

## ALERTS

### Labor & Employment Law Alert - EEOC Files ADA Lawsuit To Challenge Mandatory Wellness Program

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The Equal Employment Opportunity Commission (EEOC) has filed suit in the U.S. District Court for the Western District of Wisconsin against Wisconsin-based Flambeau, Inc., over allegations that Flambeau's "voluntary" wellness program violates the Americans with Disabilities Act. Flambeau's wellness program, although nominally voluntary, required employees to submit to a health risk assessment, including biometric testing and employees who failed to do so faced cancellation of medical insurance or a requirement to pay their full insurance premiums. In comparison, employees who submitted to the testing did not have their coverage canceled and were required to pay only 25 percent of their premiums.

According to the EEOC, Flambeau employee Dale Arnold failed to complete the health assessment and testing because he was on medical leave for heart failure. The EEOC claims Flambeau canceled Arnold's medical insurance and shifted premiums to Arnold as a result. The EEOC asserts that this constitutes disability discrimination, and that Flambeau had made disability-related inquiries that were not job-related and consistent with business necessity.

"Employers certainly may have voluntary wellness programs but they actually have to be voluntary," said John Hendrickson, regional attorney for the EEOC Chicago district. "They can't compel participation in medical tests or questions that are not job-related and consistent with business necessity by canceling coverage or imposing enormous penalties such as shifting 100 percent of the premium cost onto the back of the employee who chooses not to participate. 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 not a choice at all."

This is the second lawsuit the EEOC has filed in Wisconsin in the past three months over an employer taking action against an employee who opted out of a so-called "voluntary" wellness program. As such, it appears that wellness programs will be further scrutinized by the EEOC in the coming months.

The EEOC stated in its spring regulatory agenda that it intended to initiate a rulemaking to amend both its ADA and Genetic Information Nondiscrimination Act regulations to address the issue of wellness programs and financial incentives. The EEOC's target date for issuance of the Notices of Proposed Rulemaking was June 2014, but to date, nothing has been published.

For more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor

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