NOVEMBER 17, 2015 | DISCRIMINATION, HARASSMENT & RETALIATION

EEOC Expands Permissible Wellness Program Incentives Under GINA

On October 30, 2015, the Equal Employment Opportunity Commission ("EEOC") issued a Notice of Proposed Rulemaking to amend regulations implementing Title II of the Genetic Information Non-Discrimination Act ("GINA") as they relate to wellness programs offered through a group health plan. With this new rule, the EEOC intends to broaden the use of incentives to encourage voluntary participation in employer-sponsored wellness programs under group health plans. Specifically, the EEOC clarifies that an employer can offer a limited incentive to an employee's spouse if the spouse (1) is covered by 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 his or her current health status. Such information is often provided through a health risk assessment.

GINA prohibits an employer from using an employee's or applicant's genetic information in making employment decisions. Thus, an employer is prohibited from requesting genetic information from an employee unless the employee voluntarily accepts health or genetic services, including those offered as part of a wellness program. Even under this exception, however, current regulations restrict wellness programs from requiring employees to provide genetic information in order to receive an incentive. The proposed rule makes clear that this restriction does not apply to an employee's spouse because there is a minimal chance that an employer could obtain information about an employee's genetic make-up from the current or past health status of an employee's spouse. For this reason, the proposed rule is limited to incentives for information about an employee's spouse and does not include an incentive for current or past health status of an employee's child as the EEOC believes that information could provide insight into the genetic make-up or predisposition of an employee.

Similar to other laws regulating incentives connected to wellness program participation, incentives permitted under GINA would not be allowed to exceed 30% of the total cost of coverage for the health plan. Therefore, the total incentive for an employee and spouse to participate in the wellness program, together, may not exceed 30%. For instance, the EEOC explains that if the total cost of coverage is $14,000.00, the incentive offered for providing information on current or past health status could be no more than $4,200.00 total for both an employee and his or her spouse. Furthermore, the portion of the incentive attributable to the employee, alone, cannot be more than 30% of the cost of self-only coverage. The proposed rule allows for a reward or penalty and the incentive can be financial or "in-kind" (i.e., time-off awards, prizes, or other items of value not to exceed 30% of the cost of coverage). To participate, the spouse would have to provide knowing, written, and

voluntary authorization for the employer to collect genetic information, just like an employee.

This proposed rule appears to be part of the EEOC's continued effort over the last year to clarify the impact of federal statutes regulating health-related discrimination on wellness programs permitted and promoted under the Affordable Care Act. For instance, as we discussed in a prior post, the EEOC put out a proposed rule to address the Americans with Disabilities Act's ("ADA") impact on employer wellness programs last April. That rule clarifies when participation would be considered voluntary under the ADA and addresses incentives associated with participation. Both of these proposed rules come amidst a recent upswing in litigation over wellness programs, with the EEOC pursuing claims against employers for violating non-discrimination laws for which it had yet to even provide clear guidance.

At this point, this is only a proposed rule and could potentially change based on comments received by the EEOC. Employers currently have the opportunity to submit comments on the proposed rule until December 29, 2015. Although the proposed rule is not yet controlling and could be altered, employers should continue to take proactive steps to ensure a compliant wellness program based on current regulations and the requirements likely to come down the pipeline. The ability to offer incentives for spouse's to provide current and past health status information could benefit employers as they are continuing to look for ways to cut health care costs, as long as those incentives are compliant and the program is implemented in a manner that meets GINA's requirements.