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InSight

An Analysis of Recent Developments & Trends

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EEOC Issues Long-Awaited Proposed Rule on Employer Wellness Programs

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On April 18, 2015, the Equal Employment Opportunity Commission (EEOC) issued a proposed rule on the treatment of employer wellness programs under the Americans with Disabilities Act (ADA). The proposed rule amends the ADA regulations and interpretive guidance to address the use of incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. While the rule provides a degree of certainty in the design and administration of wellness programs, questions remain about the impact the EEOC's guidance will have on the future development of wellness programs.

The ACA, HIPAA, ADA and GINA: A Myriad of Laws Impact Wellness Programs

Employers have increasingly turned to wellness programs to reduce their healthcare costs and improve the health and productivity of their workforce. Many companies offer "participation-only" wellness programs, whereby employees attend periodic wellness seminars or complete health risk assessment questionnaires to obtain a reward from the employer, usually a discount on the cost of health insurance. Some employers also offer "outcome-based" wellness programs, which condition the reward on the employee meeting a certain health-related benchmark, such as an appropriate body mass index (BMI) or blood cholesterol level, or remaining tobacco-free. Biometric screenings are a common part of these wellness and health promotion programs.

The use of financial incentives has been a cornerstone of many wellness programs. Recognizing the benefit and popularity of such programs, the Affordable Care Act (ACA) included provisions to promote their use by codifying and building upon regulations under the Health Insurance Portability and Protection Act (HIPAA). For a wellness program conditioning a financial incentive on the participant meeting a standard related to a health factor, the 2006 HIPAA rule specified that the value of the wellness plan incentive could not exceed 20% of the cost of coverage. The ACA endorsed the use of financial incentives for health factor-based wellness programs, and increased the incentive limit from 20% to 30% of the cost of coverage, and gave the Secretary of Health and Human Services the discretion to increase the threshold to up to 50%. The ACA regulations, issued in 2013, authorized a

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50% cap for tobacco cessation programs. These limits set forth in the ACA and HIPAA apply only to health-contingent wellness programs in a health plan. The ACA and HIPAA limits on financial incentives do not apply to participatory wellness programs, which do not include any conditions for obtaining a reward based on an individual satisfying a standard related to a health factor.[1]

Although permissible under the ACA and HIPAA, the use of incentives to encourage participation in wellness programs had come under attack recently by the EEOC as violating the ADA and the Genetic Information Nondiscrimination Act (GINA). GINA generally prohibits employers from collecting genetic information, including family medical history, from employees. A limited exception exists for "voluntary" wellness programs, so long as certain requirements are met. The EEOC final regulations implementing Title II of GINA prohibits employers from offering employees financial incentives to provide genetic information. The EEOC General Counsel filed several lawsuits against employers in 2014 alleging that their wellness programs violated the ADA and GINA. In *EEOC v. Honeywell International Inc.*,[2] the EEOC tried to enjoin the employer from implementing its wellness program, claiming it violated both the ADA and GINA by penalizing employees for not participating in biometric screenings. The federal district court rejected the EEOC's request, noting that "great uncertainty persists in regard to how the ACA, ADA and other federal statutes, such as [GINA] are intended to interact." This uncertainty has left employers in legal limbo.

The uncertainty and debate centers on the definition of "voluntariness" allowed under the ADA, and whether and the degree to which a financial inducement will render a wellness program involuntary. The ADA allows employers to "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." In its *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* issued in 2000, the EEOC stated that a wellness program is voluntary if it neither requires nor penalizes employees who participate. In a 2009 letter released during the last days of the Bush Administration, the EEOC's Office of Legal Counsel endorsed the HIPAA rule and announced that a wellness plan would be "voluntary" if the inducement to participate did not exceed 20% of the cost of coverage, consistent with the HIPAA's regulations in effect at the time. In March 2009, the EEOC rescinded this statement and announced it would continue to examine the issue.

In the lawsuits filed by EEOC General Counsel David Lopez taking aim at wellness programs, Lopez seemed to interpret the ADA as precluding incentive-based wellness programs, despite the ADA exception for voluntary medical examinations that are part of an employee health program. Such lawsuits also disregard the statute's safe harbor provision that allows a covered organization to establish, sponsor, observe, or administer the terms of a "bona fide benefit plan" that is not a "subterfuge" for avoiding the purposes of the ADA, and which meet certain additional requirements. In a 2012 decision, in the absence of additional guidance, the U.S. Court of Appeals for the Eleventh Circuit addressed the treatment on wellness programs under the ADA. In *Seff v. Broward County*,[3] the court held that an employer that imposed a surcharge on employees who did not participate in the wellness program did not violate the ADA because the program fell under the ADA's "bona fide plan" safe harbor exception. The circuit court did not opine on the definition of "voluntary" for purposes of the ADA's voluntary employee health program exception.

The lack of guidance by the agency, in conjunction with the EEOC enforcement activity, has created a quagmire for employers seeking to enhance the use of effective wellness programs as the ACA envisioned. The EEOC's position on wellness programs, seemingly inconsistent with that of the Departments of Labor, Health and Human Services and Treasury, drew scrutiny and criticism from Congress. In March 2015, Rep. John Kline (R-MN), Chairman of the House Education and Workforce Committee, and Senator Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced legislation, the Preserving Employee Wellness Programs Act, to provide certainty for employers regarding wellness plans. The bill provides that wellness programs will not violate the ADA or GINA if they offer rewards up to the maximum allowed percentage amounts set by the ACA. Under the bill, participatory programs would be allowed to offer rewards up to the maximum amounts applicable to health-contingent wellness programs without running afoul of the ADA or GINA. Additionally, the legislation would permit plans to provide financial incentives for family members of employees to participate in wellness programs without running afoul of GINA.

1 For a discussion of the ACA final wellness regulations, see Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler ASAP (Aug. 8, 2013).

2 No. 0:14-04517 (D. Minn., filed Oct. 27, 2014).

3 778 F. Supp. 2d 1370 (S.D. Fla. 2011), aff'd, 691 F.3d 1221 (11th Cir. 2012).

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The Proposed Rule

After a six-year wait for the EEOC to issue guidance on the treatment of wellness programs under the ADA, and with legislation in Congress pending, the EEOC issued its proposed rule. The EEOC's proposed rule attempts to clarify what does and does not constitute a permissible wellness program in light of the ADA's protections. The Commission stated "it has a responsibility to interpret the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and HIPAA's and the Affordable Care Act's provisions promoting wellness programs." The result is a proposal that expressly affirms the use of limited financial incentives for participatory wellness programs. Yet, despite the EEOC's effort to align the treatment of wellness programs under the ADA, ACA and HIPAA, the proposal would further restrict the scope of wellness programs.

The proposed rule explains what an employee health program is, what it means for an employee health program to be voluntary, what incentives employers may offer as part of a voluntary employee health program, and what requirements apply concerning notice and confidentiality of medical information obtained as part of voluntary employee health programs. The references in the proposed rule regarding the requirement to provide notice and the use of incentives, apply only to wellness programs that are part of or provided by a group health plan or by a health insurance issuer offering group health insurance in connection with a group health plan. In addition, the proposed rule explains that compliance with rules concerning voluntary employee health programs does not ensure compliance with all the antidiscrimination laws the EEOC enforces.

Definition of an Employee Health Program

A wellness program, including any disability-related inquiries and medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. To meet this standard, the program must have "a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease."

Definition of "Voluntary"

In order for the wellness program to truly be voluntary an employer cannot require an employee to participate in such a program and may not deny coverage under any of its group health plans or particular benefits packages within a group health plan, generally may not limit the extent of such coverage, and may not take any other adverse action against employees who refuse to participate in an employee health program or fail to achieve certain health outcomes.

Neither the proposed rule nor the preamble provide any guidance on what is meant by the phrase "may not require participation," but presumably this phrase means that the employer may not take an adverse employment action against an employee for non-participation, such as reflecting non-participation on employee reviews, reducing employee compensation or disciplining the employee for not participating. Adverse employment actions of course are not part of an employee benefit plan but would be part of an employment-based wellness program and would not fall within the scope of the proposed regulations in any event, since by their terms they apply only to wellness programs that are part of an employee benefit plan.

The proposal also significantly limits the availability and flexibility in design of participatory wellness programs by forbidding plans from restricting access to benefit options based on wellness plan participation. For example, many wellness programs allow employees to enroll in a "high" group health plan (such as a PPO) only if they complete a health risk assessment or complete a biometric screen. Otherwise, they may enroll in other, arguably less desirable, benefit options such as a high deductible plan, or an HMO. Such plan designs would be prohibited under the current requirements of the proposed rule, thus significantly narrowing the designs that are currently permitted under the ACA final regulations.[4]

4 Note that the position taken by the EEOC in the proposed regulations on this point is not consistent with the EEOC's prior stance. In a January 2013 information letter, the EEOC reviewed a disease management program as part of a group health plan in which participants were required to follow a certain treatment regimen, and substantiate their compliance. Participants who failed to do so were disenrolled from the health plan and enrolled in the employer's high deductible plan instead. The EEOC opined that this arrangement did not cause the program to be involuntary. *See* Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs, *supra* note 1.

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Notice

For an employee's participation in a wellness program that is part of a group health plan to be considered voluntary, the employer must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the employer uses to prevent improper disclosure of medical information.

This requirement largely duplicates obligations that already exist under HIPAA's privacy and security rule. Thus, the proposed EEOC rules would place duplicative burdens on plan administrators and employers in administering wellness programs.

Financial Incentives

Offering limited incentives to participate in a wellness program that is part of a group health plan and includes disability-related questions or examinations does not render a program involuntary, if the total allowable incentive available under all programs does not exceed 30% of the total cost of employee-only coverage. The financial incentive can come in the form of either a reward or penalty. The cost-of-coverage includes both employee and employer contributions.

The EEOC states in the preamble to the proposed rule that this limit "generally is the maximum allowable incentive available under HIPAA and the Affordable Care Act for health-contingent wellness programs." However, there are important distinctions between the maximum allowable incentives under HIPAA and ACA versus the EEOC's proposal. The ACA and HIPAA authorize incentives of up to 30% of the cost of coverage in which the employee is enrolled. Therefore, under HIPAA and the ACA, if an employee enrolls in family coverage, the maximum incentive limit would be 30% of the cost of family coverage. In contrast, the EEOC proposed rule would appear to limit the incentive to 30% of the cost of employee-only coverage even for the employee who enrolls in family coverage. The variance between the two can be significant.

The ACA gave the regulators discretion to increase the maximum incentive to 50% of the cost of coverage. The final ACA wellness program rules allow incentives of up to 50% for tobacco cessation programs. Yet, the EEOC failed to follow the lead of the Departments of Health and Human Services, Labor and Treasury by similarly increasing the cap for tobacco cessation programs to 50%. This disconnect could prove problematic for employers and render wellness programs with tobacco cessation provisions less effective.

Privacy

Under the EEOC proposed rule, the medical information collected through an employee health program may only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan and for other limited purposes described in the regulations. Where a wellness program is part of a group health plan, the individually identifiable health information collected from or created about participants as part of the wellness program is protected health information under the HIPAA Privacy, Security, and Breach Notification Rules. Thus these restrictions again duplicate requirements already in place under HIPAA.

The Commission has asked for comments on whether certain additional requirements should be imposed on wellness programs, suggesting that additional restrictions may emerge in the final rule. For example, the EEOC asks:

- Whether to be "voluntary" under the ADA, entities that offer incentives to encourage employees to disclose medical information must also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the employee is under the care of a physician and that any medical risks identified by that physician are under active treatment.
- Whether it would be appropriate for the Commission to provide that the incentives employers offer to employees to promote participation in wellness programs must not render the cost of health insurance "unaffordable" to employees within the meaning of the ACA rules governing eligibility for a premium subsidy. Generally, the cost of health insurance is affordable within the meaning of the ACA premium subsidy provisions if the portion an employee would have to pay for employee-only coverage would not exceed a specified percent of household income (9.56% in 2015).

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- Should the proposed notice requirements also include a requirement that employees participating in wellness programs that include disability-related inquiries and/or medical examinations, and that are part of a group health plan, provide prior, written, and knowing confirmation that their participation is voluntary?

Additional constraints and compliance challenges could ensue if the Commission adopts these supplemental requirements.

While the proposed rule provides some guidance on the parameters of the "voluntary" employee health program under the ADA, it does not paint a full picture of the treatment of incentive-based wellness programs under the statute or under GINA, and further restricts such programs in ways not contemplated under the ACA final regulations.

Perhaps more importantly, the proposed rules do not take into account the ADA's clearly stated safe harbor for appropriately formulated and administered bona fide employee benefit plans. This was apparently not an oversight. In a footnote in the proposed rule's preamble, the Commission summarily dismisses the ADA's insurance safe harbor and the *Seff v. Broward County* decision. Footnote 24 simply states the "Commission does not believe that the ADA's 'safe harbor' provision applicable to insurance, as interpreted by the court in *Seff* . . . is the proper basis for finding wellness program incentives permissible." According to the EEOC, "Reading the insurance safe harbor as exempting these programs from coverage would render the 'voluntary' provision superfluous."

The proposed rule does not address the question of whether offering incentives for a spousal risk assessment would run afoul of GINA. The Commission states that it intends to issue future regulations on this topic. Until such time, the issue remains very much unresolved. Note that the legislation pending in Congress would address both the ADA as well as GINA.

Public comments on the current proposed rule amending the ADA regulations and guidance can be submitted until June 19, 2015. It is important that the employer community and those seeking to promote the use of wellness programs as envisioned by the ACA provide their input to the Commission to try to ensure the final regulations provide the certainty and support for such programs that employers need.

Next Steps for Employers

With the announcement of the EEOC's rule, what should employers be doing to ensure their active wellness programs are in compliance? Recognizing that these regulations are proposed, we recommend that employers review their current wellness programs and identify where changes may need to be made to ensure compliance.

Employers who may be adversely affected if the proposed rules are issued in final form substantially as proposed should consider submitting comments on the proposed rule, either directly or through the appropriate industry groups. Comments submitted on regulatory proposals often have an impact on the form the final rules take.

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