

Wellness Programs and EEOC Enforcement

September 30, 2016

A federal judge recently ruled in favor of an employee wellness program charged by the EEOC with violations of the Americans with Disabilities Act (the "**ADA**"), but for a reason of little future use to employers while simultaneously rejecting what had been one of their best and most successful arguments. In 2014, the EEOC brought civil actions against three separate employers (Orion Energy Systems, Inc.; Flambeau, Inc.; and Honeywell International, Inc.) for alleged violations of the ADA by their employee wellness programs. In *Honeywell*, the EEOC also alleged violations under the Genetic Information Nondiscrimination Act ("**GINA**"). All three employers decided to contest the EEOC's actions. The heavy negative attention given to the EEOC's enforcement actions in the absence of any regulatory or other formal guidance eventually pressured the EEOC to issue regulations addressing the impact of the ADA and GINA on employer-provided wellness programs, [which we addressed](#) in May. On September 19, a U.S. District Court judge ruled on cross motions for summary judgment in the *Orion* case. That court rejected Orion's position that its wellness program fit within the ADA's bona fide benefit plan safe harbor, which had served as the basis for earlier court opinions favorable to wellness programs, citing both the ADA's legislative history and the preamble to the final ADA wellness regulations (issued nearly 18 months after the *Orion* case began). In an interesting twist, the judge then determined that despite what amounted to a 100 percent financial incentive for participation in Orion's wellness program, the program could still be considered "voluntary" under the ADA, repeating "[a] hard choice is not the same as no choice." However, given that wellness programs subject to the ADA and GINA will face maximum incentive limits beginning with the 2017 plan year and the *Orion* opinion did not address those, this court's interpretation of what is "voluntary" appears to have no prospective practical application for employers. [Read our review](#) of the December 30, 2015 decision in *Flambeau*. The *Honeywell* litigation remains ongoing, and the future applicability of the ADA's bona fide benefit plan safe harbor to wellness programs is uncertain. The EEOC's position is clear, and the ADA and GINA regulations are set to impact many employer wellness programs beginning in 2017. [Read the court's *Orion* decision.](#)