

EEOC Moves Forward with New Draft Proposed Wellness Program Regulations

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Several times over the past few years, we have reported about the challenges wellness programs have faced from the Equal Employment Opportunity Commission (EEOC) and other litigants, as well as how a federal court struck down the EEOC's 2016 final regulations on wellness programs. We discussed the final regulations here, recent relevant litigation here and here, and the case ordering the EEOC to revisit the regulations here.

Earlier this summer, in a public meeting, the EEOC advanced a new draft Notice of Proposed Rulemaking to replace those vacated regulations. And while that draft was not made public, testimony provided during that meeting gives some glimpses as to what we might expect.

For example, during the hearing, it was explained that while the Americans with Disabilities Act (ADA) would prohibit wellness programs from utilizing rewards/penalties that were in excess of *de minimis* value, the proposed rule interprets the ADA safe harbor for wellness programs as creating an exception to the *de minimis* limitation for health-contingent wellness programs that are part of a group health plan. This would be a significant expansion of the way that the EEOC historically has interpreted that exception. As a result, under the proposed rule, if, among other things, a wellness program complies with HIPAA's nondiscrimination requirements for health-contingent wellness programs, it could permit the same level of incentive as permitted under the HIPAA regulations—i.e., 30% of the total cost of single coverage—without running afoul of the ADA. No guidance

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was provided which clarified the meaning or amount of a *de minimis* reward or penalty.

At the same time, the proposed regulations also recognize that the wellness program would need to comply with the ADA's requirement that participation in wellness programs that include disability-related inquiries or medical examinations must be voluntary. In other words, employers would continue to be prohibited from requiring employees to participate and from denying coverage under any of its group health plans, limiting the extent of such coverage, or taking any other adverse action against employees who decline to participate in the program or who fail to achieve certain health outcomes.

Another aspect of the proposed rule that was discussed at the meeting related to the privacy of employees participating in wellness programs. As summarized, the rule would only permit a wellness program to disclose aggregated medical information so as to prevent the disclosure of the identity of individual employees. During the meeting, a modest amendment to the proposed rule was agreed to that would require employers to ask about the privacy and confidentiality practices of wellness program vendors. As amended, the rule would not require a vendor to implement any particular safeguards with respect to an employee's health information or hold the employer liable if the vendor failed to do so; it simply would require employers to ask about the vendor's privacy policies.

It is important to keep in mind that the draft proposed regulations are far from settled. At several points during the EEOC's meeting this was highlighted. The proposed rule next will be reviewed by the Office of Management and Budget and Office of Information Regulatory Affairs for critique and comment. It then will be sent back to the EEOC for further revision, and eventually released for public comments, which will be considered by the EEOC and responded to in the preamble of the final rule. So, while we likely are still far from a new final rule from the EEOC on wellness programs, the meeting regarding the draft proposed rule gives us a glimpse of what may be coming. In the meantime, employers that sponsor wellness programs which include incentives are cautioned to review the amount of such incentives until final guidance from the EEOC is released.