Disability and Wellness Programs

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The ADA and Reasonable Accommodation

• 42 U.S.C. 12112(b)(5)(A):
  – ER must make “reasonable accommodations” to EE’s disability absent “undue hardship”
  – Key Q: Do outcome-contingent or participatory wellness programs provide waivers or alternative standards for EEs with disabilities?

The ADA and Medical Inquiries

• 42 U.S.C. 12112(d)(4):
  – ER can’t make medical exam or inquiry of EE unless “job-related and consistent w/business necessity”
  – Exception for “voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site”
  – Key Q: Are wellness programs “voluntary”?
  – ADA, unlike HIPAA, has no numerical threshold for “voluntary.”
Why Does the ADA Limit Medical Examinations/Inquiries?

• History of discrimination
• Medical exams/inquiries as ways of uncovering hidden disabilities, triggering discrimination

EEOC 2014 Wellness Litigation

• *Orion Energy* – ER allegedly shifted entire premium cost to EE for refusing to participate in wellness program & eventually fired her.
• *Flambeau, Inc.* – ER allegedly cancelled EE’s health insurance & shifted entire premium cost to EE when he refused to undergo HRA.
• *Honeywell, Inc.* – ER imposed costs up to $4000 on EEs who refused biometric screening.
EEOC Proposed ADA Wellness Rules (2015)

- Incentive of up to 30% of total cost of EE-only coverage is voluntary.
- Requires notice.
- **Issues:**
  - *Fair interpretation of “voluntary”?* Average cost: $1,800/a.
  - *Harmonization w/ACA?*
    - Different statutes can have different standards.
    - Easy enough to comply w/ACA and ADA.
    - This doesn’t really harmonize.