EEOC's Attempt to Stop Honeywell's Biometric Testing Wellness Program—Denied

11.04.14

Much has been made of the EEOC's recent brief in support of its request for a temporary restraining order to stop Honeywell from implementing its wellness program using biometric testing data. It is important to remember that an agency's brief is only its opinion. Yesterday, the District Court in Minnesota denied the EEOC request for a temporary restraining order and permitted Honeywell to move forward with its wellness program. While this means Honeywell may move forward, it is not a final determination on the legality of this wellness program or any other wellness program.

It is important to remember that a government agency's brief is the opinion of the attorneys from that agency and those briefs do not constitute published or authoritative guidance as other Circuit Courts have recently stated in their opinions, see *Smith v. Aegon Companies Pension Plan*, (6th Cir. 2014) dismissing the U.S. Department of Labor's position on choice of venue clauses in ERISA plans where such position had never been included in issued guidance subject to the notice and comment procedures and only included in its briefs.

In 2012, the 11th Circuit Court of Appeals found that a wellness program that was part of a health plan did not violate the Americans with Disabilities Act in *Seff v. Broward*, (11th Cir. 2012) and this decision was based in part on the EEOC's own manual regarding the American's with Disabilities Act. This decision is still the law in the 11th Circuit, and employers may want to consider this decision and the EEOC's published guidance as they design their wellness programs and health plan documentation.

If an employer has portions of its workforce subject to collective bargaining agreements, it is important to consider the language of the collective bargaining agreement before implementing changes to a wellness program and may want to consider the labor arbitration decision from June 13, 2014 in the case entitled In re Smith Dairy Products Company, Orrville, Ohio and Teamsters, Local 348 FMCS, case no. 13/59166 regarding contract language or lack thereof and extension of wellness programs to spouses.

Beware of Skinny or Bronze Plated Plans- Employers Using These May Have Additional Notice Requirements

The Internal Revenue Service (the "Service") issued Notice 2014-69 today to warn employers that health plans being marketed which do not provide for substantial coverage for inpatient hospital services or for physician services (referred to herein as the" Skinny" or "Bronze Plated" Plans) do not provide "minimum value" as required to prevent an employee from being able to obtain the health insurance premium tax credit available to individuals when they purchase coverage on the insurance marketplace.

The warning from the Service in the Notice includes the fact that the "Minimum Value Calculator" provided by the Department of Health and Human Services and the Service and the Treasury Department may produce inaccurate results indicating that these plans provide minimum value when the Service and HHS do not believe that they provide such value.

The warning continues and states that employers that offer one of these Skinny or Bronze Plated plans should exercise caution in relying upon the minimum value calculator to demonstrate that minimum value is provided for any period during a taxable year. *The notice cautions employers that they cannot rely solely upon the minimum value calculator to prove their Skinny or Bronze Plated plans offer minimum value for any time after the final regulations on minimum value are published in 2015, or for any portion of the tax year that ends on or after January 1, 2015.*

The Notice takes a unique step and states that final regulations on the treatment of these non-inpatient hospital service and non-physician service are expected to be issued and effective in 2015 to clarify that these plans do not provide minimum value and cannot be used to keep an employee from obtaining a premium tax credit on the insurance marketplaces.

Employer Transition Relief

In recognition that there may be some *employers who have already conducted annual enrollment or who are in the process of annual enrollment, the Service provided some transition relief for employers that had entered into a binding written commitment to adopt or has begun enrolling employees in what they call a Non-Hospitalization/Non-Physician Services Plan (aka Skinny or Bronze Plated Plan) as of November 4, 2014 which was based on the employer's reliance on the results of using the Minimum Value Calculator that the government made available*, the transition relief is not pure relief but an indication that relief is anticipated to be included in the final regulations when issued. The expectation is that the final regulations will not apply with respect to the imposition of the employer shared responsibility tax under Code section 4980H with respect to such plan before the end of the plan year (as in effect under the terms of the plan on November 3, 2014) if that plan year begins no later than March 1, 2015.

Employee Transition Relief on Availability of the Premium Tax Credit

Until the final regulations are issued an employee is not required to treat the Skinny or Bronze plated plan as providing minimum value and precluding the employee from obtaining the premium tax credit when purchasing coverage on the insurance marketplace. This relief for the employee applies for maintaining the employee's eligibility for the health care premium tax credit regardless of whether the plan qualifies for the special transition rule explained above. However, employers need to remember that if the employee obtains a premium tax credit from the insurance marketplace, that is one of the factors (among several) that must be met to trigger a Code section 4980H(b) tax assessment on the employer so this may impact the employer in more than one way.

New Notice Must be Provided Related to Offering Skinny Plans

Employers that offer one of the Skinny or Bronze Plated plans (including a pre-November 4, 2014 non-hospital /non-physician service plan) to an employee must not state or imply in any disclosure that the offer of such coverage precludes an employee from obtaining a premium tax credit, if the employee is otherwise eligible, and the employer must timely correct any prior disclosure that stated or implied that the employer's offer of what I call the Skinny plan would preclude an otherwise tax credit eligible employee from obtaining such credit. *The Notice clarifies what this means by explaining that a statement in a summary of benefits and coverage that the Skinny plan provides minimum value would be considered to imply that the offer of such plan precluded the employee from obtaining the premium tax credit and would need to be corrected.* Since the Summary of Benefits and Coverage is required to include the statement regarding whether a plan provides minimum value, this means that a corrective notice will likely be required for any employer offering what we are calling a Skinny or Bronze Plated Plan.

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