Special Update

Federal Court Decides EEOC v. Flambeau Case

On December 31, 2015, the Federal District Court for the Western District of Wisconsin issued its opinion and order in *EEOC v. Flambeau, Inc.*, Case No. 14-CV-638. Judge Barbara B. Crabb issued an opinion and order in favor of Defendant Flambeau, Inc. (Flambeau), relying on the safe harbor within the Americans with Disabilities Act (ADA) to find that Flambeau's workplace wellness program did not violate the ADA.

Flambeau's Wellness Program

Flambeau established a wellness program for those employees who wanted to enroll in Flambeau's health insurance plan for the following benefit year. Flambeau's wellness program consisted of a health risk assessment and a biometric test. The health risk assessment required each participant to complete a questionnaire about his or her medical history, diet, mental and social health and job satisfaction. The biometric test was similar to a routine physical examination: among other things, it involved height and weight measurements, a blood pressure test and a blood draw. Flambeau used this information to identify the health risks and medical conditions common among the plan's enrollees. In particular, it used the information to estimate the cost of providing insurance, set participants' premiums, evaluate the need for stop-loss insurance, adjust the copays for preventive exams and adjust the copays for certain prescription drugs. Except for information regarding tobacco use, the health risks and medical conditions identified were reported to Flambeau in the aggregate, so that it did not know any participant's individual results.

The incentives for Flambeau's wellness program changed from 2011 to 2012. In 2011, the financial incentive offered for participating in the health risk assessment and biometric test was a $600 credit. In 2012 and 2013, however, Flambeau adopted a policy of offering health insurance only to those employees who completed the health risk assessment and biometric test. The court noted that participating in the wellness program was not a condition of continued employment; it was only a condition for enrolling in Flambeau's self-insured health plan, the cost of which was heavily subsidized by Flambeau. The court also noted that Flambeau also sponsored weight loss competitions, modified vending machine options and made other "organization-wide changes" aimed at promoting health in light of the fact that a high percentage of Flambeau's employees appeared to suffer from nutritional deficiencies and weight management problems.

The Decision

The EEOC argued that Flambeau's wellness program violated the ADA because tying the health risk assessment and biometric screen to health plan eligibility did not qualify as a voluntary medical examination. Recall that the ADA prohibits employers from requiring employees to undergo a medical examination (which can include health risk assessments and biometric screens) unless the examination is job-related and consistent with business necessity. 42 USC § 12112(d)(4)(A). There is an exception for medical examinations that are voluntary and part of employee health programs. 42 USC §

12112(d)(4)(B). The EEOC's proposed rules under the ADA issued in April 2015 attempted to define what the EEOC means by "voluntary." *See* 80 Fed. Reg. 21659 (April 20, 2015).

According to Judge Crabb, Flambeau's wellness program did not need to be analyzed under the ADA's "voluntary" medical exam exception because Flambeau tied the health risk assessment and biometric screen to its health plan. As a result, the ADA's insurance "safe harbor" provision applied. This is the same safe harbor provision that won the day for Broward County in the 2012 case *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012). That safe harbor allows an employer to establish or administer the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks. 42 USC § 12201(c)(2). Judge Crabb concluded that Flambeau's wellness program requirement was a "term" of its benefit plan, even though Flambeau failed to specify the wellness program requirement in its summary plan description or collective bargaining agreement; rather, Flambeau's summary plan description only explained that participants would be required to enroll in the "manner and form prescribed by" Flambeau.

Consultants who worked for Flambeau used the information gathered from the health risk assessment and biometric screen to classify plan participants' health risks and calculate Flambeau's projected insurance costs for the benefit year. The information also helped the consultants decide whether it should charge the plan participants for maintenance medications and preventive care. The information also helped the consultants make recommendations regarding plan premiums, which included a recommendation that Flambeau charge tobacco users higher premiums. Finally, the information helped Flambeau decide to purchase stop-loss insurance. Judge Crabb viewed these types of decisions as a fundamental part of developing and administering an insurance plan, which falls squarely within the ADA insurance safe harbor. Because Flambeau's wellness program fell within the insurance safe harbor, Flambeau did not violate the ADA and the court dismissed the case, entering judgment in Flambeau's favor.

Interesting Discussion about Health Plan and Non-Health Plan Exams

The most interesting aspect of the Flambeau case for workplace wellness program designers is Judge Crabb's response to the EEOC's argument that Flambeau's wellness program violated the ADA because it was not "voluntary." According to the EEOC, applying the ADA's safe harbor exception to Flambeau's wellness program renders the ADA's "voluntary medical exam" exception irrelevant. In other words, if all an employer has to do to avoid an ADA violation is connect a wellness program to its health plan, the ADA's voluntary medical exam exception would never apply. The EEOC asserted this position in its proposed ADA rules, issued in April 2015. 80 Fed. Reg. at 21662, n. 24 (April 20, 2015).

Judge Crabb did not buy the EEOC's argument. She noted that the differences between the ADA insurance safe harbor and the voluntary medical exam exception were "obvious." The insurance safe harbor applies to medical exams tied to an employer's insurance plan. The voluntary medical exam exception applies to medical exams that are not tied to an employer's insurance plan. In the Flambeau case, only employees who wanted to enroll in Flambeau's subsidized health plan were required to participate in the health risk assessment and biometric test. Employees who were not interested in enrolling in the plan did not have to participate; Flambeau did not condition employment on participating in the program. Other features of Flambeau's wellness program, such as the vending machine changes, weight loss competitions and other organizational changes, which were likely

available to all employees regardless of health plan enrollment, did not factor into the court's ADA analysis. This is likely because the court focused on the medical exam component of the wellness program and the fact that Flambeau tied the financial incentive to completion of that component.

As for the EEOC's proposed ADA rules, Judge Crabb noted that she was not bound to abide by proposed rules and even if she was, the proposed rules do not address when and how the ADA insurance safe harbor applies to medical examinations that are part of an employer's health plan. She states that the EEOC may be correct that relying on the ADA insurance safe harbor is not appropriate when there is a stand-alone wellness program unrelated to the administration of insurance risks, but that is not the case with Flambeau's program.

Important Points about the Decision

First, it should be noted that like the *Seff v. Broward County* case, the Flambeau decision is not binding everywhere. Until the United States Supreme Court rules on an issue, a court decision is most helpful as guidance in the jurisdiction that the court covers. In the case of Flambeau, the jurisdiction is the Western District of Wisconsin. The *Seff v. Broward County* court covers parts of the South United States. Nevertheless, because two courts from two different jurisdictions issued similar decisions with regard to the ADA insurance safe harbor, there is more support in using it when creating and implementing workplace wellness programs.

Second, it is important to remember that the EEOC may appeal this decision, as it did in *Seff v. Broward County*. At stake in Judge Crabb's decision is the EEOC's proposed ADA rules. The proposed rules released in April 2015 addressed incentives offered for participating in medical exams that are provided as part of a group health plan. 80 Fed. Reg. at 21660 (April 20, 2015). Judge Crabb's decision dismantles the EEOC's proposed regulations. According to Judge Crabb, tying financial incentives to medical exam participation that is part of a group health plan would invoke the ADA insurance safe harbor. The ADA proposed rules do not address when and how the insurance safe harbor applies, even though the proposed rules limit application of the thirty percent incentive maximum to group health plan programs only. Therefore, it would seem that the ADA proposed regulations regarding the thirty percent maximum incentive is promulgated incorrectly, at least under Judge Crabb's decision. It would not be a surprise to see the EEOC appeal Judge Crabb's decision to the Court of Appeals for the Seventh Circuit to save the basic premise of the proposed ADA rules. If the EEOC does appeal and loses at the Seventh Circuit, the EEOC will likely have to reconfigure the ADA proposed rules when issuing those rules in final form.

Third, because Judge Crabb's decision disrupts the EEOC's proposed ADA rules, the EEOC may delay issuing final ADA rules until a decision about appeal can occur, or at the very least until the EEOC can determine how to reconcile the Flambeau decision with its proposed rule. This will likely take some time and may push back the issuance of final rules.

What to Do Going Forward

Given that there are two court decisions that arrive at similar conclusions about the ADA insurance safe harbor, workplace wellness program designers have some justification in relying on the ADA insurance safe harbor when administering health risk assessments or biometric screens as part of an employer health plan. The ADA insurance safe harbor does not limit the amount of financial reward

or penalty for participating in a health assessment or biometric screen that is tied to an employer health plan. Neither do the wellness program rules under the Affordable Care Act (ACA).

As a result, wellness program designers could require participation in health risk assessments and/or biometric screens that are part of an employer health plan. However, doing so still creates risk. First, to the extent that a health risk assessment asks family medical history questions of employees, or ties financial incentives to spousal or other dependent participation, there may be legal implications under the Genetic Information Nondiscrimination Act (GINA). Second, the EEOC may appeal Judge Crabb's decision and may win on appeal, overturning this lower court decision and thereby placing in jeopardy employee health plan wellness programs that incentivize medical exam participation. Third, requiring employees to participate in health plan wellness programs may not be the ideal approach to achieving workplace well-being (assuming that is a goal of the employer). As this author has mentioned before, just because something may be legal does not mean it is the best approach to achieving a goal.

If you would like help with workplace wellness program compliance, do not hesitate to contact the Center for Health Law Equity, LLC at bzabawa@cfhle.com. We would be happy to assist you in finding the best, legal approach to meeting your workplace wellness program needs.