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BENEFIT NEWS BRIEFS

District Court Case on EEOC ADA Wellness Regulations Highlights Retroactive Nature Of Some of the Regulations

The *Americans with Disabilities Act (ADA)* generally prohibits employers from requiring employees to undergo medical examinations and disability-related inquiries. The Equal Employment Opportunity Commission (EEOC) brought a lawsuit against Orion Energy Systems, Inc. (Orion) alleging Orion violated the *ADA* by requiring employees who elect to enroll in Orion's self-insured health insurance plan to either complete a health risk assessment (HRA) or pay 100% of their monthly premium amount. The EEOC also alleges that Orion violated the *ADA's* anti-retaliation provisions with regards to a certain employee. We will not look at the anti-retaliation claim.

The case is *Equal Employment Opportunity Commission, v. Orion Energy Systems, Inc.,* (E.D. Wisc. 9-19-2016)(Case No. 14-CV-1019) and is available by "*clicking here.*" The docket sheet is available by "*clicking here*."

BACKGROUND

In 2008, Orion began exploring employee wellness programs. Employees who elected to enroll in Orion's health plan would have to certify (1) that they did not smoke or pay a surcharge ($80 per month for single coverage); (2) they would have to exercise sixteen times per month on a range of motion machine located in Orion's fitness center or pay a surcharge ($50 per month); and, most importantly for purposes of this case, (3) they would have to either complete a health risk assessment (HRA) at the beginning of the insurance year or pay the entire monthly premium equivalent amount, which was $413.43 for single coverage, $744.16 for limited family coverage, and $1,130.83 for family coverage. Employees who completed the HRA paid no premium equivalent, but still had to pay their own deductibles, co-pays and out-of-pocket expenses.

The HRA consisted of a health history questionnaire, biometric screening that involves a blood pressure check, height, weight, and body circumference measurement, and a blood draw and analysis.

Prepared by Mike Ewing, J.D.
Director of Research
United Actuarial Services, Inc.
(317) 580-8659 • Fax (317) 580-8651
email: *mewing@unitedactuarial.com*
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http://www.unitedactuarial.com

Orion did not receive any personally identifying information as a result of the HRA but only received aggregated data which allowed Orion to see the percentage of participants in its plan who had particular health risks such as high cholesterol.

ANALYSIS

The Court began its analysis by noting Title I of the *ADA* states the general rule, *"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*" The prohibition extends also to employer-required "medical examinations and inquiries." However, the law permits employers to conduct "*voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site*."

The EEOC argued Orion's *HRA* was not "voluntary" given that Orion shifted 100% of the health benefit premium to employees who opted out of the assessment.

Orion argued its wellness initiative did not violate the law for three reasons: (1) the *ADA's* safe harbor relating to insurance applies to the challenged aspects of the wellness program; (2) Orion did not "make inquiries" as prohibited, Orion received only anonymous, aggregated employee responses and results from the HRA; and (3) the wellness program was voluntary because Orion's employees had a choice regarding whether to participate and sufficient time to make that choice.

District Court Rejects Orion's Use of Safe Harbor Defense

Orion argued its program was allowed under the *ADA* safe harbor which says the *ADA* "*shall not be construed to prohibit or restrict*" an employer from establishing or administering "*the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks*." The District Court rejected the *ADA* safe-harbor defense based on the *retroactive application* of the EEOC's final *ADA* wellness regulation. The EEOC regulations specifically exclude wellness plans from being covered by the safe harbor. In rejecting the safe-harbor defense, the Court discussed why and when courts defer to an agency's interpretation of a statute by regulation.

Here, the EEOC maintained that because the new regulation merely "*clarifies the prior regulations*," it applies retroactively to Orion's wellness program, and because the regulation is authorized by statute it is entitled to "substantial deference" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) and *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 229 (2001).

The Court noted that generally new regulations that merely "restate" what the law according to the agency is and has always been *may apply retroactively*, while new regulations that change the substantive state of the law may not. Thus, courts will defer to an agency's expressed intent that a regulation is a clarification "unless the prior interpretation of the regulation is 'patently inconsistent' with the later one."

The District Court then explained that a court applies *Chevron* deference to an agency's regulation when "*it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority*."

Here, the Court found that Congress had delegated such authority and the regulation was promulgated under such authority. As such, the Court granted summary judgment to the EEOC on the inapplicability of the *ADA* safe-harbor through retroactive application of the final regulation.

VOLUNTARINESS

Orion argued even if the safe-harbor did not apply, its wellness initiative was still "voluntary." The EEOC's new regulation instructs that medical examinations and histories are "voluntary" when the employer does not (1) require employees to participate; (2) deny coverage under any group health plan to employees for non-participation; and (3) take any adverse action, retaliate against, or coerce employees who choose not to participate. If an employer wishes to incentivize or penalize employees' participation, the program remains voluntary if the financial incentive is at or below 30% of the total cost for self-only coverage.

However, the Court noted that the EEOC did <u>not</u> maintain those aspects of the regulation applied retroactively. Instead the EEOC argued even apart from its new regulation that the wellness program was involuntary because shifting 100% of the premium cost to an employee who opted out of a program is so substantial that Orion's offer to pay the health benefit premium in exchange for the employee's participation in the program is more than a mere incentive. One might assume from its lack of argument that the EEOC did not think the regulations on percent limits merely clarified existing law and were entitled to retroactive application.

The Court disagreed that a 100% premium shift to the non-participating employee made participation involuntary and said:

> "But even a strong incentive is still no more than an incentive; it is not compulsion. Orion's wellness initiative is voluntary in the sense that it is optional. An employee is not required to participate in the program and is instead given a choice: either elect to complete the HRA as part of the health program or pay the full amount of the health benefit premium. There may be strong reasons to comply with an employer's wellness initiative, and the employee must balance the considerations in deciding whether to participate or not. But a 'hard choice is not the same as no choice.' "

For now, the case forecloses the use of the *ADA* safe harbor unless the EEOC regulations are rejected by later courts. That seems unlikely. This case will probably have limited impact on the incentives/penalties allowed under the EEOC *ADA* wellness program regulations going forward.

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