EEOC Final Rules on Wellness Programs

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Introduction

The Equal Employment Opportunity Commission (EEOC) has released two separate sets of final regulations relating to wellness program compliance under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Despite a few recent court rulings against the EEOC's voluntary requirements for wellness programs, the final rules generally clarify and confirm what was previously set forth in the proposed rules issued last year while expressing EEOC's reasons for disagreeing with the court decisions. The EEOC made some significant changes as well, extending the incentive limitations and notice requirements to all wellness programs that fall under ADA or GINA, regardless of whether they are tied to a group health plan, in addition to adjusting the calculations for the 30% maximum incentive limitations.

Background

The ADA restricts when an employer may make disability-related inquiries or require medical examinations, and the Act requires a reasonable accommodation for those with a disability. Wellness programs often include both disability-related questions and medical examinations or testing (e.g. health risk assessment [HRA] and biometric screening), but are allowed under the ADA so long as the program is considered "voluntary." In addition, reasonable accommodations may need to be provided for those who are unable to participate or satisfy certain criteria due to a disability.

GINA prohibits employers from conditioning eligibility or financial inducements on the provision of an employee's genetic information. "Genetic information" includes information about the manifestation of a disease or disorder of a family member, including a spouse. However, the rules allow a narrow exception in which incentives may be offered to a spouse in conjunction with a wellness program that requires such information so long as certain requirements are met. GINA rules do not allow employers to collect similar information from an employee's children.

In 2014, the EEOC brought three separate lawsuits against employers alleging that their wellness programs were not "voluntary." In 2015, the EEOC released proposed rules in regard to ADA and GINA.

Effective Date

Final rules regarding the ADA and the incentive limitations are effective for the first plan year beginning on or after January 1, 2017. All other provisions are considered clarifications of existing obligations that already apply.

Final rules regarding GINA are effective for the first plan year beginning on or after January 1, 2017.

General Requirements

Wellness programs must generally meet the following requirements to comply with ADA and GINA:

- **Must be reasonably designed to promote health or prevent disease.** Information collected must either provide results or advice to improve the health of participants, or be used to design a program that would address some of the identified conditions. The program may not require an overly burdensome amount of time, require unreasonably intrusive procedures, or place significant costs on participants. And the program may not exist simply to shift costs to targeted participants or to provide information to predict future healthcare plan costs.

- **Must be voluntary.** An employee's failure to participate in the wellness program may not result in denial of health coverage for that employee. The final rules clarified that a tiered health plan structure (also known as a "gateway plan") under which the employee is denied access to some of the plans for a failure to participate in the wellness program is not allowed. In addition, the employer may not take any other adverse action, or retaliate, interfere with, coerce, intimidate, or threaten those who do not participate or fail to achieve certain health outcomes.

- **Incentives must be limited to 30% of self-only coverage.** The maximum incentive that an employer may offer for an employee's participation in a wellness program that includes disability-related inquiries or medical examinations is 30% of the total cost of self-only coverage (including both employer and employee contributions). The same cap applies for a spouse who provides information about the manifestation of a disease or disorder. So, for example, if the employer offers self-only coverage for a total cost of $6,000, and also offers a wellness program to the employee and spouse if they participate in the plan, the employer may not offer more than $1,800 to the employee and $1,800 to the spouse (up to $3,600 total) as an incentive for participating.

  The incentive limits apply regardless of whether the wellness program is participatory or health contingent (differing from HIPAA, which applies incentive maximums only to health-contingent programs). In addition, the 30% limit applies to all wellness programs, regardless of whether they are offered in conjunction with an employer-sponsored group health plan, which is different from what was provided in the proposed rules. And the final rules provided guidance for calculating the incentive, which differs depending upon whether the incentive is tied to the group health plan(s):
  - Wellness program available only to those enrolled in the group health plan – 30% of the total cost of self-only coverage under the plan in which the individual is enrolled.
  - Single group health plan offered, but wellness program available regardless of whether individual enrolls – 30% of the total cost of self-only coverage under that plan.
  - Multiple group health plans offered, but wellness program available regardless of whether individual enrolls in any of the plans – 30% of the total cost of the lowest cost self-only major medical coverage.
  - Employer does not offer a group health plan – 30% of the cost of the second lowest cost Silver Plan available through a public Exchange established in the location that the employer identifies as its principal place of business as a benchmark for setting the incentive limit (30% of the cost of self-only coverage if purchased by a 40-yearoldnon-smoker).

EEOC guidance confirms that a tobacco-related wellness program that merely asks whether an individual uses tobacco does not fall under the ADA (and therefore the maximum 50% incentive under HIPAA

applies); but if the program involves any medical testing to verify the presence of nicotine or tobacco, the ADA 30% incentive limit applies.

The guidance also clarified that the term "incentives" means "any financial or other incentive," and that there is no exclusion for de minimis incentives.

- **Notice must be provided to participants.** Participants must be provided a notice clearly explaining what medical information will be collected, how it will be used, who will have access to it, and how it will be kept confidential. Within the next 30 days, a model notice will be available on the EEOC website. In addition, GINA requires that consent be obtained from the spouse for collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected.

- **Confidentiality of medical information collected must be maintained.** Information collected by a wellness program may generally be provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record. The final rules set forth some best practices for maintaining confidentiality, such as adopting policies, communicating such policies, training employees, using encryption, and offering breach notification.

- **Other Requirements -** Participants may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by this part to carry out specific activities related to the wellness program), or to waive confidentiality protections available under the ADA or GINA as a condition for participating in a wellness program or receiving an incentive.

- **Reasonable accommodations/alternatives must be available.** Under HIPAA, wellness programs are required to provide a reasonable alternative standard for health-contingent programs (i.e. activity-based or outcome-based); the requirement does not apply for programs that are participatory. However, under the ADA, regardless of whether the program may be considered participatory or health-contingent under HIPAA, a reasonable accommodation is required if a disability or medical condition prevents an employee from participating or earning an incentive. In addition, a spouse who is unable to participate or earn an incentive due to a disability or medical condition must have the requirement waived or be provided with a reasonable alternative standard to avoid violating GINA.

Summary

For wellness programs that involve disability-related questions or medical testing (subject to the ADA) or ask about the manifestation of a disease or disorder in a spouse (subject to GINA), there is still some question as to whether employers must follow the EEOC guidelines or whether there is potentially a safe harbor available, as found by a few district courts. However, the conservative approach for now is for employers to design wellness programs that comply with these final rules and the HIPAA regulations (as well as any other nondiscrimination rules). Specifically in regard to incentive limitations, employers may want to limit all incentives, whether tied to a group health plan or not, to 30% of self-only coverage unless the incentive is tobacco-related and no medical testing is involved. It would also be beneficial for employers

to review current notices and/or adopt the new model notice to be provided to all wellness program participants.

The EEOC press release, links to FAQs, and the final rules themselves may be found here.

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