WELL DONE? EEOC'S NEW PROPOSED RULES WOULD LIMIT EMPLOYER WELLNESS PROGRAMS TO DE MINIMIS INCENTIVES—WITH SIGNIFICANT EXCEPTIONS

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INTRODUCTION

On 7 January 2021, the U.S. Equal Employment Opportunity Commission (EEOC) proposed two new rules designed to clarify the scope of incentives that employers may offer employees as part of a wellness program without violating the Americans with Disabilities Act (ADA) or Genetic Information Nondiscrimination Act (GINA). The rules, which are subject to a 60-day public comment period, come in response to a 2017 court decision invalidating previous EEOC rules on this subject. In most instances, the rules would allow employers to offer employees only de minimis incentives for participating in a wellness program. However, there are some significant exceptions, including one that would allow employers to offer employees an incentive of up to 30 percent of the total cost of coverage, if the incentive is in connection with a health-contingent insurance plan.

BACKGROUND

For years, employers have offered incentives (or, alternatively, imposed penalties) to encourage employees to participate in health wellness programs.[1] Often, in order to earn an incentive, employees had to undergo medical exams or disclose medical conditions, which implicates the ADA and GINA. For example, the ADA generally prohibits employers from requiring medical exams or making inquiries of an employee's disability. GINA provides similar protections with respect to a person's family medical history. Nevertheless, both the ADA and GINA provide exceptions to this prohibition where the individual's participation in the wellness program is "voluntary."

In 2016, the EEOC promulgated a new rule pursuant to a "safe harbor" found in the ADA, whereby an employer's use of a penalty or incentive of up to 30 percent of the cost of self-only coverage would not render "involuntary" a wellness program that sought the disclosure of ADA-protected information.[2] At the same time, the EEOC issued a similar GINA rule that permitted employers to offer incentives of up to 30 percent of the cost of self-only coverage for disclosure of information about a spouse's "genetic information."[3] Significantly, employers could offer these incentives for both types of wellness programs: participatory programs (those that provided general education or rewards for participating in health activities, without any required results), and health-contingent programs (those that provided rewards for completion of a health-related activity or based on a health factor, such as satisfying a certain cholesterol level).[4] The incentive did not even have to be offered as part of a group health insurance program, as long as it did not exceed the 30 percent cap.

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Shortly thereafter, the American Association of Retired Persons (AARP) filed suit in the District of Columbia challenging the EEOC's 2017 rules. Ultimately, the court concluded that the rules were arbitrary and capricious and vacated them.[5] In response, the EEOC withdrew the incentive section of the ADA and GINA regulations in December 2018,[6] but until now, it had not offered any replacement language.

THE EEOC'S NEW PROPOSED RULES

In June 2020, the EEOC voted 2-1 to approve Notices of Proposed Rulemaking in response to the *AARP* decision. After subsequently being approved by the Office of Management and Budget, the rules' text now has been made public for the first time and sent to the *Federal Register* for publication.

Proposed ADA Rule

Under the proposed ADA rule, “most” wellness programs that make disability-related inquiries or require medical examinations may offer no more than de minimis incentives to employees.[7] Examples of such de minimis incentives include a water bottle or gift card of modest value. In contrast, incentives such as paying for an employee's annual gym membership or rewarding an employee with airline tickets would not be de minimis.

While the EEOC says “most” programs would be limited to de minimis incentives, there is a significant exception for health-contingent wellness programs, i.e., those that “require employees to satisfy a standard related to a health factor to receive a reward or avoid a penalty.” When the incentive is a part of, or qualifying as, group health insurance, the de minimis limit can be exceeded. In fact, the employer may offer “the maximum allowed incentive under the 2013 Health Insurance Portability and Accountability Act (HIPAA) regulations.” This maximum reward is currently 30 percent of the total cost of employee-only coverage (if the incentive is only available to the employee) or 30 percent of the total cost of coverage for employees and dependents (if the incentive is available to the employee and dependents). The 30 percent limits are increased to 50 percent to the extent the wellness program is designed to prevent or reduce tobacco use. In all cases, these limits are available only if the incentives comply with four additional HIPAA requirements:

1. Eligible individuals must be given an opportunity to qualify for a reward at least once per year;
2. a reasonable alternative standard (or waiver) to qualify for a reward must be given to any individual for whom it is unreasonably difficult or medically inadvisable to satisfy the standard due to a medical condition;
3. the program must be reasonably designed to promote health or prevent disease and not be overly burdensome, a subterfuge for discriminating based on a health factor, or highly suspect in the method chosen to promote health or prevent disease; and
4. the program must disclose a reasonable alternative standard to qualify for the reward in plan materials, and in the case of an outcome-based program, in any disclosure that an individual did not satisfy an initial outcome-based standard.[8]

Health-contingent plans that fail to meet any of these HIPAA requirements (as well as all participatory wellness plans) can offer only de minimis incentives.

Regardless of the incentive, any wellness program must still comply with other federal nondiscrimination laws. Additionally, the wellness program must otherwise be “voluntary,” i.e., an employer is prohibited from: (1)

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requiring employees to participate in any health care plan, (2) denying coverage from any plan, or (3) taking any adverse action against any employee who declines participation in any medical examination or wellness program.

Proposed GINA Rule

The EEOC explained that, while the ADA has a safe harbor provision that allows employers to award greater than de minimis incentives for health-contingent programs, GINA does not. Therefore, under the GINA proposed rule, employers may only offer "a de minimis incentive to an employee in return for the employee's family members providing information about the family members' manifestation of diseases or disorders to a wellness program."[9] Like its ADA counterpart, the GINA rule identifies "a water bottle or a gift card of modest value" as examples of "de minimis" incentives.

Besides allowing a de minimis incentive for an employee's family members providing information about their manifestation of diseases or disorders, the EEOC stated that an additional incentive—which apparently need not be de minimis—continues to be available "for participation in disease management and other programs." Under this separate GINA rule, employees who have provided genetic information (e.g., their family medical history) that "indicates that they are at increased risk of acquiring a health condition in the future" may be offered an incentive to "participate in disease management programs or other programs that promote healthy lifestyles, and to meet particular health goals as part of a health or genetic service." The EEOC provides an example of a permissible incentive under this provision: "Employees who disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment … and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA."

CONCLUSIONS

As of now, the EEOC's proposed rules are just that: proposed. Employers having concerns about how these rules may impact their wellness programs should take advantage of the 60-day public comment period. Indeed, the EEOC posed a number of specific questions regarding the proposed rules upon which it invited public comment. Of course, even if the rules do become finalized, that does not prevent future legal challenges of the type brought in *AARP v. EEOC*.[10]

However, assuming the current text of the rules becomes finalized and withstands any legal challenge, employers still must carefully determine which incentives are permissible. Generally, an employer could not distribute airline tickets or gym memberships in exchange for employees disclosing their health information or submitting to biometric screenings; such a policy would run afoul of the de minimis and insurance requirements. On the other hand, the ADA safe harbor enables employers to offer a financial incentive of up to 30 percent of the cost of coverage (assuming it is part of their health-contingent insurance program and is otherwise voluntary).

Under GINA, employers may not offer more than de minimis incentives in exchange for employees providing information about their family members' manifestation of diseases or disorders. However, employers may offer additional incentives to individuals who are at an increased risk of acquiring a health condition in order to help those individuals participate in disease management programs.

FOOTNOTES

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[1] The proposed ADA rule defines a "wellness program" to be "a program of health promotion or disease prevention that includes disability-related inquiries or medical examinations. Wellness programs that do not include disability-related inquiries or medical examinations, such as those that provide general health and educational information or reward employees for attending a smoking cessation or nutrition class, are not subject to the rules set forth in this section." RIN 3046-AB10 (amending 29 C.F.R. § 1630.14(d)(1)).

[2] *See* ADA Rule, 81 Fed. Reg. 31,133–35, 33,140 (May 17, 2016).

[3] *See* GINA Rule, 81 Fed. Reg. 31,158 (May 17, 2016). The GINA rule allowed an employee and the employee's spouse to *each* earn a 30 percent discount from the cost of single-payer coverage when both the employee and spouse were given the opportunity to participate in a wellness program.

[4] The EEOC's supplementary information to the proposed ADA rule explains the two types of wellness programs in greater detail:

Participatory wellness programs are "those that either do not provide a reward or do not include any condition for obtaining a reward that is based on an individual satisfying a standard related to a health factor. Examples of participatory wellness programs include: programs that reward employees for completing a health risk assessment regarding current health status without any further action (educational or otherwise) required by the employee with regard to the health issues identified as part of the assessment; diagnostic testing programs that provide rewards for participation in the program and do not base any part of the rewards on outcomes; programs that reimburse employees for the costs of participating in, or provide rewards for participating in, smoking cessation programs without regard to whether the employees quit smoking; and programs that provide rewards to employees for attending monthly, no-cost health education classes…."

Health-contingent wellness programs, by contrast, "require individuals to satisfy a standard related to a health factor to obtain a reward (or require an individual to undertake more than a similarly situated individual to obtain the same reward). Examples include programs that reward employees for walking, dieting, or exercising (activity-only wellness programs) or programs that use biometric screening or a health risk assessment to identify employees with certain medical conditions or risk factors (such as high cholesterol, blood pressure, or blood glucose levels) and reward those at low risk or those who meet certain health outcomes (outcome-based wellness programs)."

[5] *AARP v. EEOC*, 267 F. Supp. 3d 14 (D.D.C. 2017); *see also AARP v. EEOC*, 292 F. Supp. 3d 238, 245 (D.D.C. 2017) (where the same court said it was going to "hold EEOC to its intended deadline of August 2018 for the issuance of a notice of proposed rulemaking").

[6] 83 Fed. Reg. 65,296 (Dec. 20, 2018).

[7] RIN 3046-AB10.

[8] 26 C.F.R. § 54.9802-1(f).

[9] RIN 3046-AB11.

[10] *See also Kwessell v. Yale Univ.*, No. 3:19-cv-1098 (KAD) (D. Conn. 2019). In *Kwessell*, a class of Yale employees claimed Yale's wellness program was not "voluntary" because the employees were forced to pay a $1,300 annual fine if they did not adhere to "a strict schedule of examinations, testing and vaccination[s]" as part

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of Yale's program. Both sides' summary judgment motions are currently pending before the court.

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