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Does Your Employer Wellness Program Comply with the ADA?

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New rules from the EEOC explain how an employer can offer wellness program incentives and discounts without violating the American with Disabilities Act (ADA). The ADA limits the kinds of medical information employers may obtain from employees through disability-related inquiries or medical examinations. The EEOC has consistently taken the position that a wellness program could violate the ADA even if the wellness program complies with the numerous other regulations applicable to wellness programs that have been issued by the Departments of Labor, Treasury, and Health and Human Services. The EEOC has recently filed actions against some companies, arguing that their wellness programs violate the ADA by requiring physical examinations or biometric testing in order for a participant to receive wellness program rewards or incentives.

To date, it has been difficult for employers to know how to design their wellness programs to comply with the ADA since there has been no guidance. Now the EEOC has published proposed regulations that outline the EEOC's position on the use of physical examinations and biometric testing under employment-based wellness programs. The EEOC also requested comments on many open issues, such as whether employers must obtain written certification from employees that their participation is voluntary.

To understand the context of the proposed regulations, some background on other wellness programs requirements is in order. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits group health plans from discriminating as to premiums (and other plan benefits) among similarly situated individuals based on a “health factor” such as health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. There is an exception to this nondiscrimination rule that allows certain “wellness programs” to provide rewards or premium discounts of up to 30% (or 50% for tobacco-based reasons) based on a health factor, provided certain requirements are met. For example, an employer generally is permitted to have a wellness program that provides health plan premium discounts to participants who meet certain cholesterol targets.

Wellness programs that comply with HIPAA must separately comply with the ADA. The new EEOC rules provide guidance about how to comply with the ADA. While employers are not required to follow these rules since they are only proposed, compliance will likely avoid an ADA charge. The main requirements of the EEOC rules are:

- **Incentives are limited to 30% of employee-only coverage.** The

EEOC limits any incentives to 30% of the cost of employee-only health plan coverage, for incentives subject to the ADA. Note this appears to be more restrictive than the current limit under HIPAA rules, which allow up to 30% of the employee's actual coverage, not necessarily employee-only coverage. In addition, this limit applies to all types of wellness programs – even participatory programs (i.e., those that just require participation and are not health contingent), which under other applicable rules are not subject to an incentive dollar limit.

- **Programs must be reasonably designed to promote health or prevent disease.** The wellness 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." For example, a biometric screening that alerts an employee of health risks about which he or she was unaware is a program that is reasonably designed to promote health or prevent disease. Another reasonably designed program would be if the employer collects aggregate health information so that the employer could design a specific program to address a need, such as prevention of high blood pressure. In contrast, collecting health information without giving employees feedback and without using the aggregate information to design health programs would not be reasonably designed to promote health or prevent disease.
- **Participation must be completely voluntary.** This means that the employer cannot limit health plan participation or coverage based on participation, and is prohibited from taking any other adverse action against the employee. Moreover, if the wellness program is part of a group health plan, the employer must give a notice of what medical information will be obtained, who will receive it, how information will be used, restrictions on disclosures and how improper disclosure will be prevented.
- **Disclosure is limited and confidentiality must be maintained.** Any information collected can only be disclosed and used in the aggregate, or in a manner that does not disclose individual participant identities. HIPAA privacy rules generally also apply. The EEOC recommends the best practice of having a firewall between employees who have access to this information and employees involved in hiring and similar decisions; a third-party vendor may be helpful. Any breaches of confidentiality should be reported to affected employees and investigated, with consequences for responsible individuals or vendors.
- **The program must provide reasonable accommodations.** In order for a wellness program to comply under the ADA, the wellness program must provide reasonable accommodations that, absent undue hardship, enable employees with disabilities to earn any incentives under the wellness program – even for participatory programs (which wouldn't be required to provide a reasonable alternative under other applicable rules). For example, an employer

may have to offer a sign language interpreter for deaf employees if there is an incentive for attending a nutrition class.

The EEOC clarified that a smoking cessation program or other tobacco-related wellness program does not include disability-related inquiries or medical examinations for purposes of the maximum incentive. Under HIPAA regulations, employers can offer incentives as high as 50% on those programs. In contrast, a medical examination that tests for the presence of nicotine involves a medical examination and thus is subject to these EEOC rules and the 30% limit.

Employers should review their wellness programs to ensure that the programs meet the new EEOC rules. In particular, employers with participatory discounts need to consider the 30% limit, as well as whether to change discounts based on total cost to be limited to employee-only cost. In addition, employers with tobacco programs with more than a 30% discount should determine if they need to reduce the discount. Finally, employers with wellness programs that are part of a group health plan should consider to whether to send employees a notice about the wellness program.
