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EEOC Issues Final Wellness Regulations

The EEOC has released final regulations that describe the ADA and GINA requirements for compliant employer wellness programs. They also address the interaction of these requirements with the HIPAA wellness program rules (amended by the Affordable Care Act) — a source of confusion for employers. Generally, these final rules adhere to the principles established in the 2015 proposed regulations, but also tighten some requirements. Together with the HIPAA regulations, they establish the legal framework for employer wellness programs.

Background

Title I of the Americans with Disabilities Act (ADA), prohibits employment discrimination on the basis of disability. Among other things, the ADA restricts when an employer can make disability-related inquiries (e.g., health risk assessments) or require medical examinations (e.g., biometric screenings) that are not "job-related or consistent with business necessity." The ADA allows such exams and inquiries if they are either one of or part of these programs:

- "Bona fide benefit plan" — i.e., insured and self-insured health plans that are based on underwriting risks, classifying risks, or administering such risks, and not subterfuge for discrimination
- Voluntary employee health program where any medical records acquired as part of the program are kept confidential and separate from personnel records

In April 2015, the EEOC issued proposed regulations and interpretive guidance that would amend existing ADA regulations. (See our April 17, 2015 *FYI Alert* and our *FYI In-Depth* from December 9, 2015.) The proposed regulations address the extent to which a wellness program that includes medical examinations and/or disability-related inquiries can provide incentives and still fall within the ADA's exception for voluntary employee health programs. They provide that medical examinations and/or disability-related inquiries are permitted as long as the program is reasonably designed, is voluntary, meets confidentiality and notice requirements and, if part of a group health plan, limits any incentive to 30 percent of the cost of employee-only coverage.

The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination on the basis of an individual's "genetic information" by

group health plans, insurers and employers. Title II bars employment discrimination based on genetic information, but provides several exceptions, including employer-provided health or genetic services offered as part of a voluntary wellness program. EEOC guidance, including proposed regulations, provides that for a voluntary wellness program to meet the exception, the program must be reasonably designed, be voluntary, be authorized by the individual, and meet certain confidentiality requirements. Information about the current or past health status of a spouse is considered genetic information of the employee. Generally, offering an incentive in return for this information is prohibited unless it is offered as part of a wellness program under the group health plan, only connected to questions about the spouse's past or current health status, associated with health coverage under which the employee and spouse are covered, and the maximum incentive (for both the employee and spouse) does not exceed 30 percent of the total cost of the coverage in which the employee is enrolled.

Both the ADA and Title II of GINA are enforced by the Equal Employment Opportunity Commission (EEOC).

ADA

Today the EEOC issued final regulations providing guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. The final rules generally track the proposed rules. Some highlights include:

- The EEOC reaffirms its position that the bona fide benefit plan safe harbor does not apply to a wellness program that includes disability-related inquiries or medical examinations.

  Comment. Despite this position, also stated in the preamble of the proposed regulations, a federal district court in Wisconsin (and 11th Circuit Court of Appeals) found that the bona fide benefit plan safe harbor applied to an employer's wellness program incentive provided as a condition of participation in the group health plan. (See our January 19, 2016 *For Your Information.*) This issue is likely to continue to play out in the courts. It will be interesting to see what the courts do now that the regulations are final.

- The regulations retain the requirement that coverage may not be denied because of nonparticipation in the wellness program. The employer may not deny coverage under any group health plan or particular benefit packages within a group health plan, or limit the extent of benefits (with the exception of the incentive limit).
- A notice concerning the information collected, how and with whom it will be shared, and how it will be kept confidential is required to be disseminated to all wellness program participants whether or not the program is part of a group health plan. Notably, the EEOC declined to require employers to get prior, written authorization from employees. The EEOC will provide a sample notice within 30 days of publication of the rules.
- The final rules do not include an exception for de minimis inducements. The rules apply irrespective of the value of the incentive or disincentive. (This also applies under GINA.)
- The 30 percent incentive limit applies to self-only coverage, as proposed. The regulations explain the application of the 30 percent incentive limit to various program designs, including when participation in the wellness program depends on enrollment in the employer's group health plan and when it does not. The regulations do not adopt the HIPAA increased incentive limit for programs related to tobacco use. Note that these rules apply to tobacco-related wellness programs that require a medical test (i.e., they do not apply to wellness programs that simply ask about tobacco use).

Comment. The EEOC declined to change the incentive limit to mirror the HIPAA requirement — the cost of coverage in which the employee is enrolled — stating that the ADA only applies to incentives offered for employee, not spousal, participation.

GINA

The EEOC also issued final regulations addressing wellness programs under GINA. The final regulations reiterate that limited inducements/rewards are permitted in return for a spouse providing information about his or her current or past health status (now referred to in the regulations as "manifestation of disease and disorder"). Some highlights under the final rules include:

- The final regulations adjust the reward limit. The maximum incentive permitted may not exceed 30 percent of the cost of self-only coverage for each the spouse and the employee. That is, the total, combined inducement can be no more than twice the amount of 30 percent of the cost of self-only coverage.
- Consistent with the proposed rules, inducements are not permitted in exchange for information about an employee's children, regardless of age.
- The rules apply to all wellness programs that request genetic information, regardless of whether the employee or spouse is enrolled in the employer's group health plan.
- An employer will violate GINA if it denies an employee and/or family member access to health coverage or any benefit package under the plan because of nonparticipation in a wellness program.

In Closing

The notice requirements and incentive limits for the ADA and GINA are applicable for the first day of the first plan year beginning on or after January 1, 2017. It appears that provisions other than these two are already in effect. Employers should seek counsel with their trusted advisors to provide a gap analysis, looking at their current programs in light of these final regulations to assess any risk and determine what changes, if any, are needed.

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