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Employment Law Summer Recap 2014: Part 7 of 11 - Joey Chestnut Gets Engaged, Wins Yet Another Hotdog Eating Contest and … then Politely Declines to Participate in a Wellness Program?

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61 hot dogs in 10 minutes. Let me repeat: 61 hot dogs in 10 minutes. That's an incredible 6.1 hotdogs per minute! But for competitive eating champion Joey Chestnut, it was just another day at the office. Chestnut took home his 5th consecutive July 4th Nathan's Hot Dog Eating Contest trophy. What made this one all the more (ful)filling was that Mr. Chestnut found the time just before the starting gun went off **to propose to his girlfriend** (she said yes). The cocktail hour at that wedding should be really interesting given that this is a man who once ate 12.8 pounds of deep fried asparagus in 10 minutes, 78 matzoh balls in 8 minutes and 141 hardboiled eggs also in 8 minutes. Yum.

Here's another thing about Joey Chestnut: up until this summer, he had a day job in construction management in San Jose. And I wonder if his employer offered him and his co-workers an opportunity to participate in an employee wellness program, and if so, whether it would have tried to "persuade" Chestnut to participate?

An increasing number of employers are now turning to employee wellness programs to control health care costs, reduce employee turnover and increase employee productivity. A healthier workforce not only means a happier workforce, it also means a cheaper and more productive workforce, which is a win-win for employers and employees. Some examples of employee wellness programs include health risk assessments (provides employees with summary data regarding risk for disease and other potential health issues), health coaching (helps employees address their health issues), smoking cessation programs (self-explanatory), and health challenges (employees engage in an activity that will improve their health). Employers often offer rewards or incentives to employees who participate in these programs. For example, they may provide health insurance premium discounts to employees who have a gym membership (a participation based reward), walk a certain number of miles per week (an activity based reward), or quit smoking (an outcome based reward).

An employer offering a wellness program would probably want someone like Joey "Jaws" Chestnut to participate since his unhealthy lifestyle choices may result in him experiencing chronic health conditions down the road. But in our hypothetical, his employer could violate the Americans with Disabilities Act if it forced Mr. Chestnut to participate. The ADA restricts an employer's ability to make disability-related inquiries of employees or require them to take medical examinations. One exception is where the employee voluntarily submits to an inquiry or examination as part of a wellness program.

"Voluntary" means the employer doesn't require participation and doesn't penalize the employee for a lack of participation. To date, and although it signaled it would do so in June, the EEOC still has not issued guidance on "whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary." But last month, for the very first time, **the EEOC did sue a Wisconsin employer** saying it violated the ADA by fining a non-participating employee $50 per month and making her pay the entire

monthly health care premium. (The EEOC also said that the employer broke the law by firing her after she objected to the program). The employee there was the only one not to participate in the program, which would have, among other things, required her to self-disclose certain medical history and undergo blood work.

The EEOC is arguing that, while the employer did not require the employee to sign up for the program, the program really wasn't voluntary because of the financial harm it inflicted on non-participants. Specially, as John Hendrickson, the EEOC's regional attorney in its Chicago district, put it:

> "Employers certainly may have voluntary wellness programs -- there's no dispute about that -- and many see such programs as a positive development. But they have to actually be voluntary. They can't compel participation by imposing enormous penalties such as shifting 100 percent of the premium cost for health benefits onto the back of the employee or by just firing the employee who chooses not to participate. Having to choose between responding to medical exams and inquiries -- which are not job-related -- in a wellness program, on the one hand, or being fired, on the other hand, is no choice at all."

Whether this is a false choice is debatable and one wonders whether the EEOC would have even brought this case had the employee not been fired. Complicating matters further is that the Affordable Care Act specifically permits employers to offer the employees certain financial incentives for their participation in these programs. (We discussed some ACA-wellness program related issues **here** and **here**.) Given this recent ACA guidance, the lack thereof from the EEOC and the increasing importance of wellness programs in the workplace, employers are hoping that this case will provide further clarity on the voluntariness standard so that they can formulate and administer their wellness programs in a legal manner.

By the way, Joey Chestnut won yet another competitive eating competition on Sunday, winning the fifth annual World Bratwurst Eating Contest during Oktoberfest-Zinzinnati in Cincinnati after he scarfed down 50 bratwursts in just 10 minutes. I'm off to get a salad for lunch…

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*Tomorrow: Part 8 of 11 - New York's Coldest Summer, Especially for Employers Who Utilized Unpaid Interns. For previous parts, click **here**.*

Authors