Insight

IN-DEPTH DISCUSSION

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EEOC Issues Final Rules on Wellness Programs

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On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) issued final regulations governing the treatment of wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The final regulations provide direction to employers regarding workplace wellness programs that comply with the ADA and GINA. Also, according the Commission's press release, the guidance will help employers operate such programs consistent with applicable provisions of the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA).

The final rules, which closely track earlier proposals with some modifications, are not, however, entirely aligned with the ACA regulations. The differences between the EEOC's rules and the ACA regulations make the task of designing compliant wellness programs more complex. The new notice and rules regarding financial inducements will apply to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017. According to the EEOC, the rest of the provisions in the final regulations clarify existing obligations and apply both before and after the date of the final rules.

Background

Many employers use wellness programs to improve the health of their workforce and reduce healthcare costs by promoting healthy lifestyles and preventing disease. The ACA included provisions intended to encourage the use and effectiveness of wellness programs by codifying and enhancing regulations under HIPAA. Notably, the ACA increased the financial incentive that could be offered for health-contingent wellness programs, which require individuals to satisfy a standard related to a health factor to obtain a reward, from 20% of the cost of coverage to 30%. The ACA statute gave the Secretary of U.S. Department of Health and Human Services (HHS) the discretion to increase the threshold to up

to 50%. The ACA regulations, issued in 2013 by the HHS, the Department of Labor and the Internal Revenue Service, authorized a 50% cap for tobacco cessation programs. These caps set forth in HIPAA as amended by the ACA apply to health-contingent wellness programs in a health plan, not to participation-only wellness programs.[1]

Wellness programs often use medical questionnaires or health risk assessments and biometric screenings to determine an employee's health risk factors. In so doing, these programs implicate the ADA and GINA. As the EEOC press release explains:

> The ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses. Both laws, however, allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings to determine risk factors, if the employer is providing health or genetic services as part of a voluntary wellness program.

The central question addressed by the EEOC's wellness regulations is whether offering an incentive for employees or their family members to provide health information as part of a wellness program would render the program involuntary.

The question took on added significance for employers in light of EEOC enforcement actions targeting employer wellness programs under the ADA and GINA, drawing criticism from members of Congress. Uncertainty about the EEOC's standard for "voluntariness" left many employers concerned about possible EEOC enforcement action with respect to their wellness programs, even though the programs meet the requirements of the ACA. The enforcement action by the EEOC's and the lack of clear guidance prompted lawmakers to introduce the Preserving Employee Wellness Program Act in March 2015. The bill, sponsored by Rep. John Kline (R-MN), Chairman of the House Education and Workforce Committee, and Senator Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions Committee, provides that wellness programs will not violate the ADA or GINA if they offer rewards up to the maximum allowed percentage amounts set by the ACA. The legislation also provides that employers can offer financial incentives for family members of employees to participate in wellness programs without violating GINA. This bill is still pending.

In April, 2015, the EEOC issued proposed rules governing the use of financial incentives in connection with wellness programs under the ADA. In October of last year, the EEOC also issued proposed rules on financial incentives for an employee's spouse to participate in a wellness program under GINA. After receiving nearly 2,750 comments on the proposed ADA rule and 3,003 comments on the proposed GINA rule, EEOC simultaneously released final versions of both rules. According to EEOC Chair Jenny Yang, "[t]he Commission worked to harmonize HIPAA's goal of allowing incentives to encourage participation in wellness programs with ADA and GINA provisions that require that participation in certain types of wellness programs is voluntary."

The resulting final rules largely follow the proposals, with some limited changes. The ADA final rule provides that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30% of the total cost of self-only coverage, and impose a similar limitation even where the wellness program is not part of a group health plan, or where participation in the employer's group health plan is not required for participation in the wellness program. The GINA final rule caps the incentive attributable to a spouse's participation in a wellness program at 30%

1 For a discussion of the ACA final wellness regulations, see Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler Insight (Aug. 8, 2013).

of the total cost of self-only coverage. The relatively modest changes to the final rules fail to close the gap between the ACA and EEOC regulations, making this problematic for employers.

The Final ADA Wellness Regulations

In the proposed rule, the Commission sought comments on whether the final rule should limit the financial incentives offered as part of wellness programs outside of group health plans. The requirements of the final rule, including the limitation on incentives, does indeed apply to wellness programs that are outside an employer-sponsored group health plan. Additional provisions of the regulations require that an employee wellness program, including any disability-related inquiries and medical examinations that are part of such a program, be reasonably designed to promote health or prevent disease. To satisfy this standard, the program must have "a reasonable chance of improving the health of, or preventing disease in, participating employees, and 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." The regulations explain that a wellness program is not reasonably designed if it exists mainly to shift costs from the covered entity to targeted employees based on their health or to provide information to estimate future health care costs. Thus, if a wellness program does not provide information, advice or otherwise address a subset of conditions identified, it will not constitute a wellness program and will not meet the voluntary wellness program exception to the ADA.

The final rule includes standards on what makes a wellness program "voluntary." To be considered voluntary, an employer cannot require employee participation in the program. Nor can an employer deny coverage under any of its group health plan (or in particular benefit packages within its group health plan) for non-participation, or limit the extent of benefits. For example, a wellness program that allows employees to enroll in a "high" group health plan (such as a PPO) only if they complete a health risk assessment or complete a biometric screen is prohibited. Furthermore, an employer cannot take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not wish to participate in its wellness program.

The final rule retains a notice requirement set forth in the proposal. For an employee's participation in a wellness program that is part of a group health plan to be voluntary, the employer must provide a notice clearly explaining 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. The final rule clarifies that the notice requirements apply to all wellness programs that ask employees to respond to disability-related inquiries and/or undergo medical examinations. The Commission rejected concerns raised by some commenters that the notice requirement is duplicative of existing law. The EEOC will post on its website an example of a notice that meets the rule's requirements. The EEOC did, however, reject a requirement that employees provide prior, written, and knowing confirmation that their participation is voluntary.

One of the most significant concerns raised by the proposed rule was with respect to its 30% limit on the financial incentive that a wellness program could offer and the disconnect with the ACA regulations. Like the proposal, the total allowable incentive (financial or in-kind) cannot exceed 30% of the total cost of *self-only* coverage. In contrast, the ACA authorizes incentives of up to 30% of the cost of coverage in which the employee is enrolled. Therefore, under ACA, if an employee enrolls in family coverage, the maximum incentive limit would be 30% of the cost of family coverage. In contrast, the ADA final rule limits the incentive to:

1. 30% of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;

2. 30% of the total cost of self-only coverage under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
3. 30% of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and
4. 30% of the cost of self-only coverage under the second lowest cost Silver Plan for a 40-year-old nonsmoker on the state or federal health care Exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage.[2]

The Commission acknowledged the concerns commenters raised regarding the misalignment of the 30% limit on the total cost of self-only coverage does not align with the ACA tri-Department regulations. The EEOC rejected calls to align the EEOC's ADA regulations with those under the ACA, explaining that, because the ADA's prohibitions on discrimination apply only to applicants and employees, not to their spouses and other dependents, the ADA wellness rule does not address the incentives wellness programs may offer in connection with dependent or spousal participation (although the GINA rule does). The EEOC's explanation still leaves employers in the difficult situation of complying with multiple standards.[3]

The ADA final wellness rules also fail to align the treatment of tobacco cessation programs with those under the ACA rules. The ACA wellness program rules allow incentives of up to 50% for tobacco cessation programs. Under the final ADA rules, for a wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program), an employer can offer an incentive up to 50% of the cost of self-only coverage. However, where an employer requires any biometric screening or other medical procedure that tests for the presence of nicotine or tobacco, the rule's 30% incentive limit applies.

Like the proposed rule, the final rule requires that medical information collected through an employee health program only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan and for other limited purposes described in the regulations. For a wellness program that is part of a group health plan, the individually identifiable health information collected from or created about participants as part of the wellness program is protected health information under the HIPAA Privacy, Security, and Breach Notification Rules. Again, the EEOC's restrictions are duplicative and not entirely aligned with requirements already in place under HIPAA. In fact, the EEOC final rule adds an additional mandate to the proposal prohibiting an employer from requiring an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information or to waive confidentiality protections available under the ADA as a condition for participating in a wellness program or receiving an incentive.

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2 Note that in connection with items 2, 3, and 4, these scenarios have to do with a wellness program in which participation in the employer's group health plan that would otherwise be governed by ERISA is not required for participation, or where the wellness program is separate and apart from an otherwise compliance group health plan. In these circumstances, if the wellness program is not subject to ERISA, it will be subject to state employment laws, as ERISA preemption will not apply. Therefore, these laws must be consulted where any such wellness program structure is contemplated. If a separate (or "stand-alone") wellness program would constitute a group health plan in and of itself, compliance with ERISA, the ACA, COBRA, HIPAA, and other applicable federal employee benefits laws must be addressed. Plans of governmental entities and certain churches are not subject to ERISA in any event.

3 The result of the EEOC's more restrictive standard for wellness programs under the ADA is that only employers with fewer than 15 employees (who are thus not subject to the ADA) may apply the greater financial incentive for a wellness program as provided under the ACA final regulations.

The proposed rules failed to take into account the ADA's clearly stated safe harbor for appropriately formulated and administered bona fide employee benefit plans.[4] In a 2012 decision, *Seff v Broward County*, the U.S. Court of Appeals for the Eleventh Circuit held that an employer that imposed a surcharge on employees who did not participate in the wellness program did not violate the ADA because the program fell under the ADA's "bona fide plan" safe harbor exception. In a footnote in the proposed rule's preamble, the Commission summarily dismisses the ADA's insurance safe harbor and the *Seff v. Broward County* decision. The final rule expands upon the EEOC's interpretation that the safe harbor provision is inapplicable to wellness programs. Dismissing the concerns raised by the some commenters, that the Commission was effectively rewriting the statute, the EEOC responded that the "plain language of the safe harbor provision, and an abundance of legislative history explaining it, make its narrow purpose clear." Whether the EEOC's view of safe harbor provision prevails will likely be determined in courts based on additional challenges.[5]

The GINA Final Wellness Regulations

GINA prohibits employers from acquiring an employee's genetic information (which includes family medical history) except in limited circumstances. One of the exceptions permits employers offering health or genetic services, including those offered as part of voluntary wellness programs, to request genetic information. The EEOC's final rule on Title II of GINA explained that an employer could not offer a financial inducement for providing genetic information as part of a wellness program. However, the final rule did not expressly address the issue of offering an incentive for a spouse of an employee to provide information about the spouse's current or past health status. Read one way, such an inducement could be seen to violate the prohibition on providing financial inducements in return for an employee's protected genetic information because the spouse is a family member of the employee. However, the EEOC's final rule on Title II of GINA specifically permits employers to seek such information from a family member who is receiving health or genetic services from the employer, including such services offered as part of a voluntary wellness program, as long as each of the requirements concerning health or genetic services provided on a voluntary basis is met.

The final GINA wellness rule attempts to resolve this apparent conflict. Like the proposed rule, the final rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employee—including as part of a wellness program—and provides information about his or her current or past health status. This kind of information typically is provided as part of a health risk assessment, which may include a questionnaire or medical examination. As with the ADA final wellness rule, the GINA final rule applies to all wellness programs, regardless of whether the wellness program is offered through a group health plan.

Consistent with the ADA final rule, the maximum share of the inducement attributable to the employee's participation in an employer-sponsored wellness program (or multiple employer-sponsored wellness programs that request such information) is 30% of the cost of *self-only* coverage. Furthermore, the maximum total inducement for a spouse to provide information about his or her health status will also be 30% of the total cost of (employee) *self-only* coverage, so that the combined total inducement will be no

4 42 U.S.C. 12201(c). The "safe harbor" generally exempts the establishment, sponsorship, observance or administration of a bona fide employee benefit plan from subtitles I through III of Title I and all of Title IV of the ADA if the plan is not used as a subterfuge to avoid the purposes of the ADA and (1) is based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (2) is not subject to State laws regulating insurance. The safe harbor does not exclude a wellness program that is part of a group health plan from its application.

5 The District Court in *EEOC v. Flambeau, Inc.* followed the rationale in the *Seff* decision, holding that the safe harbor applied to a wellness program requiring participants who did not comply with a participation-only wellness program to pay the entire cost of coverage, and dismissing the EEOC's suit. 2015 WL 9593632 (W.D. Wis. Dec. 30, 2015). An opportunity for early judicial review of the EEOC's position on the "safe harbor" may be forthcoming. The EEOC has asked the district court in the case of *EEOC v. Orion Energy Systems, Inc.* to take its position on the safe harbor as set forth in the final regulations into account in pending cross motions for summary judgment in that case. *EEOC v. Orion Energy, Inc.*, Case 1:14-cv-01019-WCG (E.D. Wis.), Notice of Supplemental Authority, DKT 47, filed May 27, 2016).

more than twice the cost of 30% of *self-only* coverage . If a wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is 30% of the total cost of *self-only* coverage under the group health plan in which the employee and family members are enrolled. For example, if an employee is enrolled in a self and family plan at a total cost (considering both the employee's and employer's contributions to the premium) of $14,000 and that plan has a self-only option for a total cost of $6,000, the maximum inducement for the employee's spouse to provide health information is $1,800.[6]

If an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, the maximum inducement is 30% of the lowest cost major medical *self-only* plan the employer offers. So, if an employer has three self-only major medical plans that range in total cost from $5,000 to $8,000, the maximum inducement that can be provided for the employee's spouse to provide health information is $1,500 (30% of the cost of self-only coverage under its lowest cost plan).

Like the ADA final rule, the GINA final rule addresses situations where the employer does not offer a group health plan. If the employer does not offer a group health plan, then the maximum inducement for the spouse to provide health information is 30% of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan available through the state or federal Exchange in the location that the employer has identified as its principal place of business. For example, if a 40-year-old non-smoker could purchase the second lowest cost Silver Plan for $4,000, the maximum inducement the employer could offered for the employee's spouse to provide health information as part of a wellness program is $1,200.

As in the proposed rule, the EEOC's final GINA wellness rule prohibits inducements for information about children of employees. The fact that the final rule treats health information about spouses and children differently with respect to wellness program inducements, however, does not mean that employers are prohibited from offering health or genetic services (including participation in an employer-sponsored wellness program) to an employee's children on a voluntary basis. They may do so, but may not offer any inducement in exchange for information about the manifestation of any disease or disorder in the child.

With respect to confidentiality, the EEOC notes, "[t]he Commission intends to continue its vigorous enforcement of these requirements and believes that they already provide strong protections against unlawful disclosure of genetic information provided as part of employer-sponsored wellness programs." Although the final rule does not alter the existing GINA requirements with respect to confidentiality, the EEOC provided a description of "best practices" in an appendix to the ADA final rule and "urge[s] employers to consider adopting best practices."

In other respects, the GINA final rule tracks the ADA final rule and is subject to similar criticisms. Notably, the tying of the financial inducement to the lowest cost of *self-only* coverage is inconsistent with the ACA regulations and the requirement that wellness programs be reasonably designed to promote health or prevent disease should, instead, be covered by the ACA rules, and may in many cases severely restrict the inducements that may be offered under wellness programs. These concerns will no doubt persist as employers navigate the new rules for wellness programs.

6 Therefore, if both the employee and spouse comply with the wellness requirement, the total available incentive would be $3,600.00. Note that the available incentive under the ACA final regulations in this scenario would be 30% of the total cost of the coverage in which the employee is enrolled, or $4,200 (30% of $14,000). Therefore, in almost all cases, the imposition of the limitation under the GINA final rule results in a significant cutback of the incentives that would have been available under the final ACA wellness regulations.

Recommendations

We recommend that employers review their current wellness programs and identify where changes may need to be made to ensure compliance with the new ADA and GINA wellness regulations, including the new notice requirements.