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Practical Steps for Employers Responding to the EEOC's Final Rules on Employee Wellness Programs

An employer may offer financial incentives to its employees for participating in employee wellness programs that receive health-related information, subject to certain limits.

On May 16, 2016, the U.S. Equal Employment Opportunity Commission (the EEOC) issued final rules (the EEOC Rules, or the Rules) that provide guidance on how employer-sponsored wellness programs can comply with the Americans with Disabilities Act (the ADA) and the Genetic Information Nondiscrimination Act (GINA) while remaining consistent with the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (the ACA).[1]

This *Client Alert* discusses key aspects of the EEOC Rules and their implications for employers. New Rules, concerning maximum incentive limits, wellness program eligibility restrictions and notice requirements, go into effect on January 1, 2017. The EEOC views the remainder of the regulations as clarifying and reinforcing existing obligations under Title I of the ADA and Title II of GINA, and therefore as already having been in effect.

The EEOC Rules on Voluntary Wellness Programs

Employers have long been allowed to provide wellness programs to employees under the ADA and GINA. Wellness programs are generally conceived as employer-sponsored programs or activities that seek to improve employee health and manage overall healthcare costs. While these two laws generally prohibit employers from obtaining from applicants and employees medical information like health risk assessments and the results of previous health exams, an exception exists for such information provided in conjunction with a voluntary wellness program. With employers increasingly offering financial incentives for participation in voluntary wellness programs, the EEOC has questioned whether such programs are voluntary.[2] Consequently, the EEOC decided to provide guidance on the amount of financial incentives permissible under voluntary wellness programs, and a definition of what may be considered voluntary under such programs.

The final Rules apply to any employer-sponsored wellness program that asks employees to respond to disability-related inquiries or undergo medical examinations or requests genetic information, including programs not offered in conjunction with a group health plan.

New Limits on Financial Incentives that Employers May Offer

The final Rules allow employers seeking to attract employees to wellness programs and provide medical information to set financial rewards or penalties. Under the Rules, these financial incentives may amount to up to 30% of the cost of self-only coverage under the company's health insurance plan. If the employer offers more than one health insurance plan, the 30% limit applies to the lowest cost plan. If the employer does not offer a group health plan, the incentive limit is 30% of the total cost to a 40-year-old non-smoker

purchasing self-only coverage under the second-lowest cost Silver Plan available on the state or federal exchange established under the ACA in the location of the employer's principal place of business. This standard has remained largely unchanged, and is consistent with the standards under the ADA, GINA, and HIPAA, as amended by the ACA.

Voluntariness, New Notice Requirements and Restrictions on Information Use

The final Rules also clarify requirements for defining a wellness program as voluntary. Specifically, a wellness program is voluntary if all of the following apply:

- Employees are not required to participate.
- Coverage under any of the employer's group health plans (or particular benefit packages under those plans) is not contingent on participation in the wellness program.
- Non-participating employees are not subjected to any adverse employment action or retaliation.
- Notice is provided to employees regarding the program, clearly explaining (i) what medical information will be obtained; (ii) who will receive the medical information; (iii) how the medical information will be used; (iv) the restrictions on the disclosure of the medical information; and (v) the methods that will be applied to prevent improper disclosure of the medical information.

The EEOC will publish an example of a compliant notice on its website by June 15, 2016.

Importantly, the final Rules place additional restrictions on how the employer may use the health-related information that it collects. For example, the Rules generally only allow wellness programs to receive information in aggregate form that does not disclose the identity of any specific individual, except as is necessary to administer the plan. Further, employers generally may not require an employee to agree to the sale or other disclosure of medical information, or to waive confidentiality protections under the ADA in exchange for an incentive, or as a condition of participating in a voluntary wellness program.

The Rules also require that employees receive notice of the information that will be collected for the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the manner by which such information will be kept confidential.

Incentives for Spouses Who Participate in Health Risk Assessments

The final Rules also clarify that an employer may offer incentives for an employee's spouse to provide information about the spouse's medical history as part of a health risk assessment administered under a wellness program. The EEOC had previously viewed such incentives as violating GINA, which as a matter of general policy prevents employers from using genetic information to make employment decisions.

As is the case with employees, the final Rules require voluntary wellness programs to be reasonably designed to promote health or prevent disease of the spouse. Further, employers may not refuse an employee, spouse or covered dependant access to health insurance or to a particular plan, based on the spouse's refusal to provide information as part of a health risk assessment.

Practical Considerations for Employers

Many employers use voluntary wellness programs to reduce the high cost of healthcare by promoting prevention and healthy habits amongst their employees. While in the past, employers limited their

participation to activity challenges, subsidized gym memberships or access to weight loss programs, in recent years some voluntary wellness programs have grown to encompass health risk assessments, smoking cession or weight loss programs, and medical exams. Some employers also contract with outside firms in order to gather employee information and provide services. In light of the differences between the EEOC and HIPAA (as amended by the ACA) requirements, and the EEOC's recent enforcement actions against employers offering sponsored wellness programs, we recommend employers:

- Review their wellness programs and revise as necessary to comply with the Rules' limitations on financial incentives
- If not already providing financial incentives for participation in wellness programs, consider the potential cost savings of doing so, consistent with the guidelines
- Consider expanding incentives to participate in wellness programs to employees spouses, consistent with the guidelines
- Ensure wellness program materials address the notice requirements of the EEOC Rules

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Joseph B Farrell
joe.farrell@lw.com
+1.213.891.7944
Los Angeles

Linda M. Inscoe
linda.inscoe@lw.com
+1.415.395.8028
San Francisco

Christina Teeter
christina.teeter@lw.com
+1.415.395.8897
San Francisco

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1 The EEOC Rules with respect to wellness programs are spread across two different regulatory frameworks — the ADA and GINA — and, as such, reside in different sections of the Federal Register and the Code of Federal Regulations.

2 The EEOC has recently undertaken several notable enforcement actions against companies for allegedly violating the ADA with their wellness programs. For example, in *EEOC v. Orion Energy Systems, Inc.*, No. 14–1019 (E.D. Wis. filed Aug. 20, 2014), the EEOC argued that Orion's wellness program violated the ADA by requiring medical examinations, making medical inquiries that were not job related, forcing an employee to participate in a wellness program, and then retaliating against that employee by firing her when she refused to do so. Likewise, in *EEOC v. Flambeau, Inc.*, No. 14–638 (W.D. Wis. filed Sept. 30, 2014), the EEOC alleged that Flambeau's wellness program violated the ADA through the forfeiture of health insurance coverage and all employer contribution to the premium cost as a penalty for non-participation in it. Similarly, in *EEOC v. Honeywell International, Inc.*, No. 14-4517 ADM/TNL, 2014 WL 5795481 (D. Minn. 2014), the EEOC sought a preliminary injunction and a temporary restraining order against Honeywell for "asking" employees and their spouses to undergo blood tests to measure cholesterol levels and submit body mass index information as a part of a wellness program. Employees and their spouses who did not participate were forced to pay an additional $500 per year towards health insurance premium costs. The EEOC argued that the wellness program not only violated the ADA but, by compelling spouses to submit genetic information, violated GINA as well. These enforcement actions and the outcry they elicited from businesses operating wellness programs prompted the EEOC to issue a Notice of Proposed Rulemaking on April 20, 2015 to solicit public comments regarding the draft Rules.