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CLIENT ALERT

EEOC's Proposed Wellness Plan Rules Largely Clarify Use of Incentives

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On April 20, the Equal Employment Opportunity Commission (EEOC) published long-awaited proposed regulations and interpretive guidance (Proposed Regulations) regarding employer wellness programs. These Proposed Regulations provide a framework for allowing employers to utilize financial or in-kind incentives to encourage employees to participate in wellness programs without violating Title I of the Americans with Disabilities Act (ADA).

Wellness programs have become common in workplaces, usually as a way to reduce health care costs by attempting to improve employees' health through healthier lifestyles and/or preventing disease. Many wellness programs utilize incentives, such as prizes, cash, or a reduction in health care premiums, to encourage employee participation and engagement. Medical examinations or other similar inquires that are part of employee health programs, such as wellness programs, are permitted under the ADA if they are "voluntary."

Prior to the issuance of the Proposed Regulations, the EEOC had taken the position that a wellness program is "voluntary" so long as an employer "neither requires participation nor penalizes employees who do not participate." The EEOC previously asserted that the use of incentives in wellness plans (other than *de minimis* incentives) rendered wellness program participation involuntary by effectively penalizing employees who did not participate. This position was at odds, in several respects, with regulations issued in June 2013 by the Departments of Labor, Health and Human Services and the Treasury (collectively, the Departments). In those June 2013 regulations, the Departments specifically approved and provided guidelines for the use of incentives in wellness programs that complied with the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA), including incentives with values of up to 30 percent of the cost of coverage. In the Proposed Regulations, the EEOC changed course and apparently recognized that it "has a responsibility to interpret the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and HIPAA's and the [ACA's] provisions promoting wellness programs." Therefore, the Proposed Regulations are, according to the EEOC, intended to allow some incentives related to wellness programs while placing limits on such incentives to prevent "economic coercion that could render provision of medical information involuntary."

Framework of Proposed Rules

The Proposed Regulations provide first that any wellness program must be "reasonably designed." That term is defined to mean that the program must have a reasonable chance of improving the health of, or preventing disease in, participating employees. The program also must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.

The Proposed Regulations further explain that in order for a wellness program to be considered voluntary, an employer may not:

1. require an employee to participate in the program;

2. deny coverage under any of the employer's group health plans (or particular benefit packages within a group health plan), or generally limit the extent of such coverage; or
3. take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees who refuse to participate in the program or who fail to achieve certain health outcomes.

Finally, in order for the wellness program to be considered voluntary, employers must provide employees with a notice that clearly explains what medical information will be obtained by the wellness program, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information.

One of the most significant terms of the Proposed Regulations is the welcome clarification that the use of "limited incentives" will not render the program "involuntary." The Proposed Regulations limit the value of any "limited incentives" to no more than 30 percent of the total cost of employee-only coverage under a plan. This proposed limit largely matches the limit set on incentives in the June 2013 regulations issued by the Departments, but with some critical differences.

First, the proposed limit fixes the reference point of cost (*i.e.*, the 30 percent of total cost) to employee-only coverage, whereas the June 2013 regulations allowed this reference point to be fixed to other types of coverage (including employee plus spouse or family) provided the employee was actually enrolled in such coverage.

Second, the June 2013 regulations applied this 30 percent limit only to "health-contingent" wellness programs (*i.e.*, wellness programs which require a participant to attain a certain result or health outcome in order to obtain the reward), and did not place any limit on incentives under "participatory" wellness programs (*i.e.*, wellness programs that either do not have a reward or that do not require obtaining any health outcome for a reward). The Proposed Regulations extend this 30 percent threshold to *both*"health-contingent" *and* "participatory" wellness programs. The Proposed Regulations would also apply this threshold on an aggregate basis across all such wellness programs maintained by the employer. Thus, if an employer maintains more than one such program, it must ensure that the total incentives available to any individual employee, across all such plans, does not exceed the 30 percent threshold.

Third, whereas the June 2013 regulations would allow this threshold to be increased to 50 percent in the case of tobacco-cessation wellness programs, the Proposed Regulations keep the threshold at 30 percent even for such tobacco-cessation programs, if they include biometric screenings or other medical examinations that test for the presence of nicotine or tobacco.

As a separate requirement, the Proposed Regulations place restrictions on the handling of any medical information gathered by wellness programs. These requirements largely align with the restrictions already imposed by HIPAA privacy rules. Finally, the Proposed Regulations clarify that compliance with these rules does not relieve an employer of its obligation to comply with other employment nondiscrimination laws, such as Title VII, the Age Discrimination in Employment Act or the Genetic Information Nondiscrimination Act. Guidance issued by the Departments on April 16, 2015 contains a similar clarification.

Duty to Provide Reasonable Accommodations for Participants with Medical Conditions

The Proposed Regulations include an additional requirement that may complicate the design and administration of wellness programs. Specifically, the Proposed Regulations would require employers who offer financial incentives as part of their wellness program to provide a reasonable accommodation, absent undue hardship, to those employees who cannot participate or meet

certain outcomes as a result of a medical condition. A similar, although not identical, accommodation concept is used in the June 2013 regulations issued by the Departments. According to the EEOC, the provision of a reasonable accommodation in these circumstances may necessitate waiving the wellness program participation requirement for obtaining the incentive altogether.

The need to provide reasonable accommodations in this context would invariably require employers to engage in the interactive process with affected employees to determine whether a reasonable accommodation or alternative to participation in the wellness program is available. Complying with the ADA's reasonable accommodation and interactive processes are already some of the most challenging workplace issues facing employers today. Extending these requirements to wellness program participation will likely create increased challenges and burdens for employers as they attempt to structure incentives and the methods by which those incentives can be achieved.

Action Steps

Although the Proposed Regulations are not final agency action, employers should note that many of their requirements are already required under the June 2013 regulations promulgated by the Departments. Hence, employers and plan sponsors should re-examine their wellness programs to ensure that they are in compliance with the June 2013 regulations. Employers and plan sponsors should also take this opportunity to understand the specific ways in which the Proposed Regulations vary from the Departments' June 2013 regulations.

The EEOC has requested comments on the Proposed Regulations, which are due on or before June 19, 2015. As with any rulemaking proceeding initiated under the Administrative Procedure Act, the final version of these regulations may contain significant differences from the Proposed Regulations.

The EEOC's decision to modify its position on several of the issues addressed in the Proposed Regulations is welcome news to employers. Employers that sponsor wellness plans should continue to monitor this regulatory initiative.

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