EEOC PROPOSES WELLNESS PROGRAM RULE

Employee Benefits Alert
May 20, 2015

Practices & Industries

Employee Benefits

In April 2015, the Equal Employment Opportunity Commission (EEOC) issued a proposed rule that would amend the regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) as they relate to employer wellness programs (Proposed EEOC Rule). The Proposed EEOC Rule provides guidance on the extent to which the ADA permits employers to offer incentives to employees to promote participation in wellness programs that are employee health programs.

The Proposed EEOC Rule attempts to harmonize the ADA's wellness program requirements with HIPAA's nondiscrimination provisions, as amended by the Affordable Care Act (HIPAA Wellness Rule). The guidance reflected in the Proposed EEOC Rule is in response to the EEOC's highly publicized and controversial challenge to the wellness program maintained by Honeywell International Inc.

The Proposed EEOC Rule clarifies that compliance with the ADA's rules on voluntary employee health programs, including the proposed limit on financial incentives, does not relieve an employer of its obligation to comply with other employment nondiscrimination laws, such as Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act (ADEA), Title II of the Genetic Information Nondiscrimination Act (GINA), and other sections of Title I of the ADA.

The Proposed EEOC Rule does not address the extent to which GINA affects an employer's ability to condition incentives on a family member's participation in a wellness program, and states that this issue will be addressed in future EEOC rulemaking.

Here are the requirements for compliance with the Proposed EEOC Rule:

1. The program, including any disability-related inquiries or medical examinations that are part of the program, must be reasonably designed to promote health or prevent disease.

A program satisfies this standard if it is reasonably designed to promote health or prevent disease; is not overly burdensome; is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination; and is not highly suspect in the method chosen to promote health or prevent disease.

Asking employees to complete a HRA or have a biometric screening for the purpose of alerting them to health risks (such as having high cholesterol or elevated blood pressure) would meet this standard.

Collecting and using aggregate information from employee HRAs to design and offer programs aimed at specific conditions prevalent in the workplace (such as diabetes or hypertension) also would meet this standard.

However, asking employees to provide medical information on a HRA without providing any feedback about risk factors, or without using aggregate information to design programs or treat any specific conditions, would not be reasonably designed to promote health.

Additionally, a program is not reasonably designed to promote health or prevent disease if it imposes, as a condition to obtaining a reward, an overly burdensome amount of time for participation, requires unreasonably intrusive procedures, or places significant costs related to medical examinations on employees.

In separate but related guidance issued with respect to the HIPAA Wellness Rule (FAQ guidance), also issued in April 2015, the Department of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the departments) provided guidance on the standard for determining whether a *health-contingent* wellness program is reasonably designed to promote health or prevent disease. The FAQ guidance can be found here: www.dol.gov/ebsa/healthreform/.

While the standard in the Proposed EEOC Rule for determining whether a program is reasonably designed to promote health is similar to the standard articulated in the FAQ guidance, the HIPAA Wellness Rule standard applies only to *health-contingent* programs while the standard in the Proposed EEOC Rule applies to all wellness programs, including participatory programs. In addition, the FAQ guidance confirms that compliance with the departments' wellness program regulations does not ensure compliance with any other applicable law, including the ADA.

2. A wellness program that requires disability-related inquiries or medical examinations must be "voluntary."

An employee health program that includes disability-related inquiries or medical examinations (including disability-related inquiries or medical examinations that are part of an HRA) is voluntary as long as the employer:

- Does not require employees to participate;
- Does not deny coverage under any of its group health plans or particular benefits packages within a group health plan, or limit the extent of benefits for employees who do not participate; and
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA, with respect to employees who fail to participate.

In addition, for a wellness program that is part of a group health plan, the employer must provide employees with a notice clearly explaining what medical information will be obtained; how the medical information will be used; who will receive the medical information; the restrictions on its disclosure; and the methods the employer uses to prevent improper disclosure of medical information.

Example

Employer A sponsors a co-pay plan (e.g., a PPO) and a HDHP. Employer A also maintains a wellness program that rewards employees who participate in biometric screening. If an employee declines to participate in the biometric screen program, the employee cannot elect to participate in the co-pay plan. Under the Proposed EEOC Rule, Employer A's wellness program would not be considered voluntary because employees who fail to participate in the biometric screening may not elect to enroll in Employer A's co-pay plan package.

3. An incentive or penalty that is offered in connection with a program that is part of a group health plan, and that includes disability-related inquiries or requires a medical exam, cannot exceed 30 percent of the total cost of *employee-only* coverage.

Example 1

Under Employer A's health plan, the total annual premium for *employee-only* group health coverage (including both employer and employee contributions towards coverage) is $5,000. The maximum allowable incentive (or penalty) Employer A could offer in connection with a wellness program that includes disability-related questions (such as questions on a HRA) and/or medical examination is $1,500 (30 percent of $5,000).

Example 2

Under Employer A's health plan, the total annual premium for *employee-only* coverage is $5,000 (which includes both the employer's and employee's contributions toward coverage). Employer A's plan provides a $250 reward to employees who complete a HRA. This reward is given to any employee who completes the HRA, without regard to the health issues identified as part of the assessment. Employer A also offers a *health-contingent* wellness program to promote cardiovascular health, with an opportunity to earn a $1,500 reward. Thus, an employee who satisfies both components of the program could earn a total reward of $1,750. Such a reward would violate the ADA because the total reward available exceeds 30 percent of the total cost of *employee-only* coverage.

Incentives provided in connection with wellness programs that do not involve disability-related inquiries or medical examinations are not subject to the limits imposed by the Proposed EEOC Rule. Examples may include incentives for attending nutrition, weight loss, or smoking cessation classes.

Note: There are important differences between the Proposed EEOC Rule and the HIPAA Wellness Rule with respect to the maximum incentive (or penalty).

- Under the HIPAA Wellness Rule, incentives/penalties for employees with coverage tiers that include family members (e. g., employee plus spouse and family) may be as high as 30 percent of the premium for the applicable employee plus coverage. The Proposed EEOC Rule limits the incentive penalty to 30 percent of *employee-only* coverage, even if the employee is enrolled in a higher cost family plan.
- Under the HIPAA Wellness Rule, incentives/penalties relating to tobacco use can be as high as 50 percent of the cost of coverage. The Proposed EEOC Rule does not incorporate this expanded limit. The EEOC confirms that the expanded limit under the HIPAA Wellness Rule could apply to a smoking cessation program that merely asks about an individual's

tobacco use, because that would not be seen as a disability-related question or medical exam. However, the EEOC limit of 30 percent of *employee-only* coverage would apply to a program that detects tobacco use through biometric screenings.

- Finally, the HIPAA Wellness Rule limits do not apply to wellness programs that provide incentives simply for participating in an activity (e.g., a reward for completing an HRA or biometric screening). In contrast, the Proposed EEOC Rule applies to both participatory and *health-contingent* programs. See example two, above.

4. Employers must provide reasonable accommodations for employees with disabilities.

Regardless of whether a wellness program includes disability-related inquiries or medical examinations, reasonable accommodations must be provided, absent undue hardship, to enable employees with disabilities to earn the reward.

The Proposed EEOC Rule provides that offering a reasonable alternative standard and giving notice to the employee of that alternative as part of a *health-contingent* program under the HIPAA Wellness Rule would likely fulfill an employer's obligation to provide a reasonable accommodation under the ADA. The EEOC goes on to note, however, that the ADA requires employers to provide reasonable accommodations for participatory programs even though the HIPAA Wellness Rule does not require participatory programs to provide reasonable alternative standards.

Example 1

Employer A has employees who are hearing impaired; therefore, Employer A would need to provide a sign language interpreter to enable such an employee to earn the incentive, as long as providing the interpreter would not result in undue hardship to Employer A.

Example 2

Employer A has employees who are vision impaired. Absent undue hardship, Employer A would need to provide wellness program documents in an alternate format to accommodate vision impaired employees.

Example 3

Employer A offers a reward for biometric screening that includes a blood draw. Employer A would have to provide an alternative test (or certification requirement) to enable a disabled employee for whom blood draws are dangerous to earn an incentive.

5. Employers must take steps to protect the confidentiality of medical information.

Employers and wellness program providers must take steps to protect the confidentiality of employee medical information.

The Proposed EEOC Rule indicates that the following steps are either required by law or best practices:

- Individuals who have access to medical information must be properly trained in the requirements of HIPAA, ADA, and any other applicable privacy laws.

- Employers and program providers should have clear privacy policies and procedures related to the collection, storage, and disclosure of medical information. Online systems and other technology should guard against unauthorized access, such as

through use of encryption for medical information stored electronically.

- As a best practice, employers should only receive information collected by a wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals, except as is necessary to administer the plan.
- As a best practice, individuals who make decisions related to employment, such as hiring, termination or discipline, should not have access to medical information that is part of a wellness program.
- As a best practice, employers should use third-party vendors to reduce the risk that individually identifiable medical information will be disclosed to individuals who make employment decisions. Employers that administer their own wellness programs need adequate firewalls in place to prevent unintended disclosure.

The Proposed EEOC Rule reminds us that wellness programs that are part of a group health plan generally are subject to HIPAA privacy and security requirements that mandate certain safeguards to protect the privacy of personal health information and set limits and conditions on the uses and disclosures of that information.

As noted, the Proposed EEOC Rule differs from the HIPAA Wellness Rule in some important respects. While compliance with the Proposed EEOC Rule is not mandatory, failure to comply with the EEOC positions reflected in the proposed rule could lead to enforcement action. Neither a court nor the EEOC would be likely to find that an employer violated the ADA if the employer complies with the Proposed EEOC Rule. Employers should review their wellness programs in light of the Proposed EEOC Rule to identify features (e.g., incentives) that may need to be modified.