Employers Must Take Heed of the EEOC's Scrutiny of Overbroad Medical Authorizations and Employer-Sponsored Wellness Programs

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The EEOC's Scrutiny of Overbroad Medical Releases

The Equal Employment Opportunity Commission ("EEOC" or "the Commission") has recently focused its scrutiny on the permissible scope of medical release forms used by employers in connection with fitness-for-duty evaluations.

On September 8, 2014, the EEOC filed a lawsuit against Minnesota-based Cummins Power Generation, Inc. claiming the company violated both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) by requiring an employee to provide what it considers overbroad medical release forms for a fitness-for-duty examination.[1]

The EEOC claims that the company, as part of the fitness-for-duty examination, required that the employee sign releases of all of his medical records, including "all information concerning medical care, advice, treatment, or supplies provided to me" and "all information related to or forming the basis of any medical, mental health and/or substance abuse evaluation." The Commission further asserts that the company asked the employee to complete a diagnostic assessment form requesting information related to his family history of psychiatric conditions, chemical dependency, suicide, and major medical issues. The employee agreed to submit to the fitness-for-duty evaluation, but objected to the scope of the releases and requested they be narrowed. The EEOC alleges that the company terminated the employee's employment as a result of his refusal to sign the releases, which the company deemed a failure to cooperate in its fitness-for-duty evaluation process.

The EEOC filed suit on the employee's behalf claiming the releases were not narrowly tailored to determine whether the employee could perform the essential functions of his job. The EEOC asserts that the company made disability-related inquiries that were not job-related or consistent with business necessity in violation of the ADA. It also asserts that the diagnostic assessment form sought information regarding the employee's family history in violation of GINA, which prohibits employers from requesting or requiring that employees disclose genetic information.

In a press release issued on September 9, 2014, John Hendrickson, Regional Attorney for the EEOC's Chicago district, explained:

> The EEOC doesn't challenge [the company's] request for a fitness-for-duty examination, but [the company] had an obligation to request only those medical records and information that actually pertained to that issue. Employees don't give up all rights to privacy of their medical information when they get a job. By asking for all and sundry medical information, [the company] went too far.

Even though this case has not reached final resolution, it highlights the types of issues the EEOC is scrutinizing. In light of this case, employers should reexamine their (and any vendors') medical releases used in connection with fitness-for-duty evaluations and other evaluations of employees returning to work following a medical leave of absence, as well as job accommodation requests and employment testing (*e.g.*, post-employment physical examinations). Any medical examinations should be job-related and consistent with business necessity, and medical authorizations used in connection with those examinations should be narrowly tailored to seek information that is specific to the employee's ability to perform his or her job. The releases must *not* include a request for family history or other genetic information as prohibited by GINA. Finally, employers

[1] Complaint, *EEOC v. Cummins Power Generation, Inc.*, No. 14-cv-03408 (D. Minn. Sept. 8, 2014).

(and their vendors') medical release forms should include GINA "safe harbor" language:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information or an individual or family member of the individual except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[2]

The EEOC's Focus on Employer-Sponsored Wellness Programs

In its Spring 2014 regulatory agenda, the EEOC stated that it would focus its scrutiny on employer-sponsored wellness programs and their compliance with federal laws, including the ADA, GINA, and other statutes enforced by the EEOC. Since then, the Commission began directly challenging these programs by filing lawsuits against two Wisconsin employers alleging that their wellness programs violated the ADA.

On August 20, 2014, the agency filed suit against an employer in a Wisconsin federal district court, alleging the company administered a wellness program in violation of the ADA.[3] Specifically, the EEOC's complaint asserts that the employer required the plaintiff to pay the full cost of her health insurance premiums after she refused to participate in the wellness program and also terminated her employment for complaining to management about the program. The EEOC claims that the wellness program violated the ADA because: (1) it was not voluntary; and (2) it was not job-related or consistent with business necessity.

Just over a month later, on September 30, 2014, the EEOC filed a second lawsuit, also in a Wisconsin federal district court, challenging another Wisconsin employer's wellness program after conciliation efforts failed.[4] The Commission claims that the employer violated the ADA when it cancelled an employee's medical insurance and later discharged him because he did not complete the biometric testing and health risk assessment components of its wellness program.[5] The EEOC asserts that the biometric testing and health risk assessment constituted prohibited disability-related inquiries and medical examinations that were not job-related or consistent with business necessity, as required by the ADA.[6] The EEOC also rejected the employer's claim that the testing and assessment were voluntary on the basis that the company terminated his health insurance benefits because he did not complete them. In a press release, Hendrickson explained: "Having to choose between complying with such medical exams and inquiries, on the one hand, or getting hit with cancellation or a penalty, on the other hand, is not voluntary and is not a choice at all."[7]

In a similar action, on October 27, 2014, the EEOC filed a petition in a Minnesota federal district court seeking to enjoin a Minnesota employer from levying penalties and costs against its employees who refused to submit to biometric testing as part of its wellness program.[8] While the court denied the EEOC's petition on November 6, 2014, the case is noteworthy as it signals the EEOC's continued aggressive stance toward employer-sponsored wellness programs.

According to the EEOC, in August or September of 2014, the company announced that its employees and their spouses were to undergo biometric testing by the company's vendor for the 2015 health benefit year. The testing included a blood draw

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[2] Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008, available at http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm
[3] Complaint, *EEOC v. Orion Energy Systems, Inc.,* No. 14-cv-01019 (E.D. Wis. Aug. 20, 2014).
[4] Complaint, *EEOC v. Flambeau, Inc.,* No. 3:13-cv-00638 (W.D. Wis. Sept. 30, 2014).
[5] Press Release, EEOC, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm.
[6] *Id.*
[7] *Id.*
[8] Motion for Preliminary Injunction, *EEOC v. Honeywell International, Inc.,* No. 14-4517 (D. Minn. Oct. 27, 2014).

screened for cholesterol, glucose, and nicotine levels. It also measured blood pressure, height, weight and waist circumference. If employees and their spouses chose not to participate in the testing, the company would not contribute to their Health Savings Accounts (HSA) and would impose other surcharges. In total, the EEOC claimed, an employee could suffer a penalty of up to $4,000 through surcharges and lost HSA contributions. Employees were, however, able to avoid some of the surcharges without taking the biometric test (e.g., by enrolling and participating in a tobacco cessation program).

The EEOC asserted that the penalties rendered the program involuntary, and therefore, a violation of the ADA. It also claimed that the company was offering an inducement to obtain medical information from employees' spouses in violation of GINA. Ultimately, the court found that the EEOC did not meet its burden of establishing that an injunction was the only way to prevent irreparable harm, but noted that "this case raises intriguing legal questions that relate to important public interest considerations." The EEOC is still investigating the underlying charges that served as the basis for its request for injunctive relief. It is unclear what, if any, further action the EEOC will take with respect to the company's wellness program following its final disposition of the charges.

The recent legal action by the EEOC, in the absence of formal guidance regarding employers' use of these programs and the implications under the ADA and GINA, has left many employers frustrated and confused. Unfortunately, the EEOC is not expected to issue related guidance anytime soon.[9] The timing of the lawsuits also poses problems for many employers who are currently in their health benefits open enrollment processes and have employee wellness or health risk assessment requirements.

In light of the EEOC's recent scrutiny, employers should proceed with caution when implementing wellness programs and consider the following factors:

- Ensure that wellness programs are truly voluntary – do not penalize employees for failure to complete health risk assessments.
- Do not provide a reward or incentive in exchange for the disclosure of genetic information or seek family medical history information.
- Include GINA "safe harbor" language on medical release forms used as part of a wellness program.
- Review anti-discrimination policies to ensure that genetic information is identified as a protected class.

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[9] Ben James, *Don't Expect Wellness Program Guidance: EEOC Commish*, EMPLOYMENT LAW360 (Oct. 2, 2014).

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