

PUBLICATION

Implementing An Employee Wellness Program? Be Careful - The EEOC Is Interested

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According to recent studies, over 90% of employers offer some type of wellness incentives to their employees. This is a significant jump from 2009 when only a little over half of employers had employee wellness programs, and the Equal Employment Opportunity Commission ("EEOC") is taking note. In the last two months, the EEOC has filed two lawsuits against employers related to their company wellness programs.

In August, the EEOC sued a Wisconsin lighting retrofit company, Orion Energy Systems, Inc. ("Orion"), after the company allegedly penalized and ultimately fired an employee for opting out of a voluntary corporate wellness program. Orion set up a fairly typical wellness program in March 2009 that required employees to, among other things, provide information about their medical history, submit to blood tests, and perform certain exercises in Orion's fitness room. In exchange for participating, Orion agreed to cover employees' health insurance premiums.

One employee, however, refused to participate because she was concerned about whether Orion could guarantee that her health information would remain confidential. Because she refused, the employee was allegedly forced to pay more than \$400 per month to cover her insurance premiums along with a \$50 monthly penalty for refusing the fitness part of the program. One month later, Orion terminated the employee, which the EEOC claims was a result of her objection to the wellness program.

The following month, the EEOC made its second challenge to employee wellness programs. It sued a plastics manufacturer, Flambeau Inc., for allegedly shifting the entire health insurance premium cost to an employee after the employee failed to complete a voluntary health assessment and testing required under the company's wellness plan. The employee claims that he could not complete the tests as scheduled because he was on leave for cardiomyopathy and congestive heart failure.

What should employers learn from these lawsuits? Voluntary wellness programs are completely legal, but they must actually be voluntary. Employers cannot compel participation in medical tests or medical disclosures that are not job-related by shifting premiums back to the employees, canceling coverage, or imposing penalties. A choice between compliance and a penalty is not choice at all according to the EEOC.