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CLIENT ALERT

EEOC Issues Proposed Wellness Program Amendments to ADA Regulations

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On April 16, 2015, the Equal Employment Opportunity Commission ("EEOC") released its highly anticipated proposed regulations (to be published in the *Federal Register* on April 20, 2015, for notice and comment)[1] setting forth the EEOC's interpretation of the term "voluntary" as to the disability-related inquiries and medical examination provisions of the American with Disabilities Act ("ADA"). Under the ADA, employers are generally barred from making disability-related inquiries to employees or requiring employees to undergo medical examinations. There is an exception to this prohibition, however, for disability-related inquiries and medical examinations that are "voluntary."

All comments regarding the proposed regulations must be submitted within 60 days from April 20, 2015, which is June 19, 2015. Employers should have considerable interest in submitting comments, especially as those hostile to wellness programs will surely file comments encouraging further and more limiting regulations.

This long-awaited guidance carries significant import for employers and wellness program providers as the EEOC recently sued three employers for offering wellness program incentives.[2] At least one of the programs met applicable Affordable Care Act ("ACA") regulation standards. In those lawsuits, the EEOC argues that the employee incentives constitute coercive penalties and, therefore, the medical inquiries and biometric examinations connected to the wellness programs are involuntary and in violation of the ADA and, in one case, the Genetic Information Nondiscrimination Act ("GINA") as well. Generally, GINA prohibits employers from acquiring genetic information about an employee or his or her family members, unless through health or genetic services, including wellness programs, on a voluntary basis.

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[1] The proposed regulations will be available at https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act.

[2] See the Epstein Becker Green HEAL Advisory titled "Mainstream Wellness Program Challenged in *EEOC v. Honeywell,"* available at http://www.ebglaw.com/publications/mainstream-wellness-program-challenged-in-eeoc-v-honeywell/.

What the Proposed Rule Provides

The proposed rule clarifies that an employer may offer limited incentives up to a maximum of 30 percent of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or biometric examinations as long as participation is voluntary. It is significant that the proposed rule does authorize penalties as the EEOC's litigations and an EEOC official's statements had seemed particularly critical of penalties, even though they may have exactly the same economic impact to an employee as a reward.

The guidance expounds upon the EEOC's July 27, 2000, Enforcement Guidance, which stated that a wellness program is voluntary as long as an employer does not require participation or penalize employees who do not participate. Under the proposed rule, "voluntary" means that an ADA covered entity does not: (1) require employees to participate, (2) deny coverage under any of its group health plans or limit the extent of such coverage to an employee who refuses to participate in a wellness program, and (3) take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

Further, to ensure that participation in a wellness program that includes disability-related inquiries or medical examinations and is a part of a group health plan is truly voluntary, an employer must provide an employee with a notice indicating: (1) what medical information will be obtained, (2) who will receive the medical information, (3) how the medical information will be used, (4) the restrictions on such information's disclosure, and (5) the methods that the covered entity will employ to prevent improper disclosure.

Confidentiality of medical information also is addressed in the proposed rule. The EEOC made no changes to the current ADA confidentiality rules, but it did propose to add a new subsection that generally requires that the medical information collected though a wellness program be provided to the ADA covered entity only 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 plan.

Due to the more restrictive confidentiality requirements regarding protected health information ("PHI") under the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule, the proposed rule confirms that a wellness program associated with a HIPAA covered entity likely should comply with the new ADA confidentiality obligation by complying with the HIPAA Privacy Rule.

Key Differences Between the Proposed Rule and the Tri-Agency ACA Guidance

Building on the HIPAA regulations issued in 2006, the U.S. Departments of Labor, Health and Human Services, and the Treasury (collectively, the "tri-agency") issued regulations under the ACA in 2013 that increased the maximum total health-contingent wellness program incentive from 20 percent to 30 percent of the total cost of coverage under the group health plan and to 50 percent if used for tobacco cessation.

The EEOC's proposed rule departs from the tri-agency rule, which does not limit participatory wellness program rewards, and extends the 30 percent incentive limit under health-contingent wellness programs to participatory programs. Participatory wellness programs do not include any condition for obtaining a reward-based incentive that turns on an individual satisfying a standard related to health. A health-contingent wellness program requires an individual to satisfy a standard related to a health factor to obtain a reward.

In addition, the proposed rule excludes the additional 20 percent incentive available for wellness programs related to tobacco cessation. Also, the proposed rule gives examples to illustrate when a smoking cessation program is not governed by the ADA financial incentive rules. According to the EEOC, a smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of a program) is not an employee health program that includes disability-related inquiries or medical examination. By contrast, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination and the ADA's 30 percent financial incentive rules would apply to a wellness program that included such a screening. This seems clearly at odds with the ACA goal of reducing tobacco usage and the more generous 50 percent potential incentive to promote this goal.

By excluding the additional 20 percent incentive allowed under the ACA, employees lose the opportunity to lower their premiums by that additional amount. Even more troubling is that, depending on the employee, a refusal to permit the full tobacco cessation incentive might tip an employee over the ACA's 9.5 percent threshold for "affordability," possibly resulting in assessable payments under the shared employer responsibility provisions. Potentially compounding this problem is that the proposed rule requests comments on whether it would be appropriate for the EEOC to provide that it would be deemed coercive and involuntary to require an individual to answer disability-related inquiries or submit to medical examinations connected to a wellness program with incentives that exceed the ACA's 9.5 percent affordability rate.

It is also of great significance that the EEOC takes the position that the measure of affordability and the impact of a 30 percent reward or penalty are based on *self-only* coverage. It makes no sense that, where there is family or tiered coverage and the potential reward is available to all those covered, the 30 percent reward limitation should be based on self-only coverage.

The proposed rule does not address whether the EEOC's interpretation of the term "voluntary" and its interplay with wellness program incentives under the ADA cross over to similar provisions under GINA. The EEOC says further rulemaking on GINA and wellness programs will be forthcoming.

Tips on How to Respond to the Proposed Rule

For now, the EEOC has merely proposed amendments to its ADA regulations, and a final rule and effective date are not likely at least until the fall. Nonetheless, wellness

program providers and employers that either have or are contemplating implementing wellness programs and how they may be constructed for compliance with the ADA and the ACA are well advised to take account of the proposed EEOC guidance now.

To that end, conferring with legal counsel may be appropriate in light of the EEOC's sometimes conflicting interpretation of wellness program requirements with the tri-agency ACA regulations. For example, as argued in one of its recent lawsuits regarding wellness program incentives and in footnote 24 to the proposed rule, the EEOC adopted the questionable conclusion that the ADA's safe harbor provision applicable to bona fide benefit plans, as interpreted by the U.S. Court of Appeals for the Eleventh Circuit in *Seff v. Broward County*, is not a proper basis for finding wellness program incentives permissible when part of a health insurance plan without inquiring into voluntariness. The EEOC posits that such an interpretation would render the "voluntary" exception superfluous.

When considering the following tips, keep in mind that compliance with the ADA rules concerning wellness programs, as the proposed rule stresses, does not relieve employers and other covered entities of the obligation to comply with other employment discrimination laws, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act in connection with wellness programs:

1. Evaluate the extent to which the 30 percent limit on incentives must be extended to any participatory wellness programs.

2. Determine whether affordability is affected if the incentive is lowered for employees currently enjoying a tobacco cessation incentive above 30 percent under the ACA and, if so, begin weighing the options on whether and how to adjust it accordingly.

3. 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.

4. Prepare draft notices that comply with the above-mentioned requirements regarding the obtaining, receipt, use, restriction, and improper disclosure of medical information.

5. Confirm wellness program compliance with the HIPAA Privacy Rule, and, if the wellness program is not governed by HIPAA, consider implementing a HIPAA-compliant confidentiality policy.

6. 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 Eleventh Circuit in *Seff v. Broward County*.

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This Client Alert was authored by **Frank C. Morris, Jr.; Adam C. Solander; and August Emil Huelle***. For additional information about the issues discussed in this Client Alert or wellness programs, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

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