All Is Now Well? – EEOC Finalizes Employer Wellness Program Rules

Insights
5.16.16

Today, the U.S. Equal Employment Opportunity Commission (EEOC) published the final versions of two new rules regulating employer-sponsored wellness programs. The rules, which will go into effect in 2017, allow employers to offer incentives for programs that ask questions about their employees' health or include medical exams and also permit employers to provide incentives in exchange for information about their employees' spouses' current or past medical conditions, so long as the information is not used to discriminate.

These rules should come as welcome news for employers who have spent the past several years in limbo due to the EEOC's radio silence on these questions, particularly those who found themselves in the EEOC's crosshairs when it began aggressively targeting wellness programs back in 2014.

Why Were We So Confused In The First Place?
The confusion all began as early as 1990. That year, Congress enacted the Americans with Disabilities Act (ADA) to protect individuals with qualifying disabilities from discrimination in the workplace. The law said that it was permissible for employers to conduct medical inquiries and examinations of their employees as part of wellness programs. The only real requirement for wellness programs at that time was that employee participation in them be "voluntary," but very little was known about what the term meant.

For example, it was unknown whether it was acceptable to offer their employees financial inducements for their participation in wellness programs or their completion of medical inquiries and examinations. While the EEOC responded that "modest" incentives were allowed, the agency failed to take any stance regarding the precise amount.

Between 1996 and 2010, Congress passed three additional federal laws impacting employers' privacy obligations with respect to employee medical information. The Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Non-Discrimination Act (GINA), and the Affordable Care Act (ACA) all created additional privacy rights, and the federal government created even more rules regulating wellness programs.

At times these rules seemed to overlap and even contradict each other, and the agencies overseeing these statutes occasionally seemed at odds with each other. For example, between 2006 and 2009, the EEOC waffled on the legality of other agencies' actions. In one instance, the EEOC said that "the

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HIPAA rule is appropriate," while in another matter it said that it was "continuing to examine what level, if any, of financial inducement under a wellness program would be permissible." Unfortunately, the EEOC did not issue any further guidance after taking these seemingly contradictory positions.

In the years following, the EEOC's stance was 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, in August 2014, the EEOC awoke from its slumber and filed its first lawsuit targeting wellness programs, alleging that such programs violate the ADA.

In the months that followed, it filed similar suits against other employers, and in one of them took one of its most alarming positions on the subject to date – that is, asserting that a wellness program could violate the ADA even if it fully complies with the ACA.

How Do The EEOC's New Rules Clear Up This Confusion?

The EEOC's new rules, issued today, regulate both the ADA and GINA. Separately, they provide clear guidance to employers on how to comply with both laws while maintaining wellness programs. According to EEOC Chair Jenny Yang, these new rules represent the EEOC's attempt to harmonize HIPAA's goal of allowing incentives to encourage participation in wellness programs with ADA and GINA provisions that require participation in them to be voluntary.

Americans With Disabilities Act (ADA) Rule

The purpose of the ADA rule is to reconcile HIPAA's authorization of incentives to encourage participation in wellness programs with the ADA's requirement that medical examinations and inquiries that are part of them be voluntary.

It only applies to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward (or avoid a penalty). The rule allows employers to provide limited financial (or other) incentives to employees in exchange for their answering disability related questions or taking medical examinations as part of a wellness program, whether or not the program is even part of a health plan.

What is a 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 healthcare costs. For example, 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. In essence, they must be reasonably designed to promote health or prevent disease.

To meet this standard, wellness programs must have a reasonable chance of improving the health of, or preventing disease in, its participating employees. They also must not be overly burdensome, a

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of, or preventing disease in, its participating employees. They 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. A wellness program that asks employees to answer questions for the purpose of alerting them to health risks, for instance, would meet this standard. But one asking employees to provide information without providing them any feedback about risk factors would not.

What does it mean for a wellness program to be voluntary?
Several requirements must be met in order for a wellness program to be considered voluntary. Specifically, employers may not require employee participation, deny or limit coverage or particular benefits for non-participation, or take any adverse action against employees for non-participation or failure to achieve certain health outcomes.

Employers must also provide their employees a 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. Finally, employers must comply with the incentive limitations outlined below.

What incentives may employers offer as part of a wellness program?
Under the new rules, the offering of limited incentives will not render a wellness program involuntary. If a wellness program is open only to employees enrolled in a particular plan, then the maximum incentive an employer can offer is **30% of the total cost for self-only coverage** of the plan in which the employee is enrolled.

This means that if, for example, the total cost for self-only coverage is $6,000 annually, the employer can 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 new rule also explains that employers who do not offer their employees health insurance may still offer them incentives to participate in wellness programs. These incentives are capped at **30% of the cost that a 40-year-old non-smoker would pay for self-only coverage under the second-lowest cost Silver Plan on the state or federal health care Exchange** in the location that the employer identifies as its principal place of business.

What are the requirements concerning the notice and confidentiality of medical information obtained as part of voluntary wellness programs?
The new ADA rule does not change any of the confidentiality provisions in the EEOC's existing ADA regulations. It does, however, add two new requirements. First, it 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.

Second, it 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

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participating in a wellness program or receiving an incentive.

When must employers begin complying with the new ADA rule?
The provisions of the final rule concerning the notice requirements to employees regarding what medical information will be obtained, how it will be used, and the limits on incentives apply only prospectively to wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of incentives permitted under this rule.

Thus, if the health plan that is used to calculate the permissible incentive limit begins on February 1, 2017, then that is the date on which the rules on incentives and the notice requirements will start to apply to the wellness program.

Genetic Information Non-Discrimination Act (GINA) Rule
The new GINA rule applies only to wellness programs where a portion of the incentive offered relates to an employee's spouse answering questions about his or her current or past health status or to taking a medical examination. It does not apply to incentives relating to an employee's spouse engaging in certain activities that do not require obtaining information about their current or past health status, like attending a weight loss or nutrition class, or exercising a certain number of times each week.

The new rule clarifies that GINA does not prohibit employers from offering limited incentives to an employee whose spouse is covered under the employee's health plan, receives health or genetic services offered by the employer (including as part of a wellness program), and provides information about his or her current or past health status, typically as part of a health risk assessment or biometric screening. This type of information is usually obtained as part of a health risk assessment, which may include some type of a medical questionnaire or examination.

What incentives may an employer offer to its employees' spouses for providing information about his or her own current or health status?
The incentive levels under the new GINA rule are consistent with those under the ADA rule. That is, if an employer's wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is **30% of the total cost of self-only coverage** under the group health plan in which the employee and family members are enrolled.

Thus, for instance, if an employee is enrolled in a self and family plan and that plan has a self-only option that costs $6,000, then the maximum reward for the employee's spouse to provide health information is $1,800. If, however, an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, then the maximum inducement is **30% of the lowest cost major medical self-only plan** the employer offers.

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The new rule also explains that employers who do not offer their employees health insurance may still offer them rewards to participate in wellness programs. If an employer does not offer health insurance, then the maximum incentive for the spouse to provide health information is **30% of the total cost to a 40-year-old non-smoker purchasing coverage under the second-lowest cost Silver Plan available through the state or federal Exchange** in the location that the employer has identified as its principal place of business.

Are there any confidentiality requirements as to the genetic information that is provided by employees?

Employers are prohibited from requiring employees (or their spouses) to agree to the sale exchange, transfer, or other distribution of their genetic information or to waive the confidentiality of the same as a condition for receiving an incentive or participating in a wellness program.

When must employers begin complying with the new GINA rule?

The final GINA rule applies prospectively to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under this rule.

Accordingly, if the plan used to calculate the level of inducements begins on April 1, 2017, then April 1, 2017 is the date on which the GINA rule applies to the wellness program.

If you have any questions about this new rule, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of new agency rules. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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