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Assessing the Health of Wellness Programs under EEOC Proposed Rule

On the heels of its recent litigation against several companies for allegedly non-compliant wellness programs, the Equal Employment Opportunity Commission ("EEOC") has finally promulgated a proposed rule to address a long-standing unknown for employers – how does one implement a wellness program that complies with the Americans with Disabilities Act ("ADA")? The answer provided in its proposed rule as revealed on April 16, 2015, is still somewhat unclear and may change before the regulations become controlling law. But the rule does provide some guidance as to, at least, the EEOC's interpretation of a voluntary, compliant wellness program. This is significant because the EEOC has been very active recently in prosecuting those employers it believes have instituted non-compliant programs.

In August and September of 2014, the EEOC filed two federal lawsuits against employers charging that the manner in which they implemented their wellness programs effectively compelled employee involvement because of the consequences for non-participation. Even more recently, the EEOC attempted to obtain an injunction to stop another employer from operating a wellness program that would penalize employees who did not participate in biometric testing, but the court refused to grant such a restraint. Now the EEOC looks to impact employer wellness programs through regulations. Principally, the proposed rule explains (1) when it will be applicable and why the ADA applies to wellness programs; and (2) when a wellness program will be considered voluntary and, thus, compliant.

Applicability of this Rule and the ADA to Wellness Programs

First, the EEOC establishes that wellness programs are covered by the ADA because they are included under the umbrella of employee health programs. Though the ADA usually prohibits employers from making disability-related inquiries or requesting medical examinations, there is an exception that allows voluntary medical examinations and inquiries as part of an employee health program. Thus, such is permitted within a wellness program if participation is voluntary.

This interpretation from the EEOC dismisses court precedent set by the case *Seff v. Broward County*, in which the Southern District of Florida determined that the wellness program at issue fell within the ADA's safe harbor provision for terms of a bona fide benefit plan. Thus, it found that the wellness program was not constrained by the requirements of the ADA. In its proposed rule, the EEOC explicitly dismisses this interpretation in a footnote, stating it "does not believe the ADA's 'safe harbor' provision [is] applicable" as discussed in *Seff*.

Due to the fact that the safe harbor provision does not remove wellness programs from the purview of the ADA, the EEOC's proposed rule will apply to all wellness programs, whether participatory or health-contingent, that include disability-related inquiries or medical examinations. All such wellness programs must be reasonably designed to promote health or prevent disease, as is similarly required for health-contingent wellness programs under the regulations implementing the Affordable Care Act ("ACA"). The EEOC explains that this standard requires wellness programs have a reasonable chance of improving health or preventing disease, not be overly burdensome, not allow for employment discrimination, and not employ a suspect method to meet its health promotion obligations. The rule also requires that participation in wellness programs be voluntary.

The Meaning of a "Voluntary" Program

Importantly, the proposed rule lays out the EEOC's interpretation of what characteristics are required to ensure a wellness program is voluntary. The EEOC denotes three main qualifications for a voluntary program; namely, the covered entity (1) does not require employees to participate; (2) does not deny coverage under any group health plan for non-participation or limit the extent of benefits for employees who do not participate; and (3) does not take adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate. Additionally, an employer must provide notice to its employees from whom it intends to obtain medical information. This notice must explain what medical information will be obtained, who will receive it, how it will be used, restrictions on its disclosure, and how the employer expects to prevent improper disclosure. The proposed rule only allows the disclosure of employee medical information to the employer in aggregate form, though there is an exception where certain information is needed to administer the health plan. The rule also requires employers to protect this information and keep it confidential to generally limit its use and to comply with the security requirements regarding individual protected health information under the Health Insurance Portability and Accountability Act ("HIPAA").

Moreover, the proposed rule specifically discusses the use of incentives to motivate *voluntary* participation in a wellness program. The EEOC clarifies that an incentive can take the form of a reward or a penalty and still be compliant, but cannot be more than 30% of the total cost of employee-only coverage. Again, this limit applies to both participatory and health-contingent wellness programs, despite the fact that it is only mandated for health-contingent programs pursuant to the regulations controlling them wellness programs under the ACA. Thus, if the total contribution toward employee coverage is $5,000.00, the EEOC declares that the total financial value of the incentive(s) cannot be greater than $1,500.00 to motivate participation in any type of wellness program.

The EEOC further explains that the total financial value of any and all incentives associated with a wellness program provided under a group health plan cannot be more than 30% of the cost of the employer's and employee's contributions toward coverage. Therefore, if a wellness program has multiple initiatives, each with its own incentive, all those incentives together cannot be greater than 30% of the cost of the employee-only coverage.

In its explanation of this proposed provision, the EEOC asserts its belief that this incentive limit is "not so high as to make participation in the program involuntary." But employers can be sure the EEOC will closely monitor programs to decide when an incentive does rise to the level of making participation in a wellness program compulsory.

Next Steps and Guidance for Employers

Although this provides a long-awaited interpretation from the EEOC of the intersection between wellness programs and the ADA, it does not address the impact of the Genetic Information Non-Discrimination Act. This remains an area where employers desperately need guidance as medical inquiries and exams may entail employees divulging protected genetic information. In the proposed rule, the EEOC assures that this issue will be addressed in "future EEOC rulemaking," but it is unclear when that future rulemaking will take place.

Additionally, this is only a proposed rule. Thus, employers are not yet bound to comply with its provisions and, in fact, some aspects of the rule could be revised before it becomes mandatory. As part of the rulemaking process, employers now have the opportunity to provide comments on the rule as proposed, which could motivate the EEOC to review and change certain requirements. All comments on this proposed rule, including proposed revisions, must be submitted by June 19, 2015. Even though employers are not yet bound to abide by this rule, however, the EEOC has already taken steps to hold employers accountable to the proposed standard before it was even announced, as discussed above.

Indeed, it has filed multiple lawsuits on the basis of what it interprets to be involuntary wellness programs. Therefore, it is important for employers to take proactive steps to create a voluntary, non-discriminatory wellness program now such as using rewards to incentivize participation, monitoring employee response to incentives, and periodically auditing wellness programs to determine overall impact and effectiveness.

For assistance with developing strategies for wellness programs or issues under the Affordable Care Act or any other labor and employment issues, contact Kara Maciel, Chair, Labor & Employment, or Lindsay Smith, Associate, Labor & Employment, Conn Maciel Carey PLLC.

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