

Management Alert



EEOC Rules on Wellness Programs Further Limit Employer Design Options

By Jennifer A. Kraft and Benjamin J. Conley

Yesterday the EEOC released proposed regulations under the Americans with Disabilities Act (ADA) addressing wellness programs offered as part of a group health plan. As described in greater detail below, the proposed regulations impose much greater restrictions on wellness program designs than existed under the previously issued HIPAA rules. The proposed rules do not address the EEOC's perspective on compliance of wellness programs under the Genetic Information Nondiscrimination Act (GINA), although the rules note that those regulations are forthcoming.

Background - Prior Law Imposed Various Limits on Wellness Programs

Prior to yesterday's guidance from the EEOC, there were already various rules impacting wellness programs under ERISA, the Affordable Care Act (ACA), HIPAA (Privacy and Portability), GINA, and, where applicable, state insurance regulations. While most of those rules are well established through various formal and informal regulatory pronouncements, many plan sponsors were proceeding with caution in the wellness arena due to (a) a lack of guidance on wellness programs from the EEOC under the ADA, and (b) various recent enforcement actions from the EEOC alleging violations of the ADA and GINA for what were often otherwise compliant wellness program designs. (For a detailed description of EEOC enforcement efforts, see our blog posts [here](#) and [here](#).)

The EEOC's most recent action involved a high-profile request for a temporary restraining order against Honeywell International, Inc. The request was denied, but the resulting fallout included Congressional inquiries into the EEOC's enforcement efforts and left many in the business community clamoring for clearer guidelines from the EEOC regarding wellness programs and the ADA. The EEOC finally announced its intent to issue rules, sparking intense lobbying efforts to further shape the requirements for wellness programs, including a proposal introduced in Congress that would treat HIPAA-compliant wellness programs as compliant with the ADA as well. That proposal was not passed, however, and as described below, the EEOC did not adopt this approach.

EEOC Rejects ADA Safe Harbor for Wellness Programs as Part of a Bona Fide Benefit Plan

Most notably, the EEOC's proposed rules rejected the clear safe harbor contained in the ADA for wellness programs established as a part of a bona fide benefit plan. Despite the significance of this shift, the EEOC limits its discussion of the ADA benefit plan safe harbor to a footnote. It simply says that wellness programs are "medical examinations" and thus must be "voluntary." The EEOC, by so doing, appears to disregard the benefit plan safe harbor under the ADA.

The courts so far disagree with the position the EEOC is trying to take here (including a Florida District Court and the Eleventh Circuit in *Seff v. Broward County*), and the EEOC's proposed rules, if they become effective, could be challenged in court as being inconsistent with the ADA benefit plan safe harbor.

EEOC Establishes Restrictions for Wellness Programs that are Similar to, But Broader than Those Imposed by HIPAA

The EEOC guidance clarifies that the ADA rules relating to wellness programs are limited to those programs involving disability-related inquiries or medical examinations. To comply with the ADA, the new rules would require wellness programs that are offered as part of a group health plan to adhere to the following requirements:

- **Limit on Incentives.** The proposed rule would limit incentives linked to completion of a wellness program that involves asking disability-related questions or conducting medical examinations (such as completing a health risk assessment) to a maximum of 30% of the total cost of *employee-only* coverage. *For example*, if the total cost of coverage (employer *and* employee cost) is \$1,000, and employees typically pay \$200, an employee who refuses to complete a biometric screening could not be charged more than \$500 (a \$300 differential, which is 30% of the overall cost of coverage). In comparison, the HIPAA rules would permit a 30% differential based of the cost, calculated based on the *employee's elected enrollment level* (e.g., employee + spouse, family, etc.). This proposed rule would further undercut the HIPAA rules which would permit a 50% incentive for smoking cessation programs even if a disability-related question or medical exam is required. (Presumably, the 50% incentive would still be permissible if no disability-related inquiry or medical exam is required, although the EEOC requests comments on this point.)

In addition, this proposed EEOC rule would apply to a "participation-only" wellness program (i.e., one that does not require the participant to attain any particular outcome). HIPAA's limit on incentives only applies to so-called health-contingent wellness programs.

- **Reasonable Accommodation.** Under HIPAA rules, any health-contingent wellness program must generally provide a reasonable alternative for employees who cannot satisfy the standard required under the program. HIPAA does not require a reasonable alternative for participation-only programs. The EEOC's proposed rule would require that a "reasonable accommodation" (similar to a reasonable alternative standard) be offered for any disability-related inquiry or medical examination, regardless of whether the program is health contingent or participation-only, for employees with disabilities. The rules note that the HIPAA reasonable alternative standard would likely satisfy the reasonable accommodation requirement for health-contingent wellness programs, but employers may need to establish a reasonable accommodation for a participation-only wellness program, even though none is required under HIPAA.
- **Program Must be Voluntary.** As noted above, the EEOC remained steadfast in its earlier stance that wellness programs that are involuntary violate the ADA. The EEOC

What must be included in the wellness program notice?

Under proposed EEOC rules, the wellness program sponsor must provide a notice to participants that clearly explains:

- What medical information will be obtained;
- How the medical information will be used;
- Restrictions on its disclosures;
- How the program will prevent improper disclosure of the information (including whether the program complies with HIPAA Privacy requirements).

would consider a wellness program to be voluntary only as long as the program:

1. Does not require employees to participate;
 2. Does not deny coverage under any group health plan (or a particular benefit package within a group health plan) for employees who do not participate;
 3. Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate; and
 4. Provides employees with a notice containing certain information relating to the program.
- **Limits on Disclosure.** Information gleaned from the wellness program may only be used for purposes of benefit plan operations and may only be disclosed to the employer-plan sponsor in a de-identified, aggregate form. The preamble to the regulations note that this limitation on disclosure generally tracks the HIPAA Privacy requirements.

Request for Comments and Next Steps

The proposed EEOC regulations request comments no later than June 19, 2015. Specifically, the EEOC requests comments on:

- Whether similar incentives must be offered to employees who decline the wellness program but certify that the employee is under active treatment by a physician for any at-risk conditions;
- Whether “voluntariness” should be determined based on whether the incentives render the coverage “unaffordable” as that term is defined under the Affordable Care Act;
- Whether the rules should require wellness programs to obtain affirmative confirmation from participants that they are aware that their participation is voluntary;
- Whether the rules should contain a “de minimis” exemption from these requirements;
- What rules should apply to wellness programs offered outside of group health plans; and
- How these rules would/should interact with the HIPAA wellness limits, such as the limit on incentives relating to tobacco cessation programs.

In light of the major shift these proposed EEOC regulations would make from the current requirements, employers should determine whether these proposed rules would impact their wellness plans and consider submitting comments to the EEOC.

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