Second Time's A Charm? EEOC Offers New Wellness Program Rules For Employers

Insights
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The U.S. Equal Employment Opportunity Commission (EEOC) just revealed two new proposed rules concerning how employers can encourage employees to participate in employer-sponsored wellness programs without violating federal law. Unlike the 2016 final rule iterations, these two new rules, released on January 7 and slated to be finalized in March 2021, provide that employers must offer much smaller incentives than previously permitted in order to comply with the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA). On the one hand, this should be welcome news for employers. Indeed, employers have been left without any guidance for how to incentivize employee participation in wellness programs without rendering them involuntary under the ADA and GINA since the 2016 final rules were nixed by a federal court order. On the other hand, as is commonplace when a new administration takes over, President-elect Biden announced that he plans to freeze all pending regulations for review before they are implemented, which could further forestall this limbo period for employers. Nonetheless, what should employers know about these new rules?

A History Lesson: Why Are We Getting New Proposed Rules?

The road to get here has been long, winding, and – more often than not – confusing. The confusion all began back in 1990. At that time, the ADA was enacted to protect individuals with disabilities from discrimination in the workplace. The law also permitted employers to conduct medical inquiries and examinations of employees as part of wellness programs. The only requirement for wellness programs at that time was that participation in them be "voluntary."

Very little was known about what was meant by "voluntary" until 2000 when the EEOC explained that it meant that employers could not (1) require their employees to participate in wellness programs or (2) penalize those who chose not to participate in them. The EEOC's explanation was puzzling for most employers, particularly because it offered little in the way of whether they could offer their employees financial inducements to participate in wellness programs or to complete medical inquiries and examinations. The EEOC tried to clear this up by responding that "modest" incentives were allowed, but it failed to take any stance regarding the precise amount of "modest."

Fast forward to 2006 – the U.S. Departments of Labor, Treasury, and Health and Human Services jointly issued even more rules regulating wellness programs, but this time they did it under the Health Insurance Portability and Accountability Act (HIPAA). These rules provided that HIPAA's non-

Health Insurance Portability and Accountability Act (HIPAA). These rules provided that HIPAA's non-discrimination requirements did not apply to wellness programs so long as they met certain requirements. They also divided wellness programs up into two categories, (1) "participatory" and (2) "health-contingent." Participatory programs do not require employees to satisfy a particular health goal whereas health-contingent ones focus on activities geared towards achieving certain health goals. Finally, they provided that employers could offer financial incentives under health-contingent programs of up to 20% of the cost of coverage to employees. However, the HIPAA rules said nothing at all about limitations on financial incentives for participatory programs.

Despite the tripartite endorsement of financial incentives under health-contingent wellness programs, the EEOC waffled on their legality between 2006 and 2009, stating that "the HIPAA rule is appropriate" in one instance and that it was "continuing to examine what level, if any, of financial inducement under a wellness program would be permissible" in another. Unfortunately, the EEOC did not issue any further guidance after taking these seemingly contradictory positions.

Shortly thereafter, in 2010, the Affordable Care Act (ACA) joined the party, adding on even more rules regulating wellness programs, but at least it seemed to put the growing confusion to bed. The ACA basically adopted the 2006 HIPAA rules and increased the permissible incentive to a 30% level. It also provided for a smoking cessation incentive as high as 50%. However, just like with the earlier HIPAA rules, the ACA's focus was on health-contingent wellness programs, which meant that there was still minimal, if any, guidance for employers on participatory ones.

To complicate things even further, GINA strictly limited the ability of employers to obtain the genetic information of their employees, which includes family medical histories (including that of a spouse or other family member). Although it took no issue with wellness programs by making an exception for them, GINA prohibited employers from conditioning financial incentives to their employees on the provision of genetic information. It was silent, however, as to whether employers would run afoul of GINA if they offered financial inducements where employees' spouses were participants in the employers' health plans and were asked to complete health risk assessments.

In the years following, the EEOC took the position that it had not taken any position on the legality of offering financial incentives to join wellness programs or tying them to medical inquiries or examinations. But after remaining silent about employer wellness programs for nearly five years, the EEOC awoke from its slumber in August 2014 and filed one of its very first lawsuits targeting wellness programs alleging that they violate the ADA. In the months that followed, it filed similar suits against other employers, and in one of them took one of its more alarming positions on the subject – that is, asserting that a wellness program could violate the ADA even if it fully complies with the ACA.

The 2016 Final ADA And GINA Rules On Wellness Programs

In order to clear up all of the confusion, the Obama administration's EEOC issued final rules in May 2016 to amend its ADA and GINA regulations following consideration of public comments on its proposed rule.

proposed rule.

The 2016 ADA rule applied to any wellness programs that included disability-related inquiries and/or medical examinations. It clarified that limited incentives would not render a wellness program involuntary under the ADA. In particular, it provided that employers may use incentives (financial or in kind), whether in the form of a reward or penalty, if the maximum incentive did not exceed 30% of the total cost of self-only coverage. This meant that, for instance, if the total cost for self-only coverage is $6,000 annually, the employer could reward an employee up to $1,800 for participating in the wellness program and/or for achieving certain health outcomes (or penalize them for not participating and/or failing to meet health outcomes).

The 2016 GINA rule applied only to wellness programs where a portion of the incentive offered related to an employee's spouse answering questions about current or past health status or to taking a medical examination. It clarified that GINA did not prohibit employers from offering limited incentives to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including as part of a wellness program; and (3) provides information about current or past health status, typically as part of a health risk assessment or biometric screening. The incentive levels under the 2016 GINA rule were consistent with those under the ADA rule. That is, the maximum inducement (or penalty) for the employee's spouse to provide information about current or past health status was thirty percent of the total cost of self-only coverage under the group health plan in which the employee and family members were enrolled.

Both rules also had enhanced notice and confidentiality requirements.

The AARP Lawsuit

Shortly thereafter, in October 2016, the American Association of Retired Persons (AARP) filed a lawsuit on behalf of its members seeking to stop the 2016 final ADA and GINA rules from taking effect. The AARP argued that the 30% incentive was inconsistent with the "voluntary" requirements of the ADA and GINA in that employees who could not afford to pay such a penalty would be forced to disclose their protected information when they would otherwise not be required to do so. Essentially, the AARP questioned whether such an arrangement was truly voluntary. The AARP also argued that the EEOC never adequately explained its reasoning behind the new rules.

Both sides agreed that the EEOC's interpretation of the term "voluntary" in the ADA and GINA should be reviewed under what is known as the two-step *Chevron* analysis. Under this framework, the court first looks at whether Congress had directly answered the question at issue. Since neither the ADA nor GINA defined voluntary participation, the court would simply defer to the EEOC's interpretation of this term so long as the agency offered a reasonable explanation for its interpretation. The interpretation need not be the only possible interpretation or even the most reasonable one – it just had to be rooted in some facts connected to the determination.

After reviewing a developed administrative record, however, the federal district court found that the EEOC failed to make that showing and struck the rules. In response to this decision, the EEOC

EEOC failed to make that showing and struck the rules. In response to this decision, the EEOC revised the 2016 final ADA and GINA rules by removing the incentive provision. Since then, nearly every iteration of the EEOC's regulatory agenda indicated it would publish new rules, but it never took the step to do so until now.

What Is In The New Proposed ADA And GINA Rules?

It is important to analyze both the ADA and GINA rules in order to best understand the impact on employers.

The 2021 Proposed ADA Rule

The new proposed ADA rule clarifies the following items:

- **Types of wellness programs** under the ADA;
- What it means for a wellness program to be **"voluntary"** under the ADA;
- What **incentives** employers may offer as part of a voluntary wellness program without running afoul of the ADA; and
- What requirements apply concerning **notice and confidentiality** of medical information obtained as part of a voluntary wellness program.

What are the types of employee wellness programs under the new proposed ADA rule?

Under the newly proposed ADA rule, an employee-wellness program is any program of health promotion or disease prevention that includes disability-related inquiries or medical examinations. There are two types of wellness programs that fall under the ADA: (1) participatory and (2) health-contingent. The proposed rule no longer contains the requirement that such programs be reasonably designed to promote health or prevent disease.

What does it mean to be "voluntary" under the new proposed ADA rule?

In order for a wellness program to be considered voluntary under the ADA, just like the 2016 final rule, the new proposed rule provides that employers may not:

- Require employee participation;
- Deny or limit coverage or particular benefits for non-participation;
- Take any adverse action against employees for non-participation or failure to achieve certain health outcomes; or
- Condition participation on an employee allowing information to be disclosed to a third party.

Unlike the 2016 final rule, however, the new proposed rule no longer requires employers to issue a unique ADA notice that clearly explains what medical information will be obtained, how it will be

used, who will receive it, any restrictions on its disclosure, and the protections in place to prevent its improper disclosure.

What incentives may employers offer under the new proposed ADA rule?

The new proposed ADA rule adopts the position that allowing too high of an incentive would coerce employees to disclose protected medical information to receive a reward or avoid a penalty. As a result, it provides that most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than "de minimis" incentives to encourage participation. While the proposed rule does not specifically define the term "de minimis," it does offer the examples of a water bottle or gift card of modest value, and solicits public comments on whether it would be helpful to provide additional examples of incentives that would violate the de minimis limit.

However, health-contingent wellness programs that are part of, or qualify as, group health plans to which the 2013 tri-Department HIPAA regulations apply are an exception to the de minimis standard. Such programs may offer the maximum allowed incentive under those regulations, which is currently 30% of the total cost of coverage or 50% to the extent the wellness program is designed to prevent or reduce tobacco use, provided that they comply with the five HIPAA requirements for such plans.

What are the confidentiality protections under the new proposed ADA rule?

The new proposed ADA rule generally retains the confidentiality protections contained in the 2016 final ADA rule. In particular, it does not change any of the confidentiality provisions in the EEOC's existing ADA regulations. However, it also requires that employers may only receive information in aggregate form that does not disclose, and is not likely to disclose, the identity of the employees, except as may be necessary to administer the plan. It also provides that employers may not require their employees to agree to the disclosure of their medical information or to waive the ADA's confidentiality protections as a condition for participating in a wellness program or receiving an incentive.

The 2021 Proposed GINA Rule

The proposed GINA rule concerns whether employers may offer incentives to employees in exchange for their spouse (or another family member who participates in a wellness program) providing information about their manifestation of disease or disorder and/or to achieve health outcomes as part of the program.

What does it mean to be "voluntary" under the new proposed GINA rule?

Under the new proposed GINA rule, obtaining genetic information through employer-provided health or genetic services will be considered lawful and voluntary if *prior, knowing, voluntary, and*

written authorization is obtained, in compliance with GINA's regulatory requirements for satisfying that standard.

What incentives may employers offer under the new proposed GINA rule?

Just like under the new proposed ADA rule, the EEOC proposes permitting employers to offer only a de minimis incentive in exchange for employees' or family members' participating in a wellness program that contains inquiries about their manifestation of diseases or disorders, and similarly offers the examples of a water bottle or a gift card of modest value as clearly de minimis.

What Happens Next?

These are only proposed rules at this point. Typically, the public will have 60 calendar days to submit comments for consideration by the EEOC, and the EEOC will have an additional 30 days for making reply comments. The EEOC will consider the comments and replies in developing its final rules. The EEOC is particularly interested in receiving comments on its de minimis standard, particularly whether it should provide additional examples of incentives that would violate it.

Will The Biden Administration Have Any Impact On The New Proposed Rules?

On December 30, 2020, President-elect Biden's transition spokesperson Jen Psaki told reporters that, on his first day in office, Biden will issue a "midnight memo" which will halt or delay any regulations or actions by the Trump administration that are not in effect by Inauguration Day. Such a freeze is standard practice for incoming administrations.

While it remains to be seen whether President Biden would support the new proposed rules as written, there are a couple of points that may be worth keeping in mind. First, Republican appointees currently hold a 3-2 edge at the EEOC until at least July 2022. It would not be terribly surprising for the Biden administration to put these new rules on hold until they can be reevaluated with a majority of Democrats making up the EEOC. Second, the ACA – which was passed with Biden's intimate involvement – and the since-nixed 2016 ADA and GINA final rules – which were passed under the Obama administration – both established wellness-program incentive limits at 30% for most employer-sponsored wellness programs. Given President-elect Biden's historical connection with these incentive limits, he may very well want to reconsider the proposed de minimis limit.

Conclusion

We will continue to monitor further developments and provide updates on the fate of the wellness rules, including strategies for developing or adapting compliant wellness programs, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have any questions about these new rules, or how they may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific regulatory development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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