

EEOC Wellness Regulations

What Do They Mean for Employer-Sponsored Programs?

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Background

ADA

The Americans with Disability Act (“ADA”) prohibits employers from making disability-related inquiries with and requiring medical examinations from employees, *unless*:

- medical examinations and inquiries are “job-related and consistent with business necessity,” or
- medical examinations and inquiries are voluntary.

Background

EEOC Guidance

Before the April 16, 2015 Proposed Regulations, the *only* written guidance issued by the U.S. Equal Employment Opportunity Commission (“EEOC”) was in July 27, 2000.

EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the ADA.

“A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.”

Background

EEOC Public Statements

- May 10, 2012 - EEOC Staff for the American Bar Association's Joint Committee of Employee Benefits Technical Session

“The EEOC has taken no position as to whether a financial incentive provided as part of a wellness program that makes disability-related inquiries and/or requires medical examinations ... would render the program involuntary.”

- Jan. 18, 2013 - EEOC Informal Discussion Letter, ADA: Voluntary Wellness Programs & Reasonable Accommodation

“The EEOC has not taken a position on whether and to what extent a wellness program reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary.”

Background

EEOC Public Statements

- August 20, 2014 – EEOC Press Release by John Hendrickson, regional attorney for the EEOC Chicago district.

“Employers certainly may have voluntary wellness programs . . . but they have to actually be voluntary. They can’t compel participation in medical tests or questions that are not job-related and consistent with business necessity by cancelling coverage or imposing enormous penalties such as shifting 100 percent of the premium cost onto the back of the employee who chooses not to participate.”

Background

EEOC Litigation

- The EEOC recently alleged some wellness programs violate the ADA by requiring participation in associated medical exams because of financial inducements to incentivize participation.
 - August 20, 2014: *EEOC v. Orion Energy Systems, Inc.*
 - September 30, 2014: *EEOC v. Flambeau, Inc.*
 - October 27, 2014: *EEOC v. Honeywell International, Inc.*
(Motion for TRO Denied on November 3, 2014)

- The EEOC also argued in *Honeywell* that making financial inducements contingent upon participation by an employee's spouse violates the Genetic Information Nondiscrimination Act ("GINA").

Background

EEOC Litigation

- *EEOC v. Orion Energy Systems, Inc.*

- If participation is declined, employees must cover 100 percent of the premiums—plus a \$50 monthly penalty.
- Termination of employment allegedly followed employee opting-out.

- *EEOC v. Flambeau, Inc.*

- If participation is declined, employee's coverage is cancelled.
- Employee provided opportunity to participate in the plan as a COBRA participant, paying 100 percent of the premiums.

- *EEOC v. Honeywell International, Inc.*

- \$500 surcharge paid incrementally per pay period
- \$1,000 premium increase for each enrollee who is a tobacco user,
- Withholding of an HSA contribution ranging from \$250 to \$1,500
- Client Alert — [Mainstream Wellness Program Challenged in EEOC v. Honeywell](#) (November 2014)

Background

HIPPA

- Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)
 - Nondiscrimination Rules
 - Plans may not require an individual to pay higher premium or contribution rates than other similarly situated individuals based on a health factor.
 - Exception: Rewards for adherence to certain wellness programs.

- 2006 HIPAA Regulations by the DOL, HHS, and Treasury
 - Limits on Total Rewards
 - Participatory wellness program: Unlimited
 - Health-Contingent wellness program: 20% total plan coverage cost

Background

HIPPA, as Amended by ACA

- 2013 Affordable Care Act (“ACA”) Regulations
 - by the DOL, HHS, and Treasury
 - Limits on Total Incentives (Reward or Penalty)
 - Participatory wellness program: Unlimited
 - Health-Contingent wellness program: 30% of total coverage cost under plan
 - Tobacco Cessation: 50% of total coverage cost under plan

Summary of EEOC Proposed Rule

Designed to Promote Health

- [Amendments to Regulations Under the Americans With Disabilities Act](#)
- Wellness programs, including any disability-related inquiries and medical examinations that are part of such programs, must be reasonably designed to promote health or prevent disease.
- Must not be:
 - overly burdensome,
 - a subterfuge for violating employment discrimination laws, or
 - highly suspect in the method chosen to promote health or prevent disease.

Examples: collection of medical information without feedback; overly burdensome amount of time to participate; unreasonably intrusive procedures; and significant costs.

Summary of EEOC Proposed Rule

Limit on Incentives

- Total Limits on Incentives
 - Participatory
 - 30% of the total cost of employee-only coverage.
 - Health-Contingent
 - (including tobacco cessation programs)
 - 30% of the total cost of employee-only coverage.
- Incentives may be in the form of a reward or penalty.

Summary of EEOC Proposed Rule

Voluntary: Prohibited Actions

Voluntary means that an employer does not:

- Require employees to participate.
- Deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation or limit the extent of such coverage.
- Take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees.

Summary of EEOC Proposed Rule

Voluntary: Notice Requirements

To ensure voluntary participation, an employer must provide a notice that clearly explains:

- What medical information will be obtained.
- Who will receive the medical information.
- How the medical information will be used.
- The restrictions on its disclosure.
- The methods the covered entity will employ to prevent improper disclosure of the medical information.

Summary of EEOC Proposed Rule

Confidential Medical Information

- Disclosure of medical information from wellness programs to employers:
 - aggregate form - not reasonably likely to disclose the identity of specific individuals;
 - except as needed to administer the health plan.
- Compliance with the HIPAA Privacy Rule likely satisfies this requirement.

Summary of EEOC Proposed Rule

Reasonable Accommodations

- Must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any reward or avoid any penalty offered.
- Example: Alternative to requirement to meet a fitness standard, such as BMI or cholesterol must be waived for someone whose disability would not permit this or would make it inadvisable

Summary of EEOC Proposed Rule

Reasonable Accommodations

- General ADA Title I reasonable accommodation requirements still apply.
- Example: An employer would, absent undue hardship, upon request, have to provide written materials that are part of a wellness program in an alternate format, such as in large print or on computer disk, for someone with a vision impairment.

Summary of EEOC Proposed Rule

GINA

- The proposed rule does not address the extent to which Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) affects an employer’s ability to condition incentives on a family member’s participation in a wellness program.
- This issue will be addressed in future EEOC rulemaking.

Summary of EEOC Proposed Rule

Seff v. Broward County

- EEOC proposed rule, footnote 24 (and as EEOC argued in Honeywell case) takes position that ADA's bona fide benefit plan safe harbor provision is inapplicable, contrary to the 11th Circuit U.S. Court of Appeals in *Seff v. Broward County*, that voluntariness is not an issue when wellness program incentives are part of a health insurance plan because they are then in the bona fide benefit plan safety harbor.
- The EEOC posits that such an interpretation would render the “voluntary” exception superfluous.

EEOC Rule Inconsistencies with ACA

Incentives: Limits

ACA

- Participatory wellness program incentives are unlimited.
- Health-contingent wellness programs incentives related to tobacco cessation are up to 50%.

ADA/EEOC

- Participatory wellness program incentives limited to 30%.
- Ignores additional 20% incentive for tobacco cessation under health-contingent wellness programs.

EEOC Rule Inconsistencies with ACA

Incentives: Determining Total Cost

ACA

- Total reward for wellness programs based upon “the total cost of coverage under the plan.”

ADA

- Total reward for wellness programs based upon “the total cost of **employee-only** coverage under the plan.”

EEOC Rule Inconsistencies with ACA

Reasonable Accommodations

- HIPAA/ACA Reasonable Alternatives
 - Health-Contingent Only
 - Activity-Only: Reasonable alternative standard (or waiver of applicable standard) for obtaining reward, due to medical condition.
 - Outcome-Based: Reasonable alternative standard (or waiver) if initial standard is not met due to a measurement, test, or screening.
 - Likely fulfills employer's ADA reasonable accommodations obligation for health-contingent wellness programs.
- ADA Reasonable Accommodations
 - Participatory and Health Contingent.

EEOC Request for Comments

The Voluntary Requirement

Must employers that offer incentives to encourage employees to disclose medical information **also offer similar incentives to persons who choose not to disclose such information**, but who instead provide medical professional certification stating:

- employee is under the care of a physician and
- any medical risks identified by that physician are under active treatment.

EEOC Request for Comments

The Voluntary Requirement

Whether incentives that render the cost of health insurance unaffordable to employees is deemed coercive and “involuntary” when connected to required disability-related inquiries and medical exams, where unaffordable is based on the premium assistance provisions in the ACA, *i.e.*, the portion an employee must pay for employee-only coverage exceeds a specified percent of household income (9.56% in 2015).

EEOC Request for Comments

Notice Requirements

Should the proposed notice include a requirement that employees participating in wellness programs provide **prior, written, and knowing confirmation that their participation is voluntary?**

- If so, what should be the form of authorization?
- Should principles of informed consent be used?
- What are costs of developing and maintaining the forms?
- Could existing forms provide adequate protections, e.g., HIPAA forms employers already use in connection with wellness programs, or forms employers use to comply with Title II of GINA.

EEOC Request for Comments

Notice Requirements

- Should the proposed notice requirement apply only to
 - more than de minimis rewards or penalties to employees who participate (or decline to participate) where wellness programs ask disability-related inquiries or have medical examinations?
- If so, how should the Commission define “de minimis”?

EEOC Request for Comments

Designed to Promote Health

- Which best practices ensure that wellness programs are:
 - designed to promote health
 - do not operate to shift costs to employees with health impairments or stigmatized conditions?
- Is the EEOC now taking over HHS's role?

EEOC Request for Comments

Limited Incentives on Non-GHP Programs

- Whether employers offer (or are likely to offer in the future) wellness programs outside of a group health plan or group health insurance coverage that:
 - use incentives to promote participation in such programs or
 - to encourage employees to achieve certain health outcomes and
 - the extent to which the ADA regulations should limit incentives provided in such programs.

EEOC Request for Comments

Tobacco Cessation Limits

What is the impact of the proposed rule's 30% limit on incentives on tobacco cessation programs where employees are asked to respond to disability-related inquiries or undergo medical examinations?

Key Employer Concerns

Plan & Program Design

- EEOC's sometimes conflicting interpretation of wellness program requirements with the ACA regulations suggests approaching plan design and amendment with care.
- Consider whether, notwithstanding the proposed regulation, it makes sense to make a wellness program part of your health benefit plan, thus, potentially meeting the ADA bona fide benefit plan safe harbor as endorsed by the 11th Circuit in *Seff v. Broward County*.

Key Employer Concerns

Mid-Year Plan Changes

No effective enforcement date is stated in the proposed rule or whether transitional relief will be provided to allow time to amend plan terms and allow current participant elections to continue through the end of the plan year.

To avoid possible mid-year election compliance concerns:

- Evaluate the extent to which the 30 percent limit on incentives must be extended to any participatory wellness programs.
- Make sure a wellness program cannot reasonably be read to require employee participation or to deny or limit group health plan coverage as a consequence for non-participation.
- Consider submitting comments on effective date in light of likely short window between Fall 2015 open enrollments and promulgation of final regulation.

Key Employer Concerns

Incentives: Determining Total Cost

- Highly significant that EEOC would measure affordability and the impact of a 30% reward or penalty on self-only coverage.
- Where family or tiered coverage and the potential reward is available to all those covered, a 30% reward limitation based on self-only coverage is problematic.
- Consider submitting comments on key issue.

Key Employer Concerns

Affordability & Cost

- Affordability may be affected if the incentive is lowered for employees currently enjoying a tobacco cessation incentive above 30% consistent with ACA regulations.
 - If this is the case, begin weighing the options on whether and how to adjust it accordingly
 - Participation may also be impacted
- Preparing, maintaining, and communicating the required notices (regarding the obtaining, receipt, use, restriction, and improper disclosure of medical information) may impose additional costs.
 - Submit comments regarding notice costs and start preparing for the same.

Key Employer Concerns

Confidentiality Standards

- Given recent wave of health plan data breaches, compliance with the proposed standard for confidentiality of medical information is especially important.
- Consider whether the heightened standard of confidentiality for Protected Health Information (“PHI”) under the HIPAA Privacy Rule is the preferred safeguard.
- Note that if an employer is not performing group health plan administration, the employer may receive aggregate information from the wellness program only so long as it is **de-identified** in accordance with the HIPAA Privacy Rule.

Impact on EEOC Lawsuits

Orion, Flambeau, and Honeywell

The proposed rule is not effective and enforceable until it matures into a final rule. Does the proposed rule give any insight on EEOC's pending lawsuits?

- Do the facts of *EEOC v. Orion Energy Systems, Inc.* (alleges non-participant pays 100% and \$50 monthly penalty) and *EEOC v. Flambeau, Inc.* (alleges coverage cancelled and employee given COBRA option at 100% of cost) suggest EEOC will argue that the wellness programs at issue are not voluntary under the ADA given the language of the proposed rule?
- In *EEOC v. Honeywell International, Inc.*, the incentives are ACA compliant, which suggests the outcome should favor Honeywell, but the EEOC's position remains to be seen.

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BECKER
GREEN

Closing Remarks

Question?



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Thank You.