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Get Healthy (Or Else?): The EEOC Proposes New Rules to Define When Participation in an Employer Wellness Program Is "Voluntary"

Under Title I of the Americans with Disabilities Act ("ADA"), employers aren't allowed to discriminate against workers based on health status. Under the ADA, employers can, however, ask workers for details about their health and conduct medical exams as part of a *voluntary* wellness program. Employers have been clamoring for the EEOC to spell out what "voluntary" means under the ADA and to clarify the relationship between the ADA and wellness program financial incentives permitted under the Patient Protection and Affordable Care Act ("Affordable Care Act").

On Thursday, April 16, 2015, the U.S. Equal Employment Opportunity Commission (the "Commission") answered this call.[1] It published a Proposed Rule describing how the ADA applies to employer wellness programs.[2] The final Rule will provide critical guidance to both employers and employees about how wellness programs offered as part of an employer's group health plan can comply with the ADA. Members of the public have until June 19, 2015, to submit comments on how the rule can be improved or clarified.

Background Information

Employer wellness initiatives generally fall into two categories: (1) participatory wellness programs and (2) health-contingent wellness programs. Participatory wellness programs provide rewards without regard to an individual's health status. These might include, for example, reimbursement for fitness club memberships or financial rewards for completing a comprehensive health risk assessment. Health-contingent wellness programs, in contrast, generally require individuals to meet a specific standard related to their health to obtain a reward. These might include, for example, quitting smoking or achieving a specific cholesterol goal.

To encourage greater participation in wellness programs, the Affordable Care Act increased the maximum "wellness reward" that employers may offer. Currently, employers may reward employees with as much as 30% of the cost of their health coverage for participating in wellness programs and as much as 50% for programs focusing on tobacco cessation.[3] The Affordable Care Act also requires employers to offer a "reasonable alternative" means of earning the reward if the required activity would be unreasonably difficult to complete because of a medical condition.

There is a tension between the Affordable Care Act's encouragement of wellness programs and the ADA, which generally prevents employers from making disability-related inquiries of employees or asking them to take medical examinations.[4] Since the ADA allows employers to ask for medical information in connection with "voluntary" wellness programs, the Commission's Proposed Rule provides much-needed clarification about whether an employer wellness program is "voluntary" and, therefore, compliant with Title I of the ADA.

Proposed Definition of "Voluntary"

At the outset of the Proposed Rule, the Commission notes some skepticism about the role of *any* financial incentives to elicit health information from employees. Specifically, it noted that offering anything of real value for an employee's participation (or nonparticipation) in wellness programs could plausibly be read to make that program "involuntary."[5] However, since such a narrow definition of voluntariness would undermine the Affordable Care Act's encouragement of

wellness programs, the Commission endeavored to define "voluntariness" in a way that "reflects both the ADA's goal of limiting employer access to medical Information and [statutory] provisions promoting wellness programs."[6]

The Commission's proposed rule does not prohibit the use of incentives to encourage participation in employee health programs, but it does place limits on them. The Proposed Rule lists several requirements that must be met in order for participation in employee health programs to be "voluntary." Specifically, an employer:

- May not require employees to participate;
- May not deny access to health coverage or generally limit coverage under its health plans for non-participation; and
- May not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes).[7]

The Commission indicated that its goals in promulgating the Proposed Rules were to "promot[e] the ADA's interest in ensuring that incentive limits are not so high as to make participation in the program involuntary,"[8] and "prevent economic coercion that could render provision of medical information involuntary."[9] Under the Proposed Rule, the 30% of the cost of health coverage cap would extend to participatory wellness programs as well as health-outcome programs.[10] When, if ever, an incentive that complies with the 30% cap can rise to the level of "economic coercion" is not specifically discussed in the Proposed Rule.

Additional Requirements: Notice and Confidentiality

In addition to defining voluntariness, the Proposed Rule also imposes a notice requirement. Under the Proposed Rule, an employer offering a wellness program "must provide a notice clearly explaining what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure."[11] The Commission also proposes additional confidentiality rules requiring that any medical information collected through an employee health program be maintained in a manner that does not disclose the identity of specific individuals.[12]

Next Steps

The Commission has invited written comments from members of the public on any aspect of the Proposed Rule. In addition, the Commission specifically requests comments on, among other things, whether the way in which the Commission reconciles the ADA's "voluntary" requirement with the wellness program provisions in the Affordable Care Act is appropriate given the intent behind both provisions.[13]

Employers should take note that many of the requirements explicitly set forth in the proposed rule are already requirements under the law, e.g., providing reasonable accommodations that allow employees with disabilities to participate in wellness programs and maintaining any medical information they obtain from employees in a confidential manner.

More Information

The Commission has provided information about the Proposed Rule for small businesses and the public at large:

- Fact Sheet for Small Business: The EEOC's Notice of Proposed Rulemaking on the Americans with Disabilities Act and Employee Wellness Programs (http://www.eeoc.gov/laws/regulations/facts_nprm_wellness.cfm)

- Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs (http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm)

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1 The Proposed Rule was formally published in the Federal Register on Monday, April 20, 2015. This latter date is the official publication date.
2 Equal Employment Opportunity Commission Proposed Rule, 80 FR 21,659 (proposed April 20, 2015) (to be codified at 29 C.F.R. pt. 1630), *available at* https://federalregister.gov/a/2015-08827.
3 Fact Sheet: The Affordable Care Act and Wellness Programs, *available at* http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html.
4 *See* 42 U.S.C. § 12112(d); 29 C.F.R. §§1630.13, 1630.14.
5 80 FR at 21,662.
6 *Id.*
7 *Id.* at 21,667.
8 *Id.* at 21,663.
9 *Id.* at 21,662.
10 *Id*. at 21,663.
11 *Id.*
12 *Id.*
13 *Id*. at 21,664.

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