IslerDare PC

EMPLOYEE BENEFITS UPDATE

May 31, 2016

EEOC Releases Final Regulations on Employer Wellness Programs

Executive Summary

- The Equal Employment Opportunity Commission (EEOC) recently issued final regulations that provide guidance regarding the extent to which employers may utilize incentives in their wellness programs that include disability-related inquiries and/or medical examinations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).
- While the EEOC final regulations provide some clarification on the EEOC's position on what is permissible under the ADA and GINA, they do not align with rules under the Health Insurance Portability and Accountability Act (HIPAA) and the Patient Protection and Affordable Care Act (ACA), so that employers must still carefully navigate the rules around employer wellness programs.

What You Should Do

- Continue to monitor litigation and government guidance in this area closely, as the regulatory and judicial landscape surrounding wellness programs continues to be extremely fluid.
- Once the EEOC issues a model notice this summer, for employers who sponsor wellness programs, prepare and distribute a notice to employees as necessary.
- Consider whether you want to modify your wellness program now to align more closely with the EEOC's final regulations, given the EEOC's increasingly activist position on wellness programs, or in the alternative, adopt a "wait and see" approach as challenges to the EEOC's position continue to wind their way through the courts.

In recent years many employers have introduced wellness programs into the workplace as a way of curbing rising medical costs and encouraging greater employee ownership over their health. These programs encompass many different activities, ranging from walking clubs and smoking cessation programs to completion of a health risk assessment (an "HRA") and biometric screening. For example, it is a common feature of wellness programs to ask employees to complete an HRA and/or undergo biometric screenings for certain risk factors such as high blood pressure. Upon completion of those activities, employees often receive incentives in the form of reduced premiums or contributions to the employee's Health Savings Account.

Recently, employee wellness programs have come under increased scrutiny, in large part because the EEOC has brought several highly-publicized lawsuits that certain types of wellness programs involving incentives violate the ADA and GINA, the statutes which they are responsible for enforcing. It remains to be seen what the ultimate outcome will be, but some courts thus far have ruled against the EEOC. While the cases are pending in the courts, the EEOC released final regulations on May 16, 2016, which generally track the proposed rules they issued in April 2015.

Wellness Programs under the Americans with Disabilities Act

By way of background, the ADA prohibits employment discrimination on the basis of disability. This prohibition includes restrictions on when an employer can make disability-related inquiries or require medical exams, unless they are "job-related or consistent with business necessity." However, such inquiries or exams are permitted if they are part of a "bona fide benefit plan" or a "voluntary employee health plan" where medical records are kept confidential and separate from other personnel records. The final regulations reflect the EEOC's position that the ADA "bona fide benefit plan" safe harbor does not apply to wellness programs (although this is one of the hot-button issues that is currently being litigated).

To qualify for the exception under the ADA for a "voluntary employee health plan", a wellness program must meet the following requirements under the EEOC final regulations:

- *Be reasonably designed to promote health or prevent disease.* For example, if health-related information is collected, it must actually be used to design a program that addresses some of the conditions identified. A plan does not meet this first requirement if employer costs are shifted to targeted employees based on health, or if a program simply gives the employer information to estimate future health care costs.

- *Employees must not be required to participate.*

    - This means that the employer may not deny coverage under any of its group health plans or particular benefit packages within a group health plan for non-participation, or limit the extent of benefits for employees who choose not to participate. This means that an employer cannot use a wellness program as a "gateway" plan, determining eligibility for a particular program on completing an HRA or undergoing biometric screenings.
    - No adverse employment action or retaliation may be taken against employees who choose not participate.
    - Employers must provide employees with a notice that (1) is written so that the employee is reasonably likely to understand it; (2) describes the type of medical information that will be obtained and the specific purposes for which the information will be used; and (3) describes the restrictions on the disclosure of the employee's medical information, the employer's representatives or other parties with whom the information will be shared, and the employer's methods for ensuring that medical information is not improperly disclosed. The EEOC will provide a model notice by mid-June 2016.

- *Limited Incentives.* Importantly, the current HIPAA/ACA regulations distinguish between so-called "participatory" programs, which are subject to minimal regulation, and "health-contingent" programs, which are permitted to provide incentives of up to a 30% (50% in connection with smoking cessation programs).

Under the EEOC's final ADA regulations, however, incentives, whether in the form of a reward or penalty, are permissible as long as the maximum available incentive under all wellness programs sponsored by an employer (*i.e.* whether the program is a participatory program or a health contingent program) is not more than 30% of the cost of self-only coverage. For this purpose, the cost of self-only coverage takes into account both employee and employer contributions and will be determined as follows:

- If participation in the wellness program is limited to employees enrolled in the group health plan: 30% of the total cost of self-only coverage of the group health plan in which the employee is enrolled;
- If the employer only offers one group health plan: 30% of the total cost of self-only coverage under the group health plan, where participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
- If the employer offers multiple group health plans: 30% of the total cost of the lowest cost self-only coverage under a major medical group health plan where participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and
- If the employer does not offer any group health plan: 30% of the cost of self-only coverage under the second lowest cost Silver Plan available on the marketplace exchange to a 40-year-old nonsmoker in the location that the employer identifies as its principal place of business.

The 30% limit on the total cost of self-only coverage under the EEOC's rules does not align with the ACA regulations, which permit an incentive of up to 30% of the cost of the actual level of coverage in which the employee is enrolled. Thus, for an employee enrolled in family coverage, the ACA permits a maximum incentive limit equal to 30% of family coverage. This misalignment of the maximum limits under the different laws is likely to complicate the design of an employer's wellness program.

Another disconnect between the ACA rules and the EEOC final regulations pertains to smoking cessation programs. Under the EEOC's final rules, programs that ask employees to certify whether or not they use tobacco may offer incentives up to 50% of the cost of self-only coverage, but any biometric screening or medical procedure that tests for the presence of nicotine or tobacco may only offer an incentive up to 30%. In contrast, the ACA regulations allow incentives of up to 50% for all tobacco cessation programs.

- *Confidentiality.* Generally, information collected as part of a wellness program may only be provided to the employer in aggregate form and in a manner that does not disclose the identity of individual employees.

- *Non-discrimination Rules.* Wellness programs that are part of a group health plan are subject to HIPAA non-discrimination rules.

Wellness programs that provide general health and educational information are not subject to the EEOC's final regulations and have not been implicated in the EEOC's more aggressive litigation actions in recent years.

Wellness Programs under the Genetic Information Nondiscrimination Act

GINA generally prohibits employers from requesting, requiring or purchasing genetic information. Genetic information includes information about the manifestation of a disease or disorder in family members of an individual. One exception to this rule is where an employer offers health or genetic services under a voluntary wellness program, assuming that certain requirements are satisfied. The EEOC's final GINA regulations apply to wellness programs that offer incentives to employees based on an employee's spouse providing genetic information as part of an HRA. This means that when an employee and spouse participate in a wellness program, the incentive cannot exceed 30% of the cost of the self-only coverage under the applicable group health plan, and the combined total incentive for both the employee and the spouse cannot be more than twice the cost of 30% of the applicable self-only coverage, using standards similar to those under the final ADA regulations (e.g., using the second lowest Silver Plan available if the employer does not offer a group health plan). As is the case with the EEOC's final ADA regulations, the final GINA regulations do not align with the ACA's final regulations that permit an incentive up to 30% of the total cost of the coverage in which the employee is enrolled.

Importantly, no incentives can be offered for the provision of genetic information about employees' children, including adult children. This reflects the EEOC's concerns that there is a greater likelihood of discrimination based on the genetic profile of the employee's child relative to the employee's spouse. Further, an employer may not deny access to health insurance or any package of health insurance benefits to an employee and/or the employee's family members, based on a spouse's refusal to provide information about the spouse's manifestation of disease or disorder to a wellness program. Spouses, can, however, be requested to provide information about tobacco usage or required to take a blood test to determine nicotine levels, since these are not considered requests for information about the spouse's manifestation of disease or disorder.

The new notice requirement and the 30 percent limit on incentives in the ADA and GINA final regulations will apply to employer wellness programs as of the first day of the first plan year that begins on or after January 1, 2017. The EEOC's position is that the other provisions in the final regulations merely clarify existing statutory obligations under the ADA and GINA.

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If you have any questions about the new EEOC rules or the application of the final regulations to your company's wellness program, please contact us.

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