



New Guidance On Wellness Programs

Insights

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The U.S. Equal Employment Opportunity Commission (EEOC) recently issued proposed new rules clarifying its stance on the interplay between the Americans with Disabilities Act (ADA) and employer wellness programs. Officially called a “notice of proposed rulemaking” or NPRM, the new rules propose changes to the text of the EEOC’s ADA regulations and to the interpretive guidance explaining them.

If adopted, the NPRM will provide employers guidance on how they can use financial incentives or penalties to encourage employees to participate in wellness programs without violating the ADA, even if the programs include disability-related inquiries or medical examinations. This should be welcome news for employers, having spent nearly the past six years in limbo as a result of the EEOC’s virtual radio silence on this question.

A Brief History: How Did We Get Here?

In 1990, the ADA was enacted to protect individuals with ADA-qualifying disabilities from discrimination in the workplace. Under the ADA, employers may conduct medical examinations and obtain medical histories as part of their wellness programs so long as employee participation in them is voluntary. The EEOC confirmed in 2000 that it considers a wellness program voluntary, and therefore legal, where employees are neither required to participate in it nor penalized for nonparticipation.

Then, in 2006, regulations were issued that exempted wellness programs from the nondiscrimination requirements of the Health Insurance Portability and Accountability Act (HIPAA) so long as they met certain requirements. These regulations also authorized employers for the first time to offer financial incentives of up to 20% of the cost of coverage to employees to encourage them to participate in wellness programs.

But between 2006 and 2009 the EEOC waffled on the legality of these financial incentives, stating that “the HIPAA rule is appropriate because the ADA lacks specific standards on financial incentives” in one instance, and that the EEOC was “continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA” in another.

Shortly thereafter, the 2010 enactment of President Obama’s Patient Protection and Affordable Care Act (ACA), which regulates corporate wellness programs, appeared to put this debate to rest. The

ACA authorized employers to offer certain types of financial incentives to employees so long as the incentives did not exceed 30% of the cost of coverage to employees.

But in the years following the ACA's enactment, the EEOC restated that it had not in fact taken any position on the legality of financial incentives. In the wake of this pronouncement, employers were left understandably confused and uncertain. To alleviate these sentiments, several federal agencies banded together and jointly issued regulations that authorized employers to reward employees for participating in wellness programs, including programs that involved medical examinations or questionnaires. These regulations also confirmed the previously set 30%-of-coverage ceiling and even provided for incentives of up to 50% of coverage for programs related to preventing or reducing the use of tobacco products.

After remaining silent about employer wellness programs for nearly five years, in August 2014, the EEOC awoke from its slumber and filed its very first lawsuit targeting wellness programs, *EEOC v. Orion Energy Systems*, alleging that they violate the ADA. In the following months, it filed similar suits against Flambeau, Inc., and Honeywell International, Inc. In *EEOC v. Honeywell International, Inc.*, the EEOC took probably its most alarming position on the subject to date, asserting that a wellness program violates the ADA even if it fully complies with the ACA.

What's In The NPRM?

According to EEOC Chair Jenny Yang, the purpose of the EEOC's NPRM is to reconcile HIPAA's authorization of financial incentives to encourage participation in wellness programs with the ADA's requirement that medical examinations and inquiries that are part of them be voluntary. To that end, the NPRM explains:

- what an employee wellness program is;
- what it means for an employee wellness program to be voluntary;
- what incentives employers may offer as part of a voluntary employee wellness program; and
- what requirements apply concerning notice and confidentiality of medical information obtained as part of voluntary employee wellness programs.

Each of these parts of the NPRM is briefly discussed below.

What is an employee wellness program?

In general, the term "wellness program" refers to a program or activity offered by an employer to encourage its employees to improve their health and to reduce overall health care costs. For instance, one program might encourage employees to engage in healthier lifestyles, such as exercising daily, making healthier diet choices, or quitting smoking. Another might obtain medical information from them by asking them to complete health risk assessments or undergo a screening for risk factors.

The NPRM defines wellness programs as programs that are reasonably designed to promote health or prevent disease. To meet this standard, programs must have a reasonable chance of improving the health of, or preventing disease in, its participating employees. The programs also must not be overly burdensome, a pretext for violating antidiscrimination laws, or highly suspect in the method chosen to promote health or prevent disease.

How is voluntary defined?

The NPRM contains several requirements that must be met in order for participation in wellness programs to be voluntary. Specifically, employers may not:

- require employees to participate in a wellness program;
- deny or limit coverage or particular benefits for nonparticipation in a wellness program; or
- take any adverse action against employees for nonparticipation in a wellness program or failure to achieve certain health outcomes.

Additionally, for wellness programs that are part of a group health plan, employers must provide a notice to employees clearly explaining what medical information will be obtained, how it will be used, who will receive it, restrictions on its disclosure, and the protections in place to prevent its improper disclosure.

What incentives may you offer?

The NPRM clarifies that the offer of limited incentives is permitted and will not render wellness programs involuntary. Under the NPRM, the maximum allowable incentive employers can offer employees for participation in a wellness program or for achieving certain health results is 30% of the total cost of coverage to employees who participate in it. The total cost of coverage is the amount that the employer and the employee pay, not just the employee's share of the cost. The maximum allowable penalty employers may impose on employees who do not participate in the wellness program is the same.

What about confidentiality?

The NPRM does not change any of the exceptions to the confidentiality provisions in the EEOC's existing ADA regulations. It does, however, add a new subsection that explains that employers may only receive information collected by wellness programs in aggregate form that does not disclose, and is not likely to disclose, the identity of the employees participating in it, except as may be necessary to administer the plan.

Additionally, for a wellness program that is part of a group health plan, the health information that identifies an individual is "protected health information" and therefore subject to HIPAA. HIPAA mandates that employers maintain certain safeguards to protect the privacy of such personal health information and limits the uses and disclosure of it.

Keep in mind that the NPRM revisions discussed above only clarify the EEOC's stance regarding how employers can use financial incentives to encourage their employees to participate in employer wellness programs without violating the ADA. It does not relieve employers of their obligation to ensure that their wellness programs comply with other antidiscrimination laws as well.

Is This The Law?

The NPRM is just a notice that alerts the public that the EEOC intends to revise its ADA regulations and interpretive guidance as they relate to employer wellness programs. It is also an open invitation for comments regarding the proposed revisions. Anyone who would like to comment on the NPRM must do so by June 19, 2015. After that, the EEOC will evaluate all of the comments that it receives and may make revisions to the NPRM in response to them. The EEOC then votes on a final rule, and once it is approved, it will be published in the Federal Register.

Since the NPRM is just a proposed rule, you do not have to comply with it just yet. But our advice is that you bring your wellness program into compliance with the NPRM for a few reasons. For one, it is very unlikely that the EEOC, or a court, would fault you for complying with the NPRM until the final rule is published. Additionally, many of the requirements that are set forth in the NPRM are already required under currently existing law. Thus, while waiting for the EEOC to issue its final rule, in the very least, you should make sure that you do not:

- require employees to participate in wellness programs;
- deny health insurance coverage to employees for nonparticipation in wellness programs; or
- take adverse employment action against employees for nonparticipation in wellness programs or for failure to achieve certain health outcomes.

In addition you should provide reasonable accommodations to employees with disabilities to enable them to participate in wellness programs and obtain any incentives offered (e.g., if an employer has a deaf employee and attending a diet and exercise class is part of its wellness program, then the employer should provide a sign language interpreter to enable the deaf employee to participate in the class); and ensure that any medical information is maintained in a confidential manner.

If you would like us to review your currently existing wellness program, or if you would like to create one that is compliant with the NPRM and existing law, just let us know. We will help you to encourage your employees to maintain healthy lifestyles and reduce your overall healthcare costs while making sure that your door is not the one that the EEOC comes knocking on next.

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