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EEOC Releases Proposed Rule on Employee Wellness Plans

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Yesterday, the ***Equal Employment Opportunity Commission (EEOC)*** released a long awaited proposed rule on employee wellness programs. The rule is designed to help companies structure such programs to meet their obligations under the ***Americans with Disabilities Act (ADA)***.

The ADA prohibits medical exams that are not job related and consistent with business necessity but permits voluntary wellness programs. Common wellness program offerings, such as health risk assessments (designed to identify potential health risks such as high cholesterol or blood pressure so that employees can address those risks through preventative care) are "medical exams" within the meaning of the ADA. When employers offer certain incentives, such as discounts on health premiums for participating in a health risk assessment, participation in the exams could be deemed "involuntary" if the incentive is so large that it is too good to refuse.

The EEOC's proposed rule attempts to clarify the amount of incentive an employer can provide to encourage (but not coerce) participation in health risk assessments and other wellness program offerings. Other provisions of the rule define a bona fide "wellness" program, require specific notice to participants about the medical information requested and address how confidentiality of medical information will be protected.

The EEOC has faced harsh criticism for leaving companies in the dark as to its position on how wellness programs should be structured to comply with the ADA and taking positions in litigation inconsistent with the Affordable Care Act (ACA), which encourages companies to provide wellness programs to promote the health of employees.

The proposed rule would permit employers to offer incentives amounting to up to 30 percent of the total cost of an employee-only health plan (including both the employer's and the employee's contributions) for participation in a wellness program that is: (i) part of a group health plan; and (ii) includes disability-related inquiries and/or medical examinations (as defined under the ADA) without running afoul of the ADA's requirement that such programs be "voluntary."

This 30 percent cap would apply to all of an employer's wellness programs combined, including both participatory programs (for example, completing a health risk assessment without any further action required by the employee based on the results) and health-contingent programs (programs that require an employee to meet a health-related goal in order to obtain an incentive), if such programs are part of a group health plan and include medical inquiries or exams. Interpretive guidance on the proposed rule further makes clear that employers offering wellness programs that include smoking cessation components that do not include medical inquiries or exams but merely ask employees whether or not they use tobacco (or whether they have ceased doing so at the end of the program) may offer incentives as high as 50 percent of the cost of employee coverage for participation in such a program, consistent with current Health Insurance Portability and Accountability Act (HIPAA) guidance as amended by the ACA (though any smoking cessation program that includes a medical inquiry or exam would be subject to the 30 percent cap).

Other relevant points of the proposed rule include how a valid employee wellness program is defined. Under the proposed rule, a program must be "reasonably designed to promote health or prevent disease" – that is, designed with an eye toward improving employee health rather than to shift costs of health care from the employer to targeted employees based on their health. The rule also sets out additional criteria for a wellness program to qualify as "voluntary" including that it:

- does not require an employee to participate in such a program;
- does not deny coverage under any of its group health plans or deny particular benefits packages within a group health plan or limit the extent of such coverage (except for allowed incentives); and
- does not take any other adverse action against employees who refuse to participate or fail to achieve certain health outcomes.

Employers would also be obligated to provide employees with a notice that clearly sets forth:

- 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.

Finally, to further protect employee privacy and ensure confidentiality of medical information, the proposed rule requires that any medical information collected through an employee wellness program be provided to an employer only in aggregate terms that do not disclose the identity of specific individuals taking part in the program.

Employers also must modify some offerings as an accommodation to individuals with disabilities to ensure an equal opportunity to qualify for program financial incentives or avoid penalties. For example, if an employer offers an incentive for completing a health screening that includes a blood

test, the employer would have to ensure that an alternative measure is provided for an employee with a disability that makes drawing blood dangerous.

The EEOC will accept public comment on the proposed rule through June 19, following which final regulations will be issued.

In the meantime, the EEOC has also published a series of Q & As, including one on the EEOC's view as to what employers should do until a final rule is implemented. It reads:

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 [notice of proposed rulemaking] 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 must 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.

Other useful links include the EEOC's Fact Sheet for Small Business on the proposed rule and an FAQ about implementation of the ACA with regard to wellness programs published jointly by the Department of Labor (DOL), Health and Human Services (HHS) and the Treasury.

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