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WELLNESS PROGRAMS

Employee wellness programs are becoming popular tools for employers seeking to combat rising healthcare costs, and the Affordability Care Act (ACA) offers increased motivation to implement wellness programs as it encourages group plan sponsors to offer incentives to participants who adhere to certain wellness program criteria.

On April 20, 2015, the Equal Employment Opportunity Commission (EEOC) issued a notice of proposed rulemaking on how the Americans with Disabilities Act (ADA) applies to employer wellness programs that are part of a group health plan. There have been concerns raised that such plans might be discriminatory against individuals with disabilities. The following are a series of questions and answers concerning the proposed rules.

1. What is a wellness program?

The term “wellness program” refers to programs and activities typically offered through employer-provided health plans as a means to help employees improve health and reduce health care costs. Some wellness programs ask employees to engage in healthier behavior (for example, by becoming more active, not smoking, or eating better), while other programs obtain medical information from employees by asking them to complete a health risk assessment or undergo biometric screening for risk factors (such as high blood pressure or cholesterol).

2. How does the ADA affect workplace wellness programs?

The ADA generally restricts employers from obtaining medical information from employees but allows medical examinations of employees and inquiries about their health if they are part of a “voluntary” employee health program. Prior to the proposed rules, the EEOC had not established a position on whether employers may offer incentives to encourage employees to participate in such programs or whether offering incentives would make participation involuntary. However, the Health Insurance Portability and Accountability Act (HIPAA), as amended by ACA, allows wellness programs to offer incentives – in the form of rewards to participating employees who achieve certain health outcomes or penalties if participating employees fail to achieve health outcomes.

The proposed rule provides that the ADA allows employers to offer incentives up to thirty percent (30%) of the cost of employee-only coverage to employees who participate in a wellness program and/or for achieving health outcomes. The rule also describes employer practices that are wellness programs and those that are not, defines what it means for an employee health program to be voluntary, and explains how ADA rules requiring employers to keep medical information confidential apply to medical information obtained as part of voluntary employee health programs.

3. When is a wellness program considered “an employee health program” within the meaning of the ADA?

A wellness program is considered an employee health program when it is reasonably designed to promote



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health or prevent disease. The program 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. For example:

- Asking employees to complete a health risk assessment or have a biometric screening for the purpose of alerting them to health risks (such as having high cholesterol or elevated blood pressure) is reasonably designed to promote health or prevent disease.
- Collecting and using aggregate information from employee health risk assessments to design and offer programs aimed at specific conditions prevalent in the workplace (such as diabetes or hypertension) also would meet this standard.

However, asking employees to provide medical information on a health risk assessment without providing any feedback about risk factors or without using aggregate information to design programs or treat any specific conditions would not be reasonably designed to promote health.

4. When is a health program considered “voluntary”?

The new rule lists several requirements that must be met in order for participation in employee health programs that include disability-related inquiries or medical examinations to be voluntary. Specifically, an employer:

- may not require employees to participate;
- may not deny access to health coverage or generally limit coverage under its health plans for non-participation; and
- may not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes).

Additionally, if a health program is considered a wellness program that is part of a group health plan, an employer must provide a notice clearly explaining what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure.

5. How much of an incentive may employers offer to encourage employees to participate in a wellness program or achieve certain health outcomes?

The maximum allowable incentive an employer can offer employees for participation in a wellness program or for achieving certain health outcomes, and the maximum allowable penalty an employer can impose on employees who do not participate or achieve certain health outcomes, is thirty percent (30%) of the total cost of employee-only coverage. The total cost of coverage is the amount the employer and employee pay, not just the employee's share of the cost.

6. What confidentiality requirements apply to the medical information employees provide when they participate in wellness programs?

The proposed rule does not change any of the exceptions to confidentiality requirements provided in the EEOC's existing ADA regulations but adds a new subsection. That section states that a covered entity only may receive information collected by a wellness program in aggregate form that does not disclose, and is not

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reasonably likely to disclose, the identity of specific individuals except as is necessary to administer the plan.

Wellness programs that are part of a group health plan, including those administered by employers, generally are subject to HIPAA requirements that mandate certain safeguards to protect the privacy of personal health information and set limits and conditions on the uses and disclosures of that information.

7. What is the purpose of this proposed rule and what happens next?

The new rule is a notice alerting the public that the EEOC plans to change the ADA regulations and interpretive guidance as they relate to employee health programs and is seeking comments about the proposed revisions. Anyone who wants to comment has sixty (60) days to do so until June 19, 2015. Members of the public may comment on anything in the proposed rule and in the interpretive guidance accompanying the rule. However, the commission has identified some specific issues of particular interest to aid in the development of a final rule, such as whether any additional safeguards are necessary to ensure that employees' participation in wellness programs is voluntary.

The EEOC then will evaluate all of the comments it receives and make revisions in response to those comments. The commission will then vote on a final rule. After the commission approves it, the final rule will be sent to the Office of Management and Budget and will be coordinated with other federal agencies before it is published in the Federal Register.

8. What should employers do until a final rule is published to make sure their wellness programs comply with the ADA?

While employers do not have to comply with the proposed rule, they may certainly do so. It is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the rule until a final rule is issued. Moreover, many of the requirements explicitly set forth in the proposed rule are already requirements under the law. For example, employers should make sure they:

- do not require employees to participate in a wellness program;
- do not deny health insurance to employees who do not participate; and
- do not take any adverse employment action or retaliate against, interfere with, coerce, or intimidate employees who do not participate in wellness programs or who do not achieve certain health outcomes.

Additionally, employers must provide reasonable accommodations that allow employees with disabilities to participate in wellness programs and obtain any incentives offered. For example, if attending a nutrition class is part of a wellness program, an employer may be required to provide a sign language interpreter, absent undue hardship, to enable an employee who is deaf to participate in the class. Employers also must ensure that they maintain any medical information they obtain from employees in a confidential manner.

When the rules are finalized, we will provide an update.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.