monthly health care premiums to employees who decline to participate in a voluntary wellness program without violating the ADA.

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