

## EEOC CATCHES UP WITH THE WELLNESS WAVE

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### Labor, Employment and Workplace Safety Alert

By: Blinn-Spears, Bridget

The Equal Employment Opportunity Commission ("EEOC") has issued a proposed rule finally illuminating whether and to what extent incentives can be offered for participation in a wellness program that involves disability-related inquiries or medical examinations without running afoul of the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination based on disabilities, and it restricts employers from obtaining medical information about employees by prohibiting disability-related inquiries or requiring medical examinations. However, the ADA permits voluntary medical examinations and inquiries that are part of an employee health program. The meaning of the voluntary requirement has been an unanswered question with which employers have had to grapple for years. The proposed rule brings ADA regulations largely into line with existing regulations under other statutes, capping incentives at 30 percent of the total cost of employee-only coverage under the employer-sponsored health plan through which such workplace wellness programs must be offered.

### THE EEOC'S AGGRESSIVE INITIAL APPROACH

Although workplace wellness programs are widely available and viewed as largely beneficial to employees, the EEOC filed three lawsuits in 2014 attacking such programs under the ADA. The agency drew substantial public criticism for filing these lawsuits without issuing guidance to help companies comply with the law. Employers viewed these lawsuits as frivolous and out of step with both the healthcare marketplace and the intent of the Affordable Care Act ("ACA") and the Health Insurance Portability and Accountability Act ("HIPAA").

As the EEOC now acknowledges, many employers offer health programs and activities to improve employee health and reduce healthcare costs by promoting healthier lifestyles and preventing disease. Depending on their features and overall design, workplace wellness programs can be offered both as part of or outside group health plans, both insured and self-insured. Examples include nutrition classes, exercise facilities, weight loss and smoking cessation programs, and coaching toward health goals. Such programs often include health risk assessments and biometric screenings measuring risk factors like weight, cholesterol, blood glucose, and blood pressure. Employers frequently offer incentives such as time off, prizes, and different employee contribution rates for health plan coverage to encourage participation in such programs. Some incentives are based on participation, and others are outcome-based; some are rewards and others are penalties. The ACA and HIPAA encourage development and implementation of these programs. Most incentives are valued at less than \$500 per year according to the EEOC. Since the total cost of employee-only coverage under employer-sponsored health plans typically exceeds \$1,666.67 per year, most existing workplace wellness programs should fall within the proposed cap.

### ADA REGULATIONS BROUGHT INTO LINE WITH EXISTING REGULATIONS

Workplace wellness programs are already subject to a wide variety of regulations from several government agencies. The Department of Labor, Department of Treasury, and Department of Health and Human Services have issued joint regulations regarding nondiscrimination requirements under HIPAA, and the EEOC previously issued regulations regarding discrimination and gathering medical information. The previous EEOC guidance on the requirement that participation be voluntary in order to comply with the ADA consisted of a few sentences with no significant detail.

## **"Voluntary" Programs including Incentives**

For a program to be voluntary under the proposed rule, employers may not require employees to participate, nor may they deny or limit coverage for those who decline to participate. Adverse action against employees who refuse to participate or fail to achieve health outcomes is prohibited, as are retaliation, interference, coercion, intimidation or threatening employees in violation of the ADA. Offering limited incentives would not render a covered program involuntary so long as the total allowable incentives do not exceed 30 percent of the total cost of the employee-only coverage (the same maximum incentive allowed under HIPAA and the ACA for non-tobacco-related health-contingent wellness programs).

One notable difference is that under HIPAA and the ACA, smoking cessation programs may include incentives as high as 50 percent. However, the ADA incentive rules apply only to employee health programs that include disability-related inquiries or medical examinations. The EEOC's interpretive guidance takes the position that a smoking cessation program that asks only whether employees use tobacco is not such a program. Accordingly, a 50 percent incentive would be permissible under the ADA regulations for a smoking cessation program that limited its inquiry accordingly. Other tobacco cessation programs, such as those that test for the presence of nicotine or tobacco, would be subject to the 30 percent cap under the proposed rule.

The ADA proposed rule caps both rewards and penalties with respect to any wellness program that involves disability-related inquiries or medical examinations, including programs that are only participatory in nature. In contrast, the ACA and HIPAA regulations do not place any limit on the dollar value of participatory wellness program incentives.

## **Promotion of Health or Prevention of Disease**

Under the proposed rule, an employee health program, including disability-related inquiries and medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. The EEOC's interpretive guidance offers examples of compliant programs and those that would not meet the standard. Notably, gathering information without providing follow-up information or advice to employees would not be reasonably designed to promote health. Programs also would not be reasonably designed if they existed mainly to shift costs to employees based on their health. The guidance also emphasizes that employers must continue to provide reasonable accommodations for employees with disabilities that impact their participation in such programs.

## **Privacy Requirements**

Medical information collected through an employee health program may only be provided to a covered entity under the ADA (i.e., the employer) in aggregate terms that protect the identity of specific individuals except as needed to administer the health plan. Noting that such information is protected health information under HIPAA's privacy rule, the interpretive guidance provides that compliance with applicable HIPAA privacy requirements would generally satisfy this confidentiality requirement. The proposed rule also requires employers to provide a notice that clearly explains what medical information will be obtained, who will receive it and how it will be used, as well as what restrictions exist on its disclosure and how improper disclosure will be prevented.

## REMAINING OPEN QUESTIONS

Unanswered questions remain under the Genetic Information Nondiscrimination Act ("GINA") regarding whether and to what extent incentives can be offered for participation in a wellness program that involves the collection of genetic information, particularly with respect to an employee's spouse's completion of a health risk assessment or biometric screening. The EEOC has indicated further rulemaking on the definition of voluntary under GINA is yet to come. Employers can be hopeful it will issue those proposed rules before taking legal action against them for alleged violations of GINA.

## CONCLUSION

Employers should reevaluate their wellness programs in light of the proposed rule, with particular attention to tobacco cessation programs. If a company identifies concerns, it should consult with an employment or employee benefits attorney.

The EEOC is seeking comments on the proposed rule on or before June 19, 2015. The agency has explicitly requested comment on whether additional protection is needed for low-income employees.

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