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EEOC Issues Proposed Rule on the ADA and Wellness Programs

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Quick Facts:

- The EEOC issued a long-awaited proposed rule on how employers can structure their wellness programs under the ADA.
- The proposed rule provides guidance on permissible incentives for wellness programs.
- Until the rule is finalized, employers that follow the proposed rule will likely comply with the ADA's requirements for wellness programs.

On April 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) released a **proposed rule** that describes how the Americans with Disabilities Act (ADA) applies to employee wellness programs that include questions about employees' health or medical examinations. Although the ADA limits when employers may inquire about employees' health or require them to undergo medical examinations, these inquiries and exams are permitted if they are part of a **voluntary wellness program.**

On April 16, 2015, the EEOC released a proposed rule that provides much needed guidance on how the Americans with Disabilities Act (ADA) applies to employee wellness programs.

The long-awaited proposed rule would provide much needed guidance for employers on how to structure employee wellness programs without violating the ADA. Most importantly, the proposed rule addresses the amount of incentives that may be offered under employee wellness programs that are part of group health plans. This amount is generally consistent with HIPAA's limits on wellness program incentives, although the proposed rule does not fully incorporate HIPAA's increased incentive limit for tobacco cessation programs.

Implications for Employers

The EEOC is seeking comments on the proposed rule and may make revisions to its guidance before it is finalized. While employers are not required to comply with the proposed rule before it is finalized, they may choose to do so. According to the EEOC, it is unlikely that a court or the EEOC would find an ADA violation where an employer complied with the proposed guidance until a final rule is issued.

Wellness Programs

Many employers offer workplace wellness programs as a way to help control health care costs, encourage healthier lifestyles and prevent disease.

Employers may offer **participatory wellness programs**, which do not require individuals to meet a health-related standard in order to obtain an incentive. Participatory wellness programs include, for example, subsidized fitness club memberships, reimbursement of smoking cessation classes (without regard to whether the employee quits smoking) or rewards for completing a **health risk assessment (HRA)** without any further action required by the employee with respect to the health issues identified by the HRA.

Employers may also offer **health-contingent wellness programs**, which require individuals to satisfy a standard related to a health factor in order to obtain an incentive. For example, health-contingent wellness programs may require participants to participate in exercise programs, remain tobacco-free or attain certain results on biometric screenings (for example, low cholesterol, blood glucose and blood pressure levels) to obtain an incentive.

Wellness program incentives can be framed as rewards or penalties and often take the form of prizes, cash, or a reduction or increase in health care premiums or cost-sharing.

Legal Concerns for Wellness Programs

Employee wellness programs must be carefully designed to comply with the ADA and other federal laws that prohibit discrimination based on race, color, sex (including pregnancy), national origin, religion, compensation, age or genetic information.

Additionally, wellness programs that are part of group health plans must be designed to comply with HIPAA's nondiscrimination requirements, as amended by the Affordable Care Act (ACA). Under HIPAA, health-contingent wellness programs are required to follow certain standards related to nondiscrimination, including a standard that limits the amount of incentives that can be offered. The maximum reward under HIPAA for health-contingent wellness programs is **30 percent** of the cost of health coverage (or **50 percent** for programs designed to prevent or reduce tobacco use).

EEOC Guidance

Background

The ADA prohibits employers with **15 or more employees** from discriminating against individuals with disabilities. Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.

Neither the ADA nor prior EEOC guidance addressed the extent to which incentives affected the voluntary nature of a wellness program. Recently, the EEOC filed well-publicized lawsuits against a number of employers, alleging that their wellness programs violated the ADA and other federal fair employment laws. In response, Congress called on the EEOC to issue guidance on wellness programs and introduced legislation, the Preserving Employee Wellness Program Act, to provide more certainty for employers regarding wellness programs.

Proposed Guidance

The EEOC's proposed rule would establish the following parameters for permissible wellness program designs under the ADA.

- **Reasonable Design:** A wellness program must be reasonably designed to promote health or prevent disease. A program that collects information on an HRA to provide feedback to employees about their health risks, or that uses aggregate information from HRAs to design programs aimed at particular medical conditions is reasonably designed. A program that collects information without providing feedback to employees or without using the information to design specific health programs is not reasonably designed.
- **Voluntary**: Wellness programs must be voluntary. Employees may not be required to participate in a wellness program, may not be denied health insurance or given reduced health benefits if they do not participate, and may not be disciplined for not participating. Employers also may not interfere with the ADA rights of employees who do not want to participate in wellness programs, and may not coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes.

- **Employee Notice**: For wellness programs that are part of group health plans, employers **must provide employees with a notice** that describes what medical information will be collected as part of the wellness program, who will receive it, how the information will be used and how it will be kept confidential.
- **Limited Incentives**: For wellness programs that are part of group health plans, employers may offer limited incentives for employees to participate in the programs or to achieve certain health outcomes. Consistent with HIPAA, the amount of the incentive that may be offered for an employee to participate or to achieve health outcomes may not exceed **30 percent of the total cost of employee-only coverage**. For example, if the total cost of coverage paid by both the employer and employee for self-only coverage is $5,000, the maximum incentive for an employee under that plan is $1,500.

  This incentive limit only applies to wellness programs that include disability-related inquiries or medical examinations. According to the EEOC, a smoking cessation program that merely asks employees whether they use tobacco (or whether they stopped using tobacco upon completion of the program) is not a wellness program that includes disability-related inquiries or medical examinations. Thus, the EEOC's proposed guidance would allow an employer to offer incentives as high as 50 percent of the cost of employee coverage for that smoking cessation program, consistent with HIPAA's requirements. However, an incentive tied to a biometric screening or medical examination that tests for the presence of tobacco would be limited to 30 percent under the proposed rule.
- **Confidentiality**: Medical information obtained as part of a wellness program must be kept confidential. Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees.

  Wellness programs that are part of a group health plan may generally comply with their obligation to keep medical information confidential by complying with the HIPAA Privacy Rule. Employers that are not HIPAA covered entities may generally comply with the ADA by signing a certification, as provided for by HIPAA regulations, that they will not use or disclose individually identifiable medical information for employment purposes and abiding by that certification.

  Practices such as training individuals in the handling of confidential medical information, encryption of information in electronic form, and prompt reporting of breaches in confidentiality can help assure employees that their medical information is being handled properly.
- **Reasonable Accommodations**: Employers must provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employer offers. For example, an employer that offers an incentive for employees to attend a nutrition class must, absent undue hardship, provide a sign language interpreter for a deaf employee who needs one to participate in the class. An employer also may need to provide materials related to a wellness program in alternate format, such as large print or Braille, for someone with vision impairment. An employee may need to provide an alternative to a blood test if an employee's disability would make drawing blood dangerous.

More Information

To help employers understand the proposed guidance, the EEOC provided a fact sheet and a set of questions and answers.