EEOC Issues Draft Regulations on Wellness Programs and the ADA

On April 16, 2015, the Equal Employment Opportunity Commission (EEOC) issued draft regulations on Wellness Programs and the Americans with Disabilities Act (ADA). These draft regulations were much anticipated and bring a measure of certainty to a complex regulatory landscape that had been in turmoil after recent EEOC litigation. That litigation challenged whether wellness programs that were facially compliant with final wellness regulations under the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) were “voluntary” under the ADA. (See Alert 2014-18 EEOC Suit Alleges Commonplace Wellness Program Violates ADA and GINA.)

Background on the ADA and Wellness Programs
The ADA generally restricts the medical information employers can request from applicants and employees and makes it illegal to discriminate against individuals based on disability. The ADA specifically limits an employer’s ability to require employees to submit to a physical exam or respond to health-related inquiries except where they are either job related or are part of a “voluntary” wellness program. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate. The EEOC had informally indicated that restricting eligibility for employees who do not complete a Health Risk Assessment (HRA) would violate the ADA (gateway plan) and questioned whether too great of an incentive would render a wellness program involuntary. Recent litigation by EEOC challenged incentives that would be permissible under the final regulations on Wellness Programs under HIPAA and the ACA as violating this undefined incentive threshold that can render a program involuntary under the ADA. As summarized below, the draft regulations give employers concrete guidance on gateway wellness plan designs and set limits on permissible incentives that are generally consistent with rules under HIPAA and the ACA.

Background on Wellness Programs under HIPAA and the ACA
HIPAA’s nondiscrimination provisions generally prohibit group health plans from discriminating against participants with respect to premiums, benefits, or eligibility based on a health factor. Wellness programs, programs designed to promote health or prevent disease, are an exception to this general rule if they meet certain requirements.

Final HIPAA wellness regulations discuss two types of wellness programs: participatory
programs and health-contingent programs. Participatory wellness programs either do not provide a reward or do not include any conditions for obtaining a reward that are based on satisfying a standard related to a health factor. Examples in the final regulations include, a program that reimburses employees for all or part of the cost of a gym membership, a program that reimburses employees for the costs of a smoking cessation program even where the employee does not quit smoking, and a program that provides a reward to employees who complete a HRA without any further action required by the employee. Participatory wellness programs are permissible under HIPAA if they are made available to all similarly situated individuals.

Health-contingent wellness programs, which can be activity-only or outcomes-based, require individuals to satisfy a standard related to a health factor to obtain a reward. Activity-only programs require individuals to complete an activity related to a health factor and can include diet or exercise programs. Outcomes-based programs require individuals meet a certain health metric, for example having a certain Body Mass Index (BMI), cholesterol level, or being tobacco free. All health-contingent programs must meet the following 5 compliance requirements: (1) eligible individuals must be given the opportunity to qualify for the reward at least once per year, (2) the total reward offered cannot exceed 30% of the total cost of coverage under the plan (both employee and employer contributions) or 50% for tobacco prevention programs, increased from 20% under the 2006 regulations, (3) programs must be reasonably designed to promote health or prevent disease, (4) the full reward must be available to all similarly situated individuals, which requires a reasonable alternative standard be offered to anyone who does not meet a health-contingent outcomes-based standard and anyone for whom an activity based program is unreasonably difficult or medically inadvisable, and (5) plans must disclose the availability of a reasonable alternative standard in all plan materials.

The Draft EEOC Wellness Regulations on the ADA
The EEOC’s draft regulations clarify that under the ADA an employer may offer incentives under a wellness program that is part of the group health plan of up to 30% of the total cost of coverage, whether in the form of a reward or penalty. Although this is generally the maximum incentive allowed under HIPAA and the ACA for health-contingent wellness programs, the EEOC explains that for its’ purposes the 30% limit also includes incentives offered under participatory wellness programs that involve disability-related inquiries or medical exams in addition to rewards offered under health-contingent programs. Historically, many employers that offered wellness programs with both participatory and health-contingent components limited the reward for the health-contingent piece of the program to 30% of the cost of coverage but then provided additional incentives for completion of a HRA. Under the draft regulations, that design would violate the ADA.
However, this 30% limit on incentives under the ADA only applies only to the extent that wellness program includes a physical exam or health-related inquiries. The draft regulations clarify that a smoking cessation program that merely asks employees whether or not they use tobacco (or ceased using tobacco upon completion of the program) does not constitute disability-related inquiries or medical examinations. Thus, the ADA's incentive limits would not apply and a plan could offer incentives as high as 50% of the cost of coverage for that smoking cessation program as permitted under HIPAA.

The draft regulations establish other rules for a program to be considered voluntary under the ADA. Specifically an employer or plan cannot: (1) require employees to participate, (2) deny coverage under any of its group health plans or benefits packages for employees who do not participate, and (3) take adverse employment actions or retaliate against employees who do not participate. These rules eliminate many gateway wellness plan designs that employers with more aggressive wellness strategies have used. These prohibited designs would include limiting eligibility for medical coverage to employees who complete an HRA and limiting eligibility to a less rich benefit option for employees who do not complete an HRA.

The draft regulations also confirm that disability-related inquiries and medical exams must be reasonably designed to promote health or prevent disease. This standard is similar to the standard under the HIPAA final rules for health-contingent wellness programs. The regulations note that collecting medical information without providing employees follow-up information or advice, such as providing feedback about risk factors or using aggregate information to design programs or treat any specific conditions, would not be reasonably designed to promote health. Additionally, a program cannot require an overly burdensome amount of time for participation, require unreasonably intrusive procedures, or place significant costs related to medical examinations on employees. A program also is not reasonably designed if it exists mainly to shift costs from the employer or plan to targeted employees based on their health.

To ensure that participation in a wellness program that includes a physical exam or health-related inquiries, and that is part of a group health plan, is voluntary an employer must provide a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. Finally, the proposed rule allows the disclosure of medical information obtained by wellness programs to employers only in aggregate form, except as needed to administer the health plan. The EEOC stated that adhering to the HIPAA Privacy Rule and providing a HIPAA Privacy Notice would likely satisfy this obligation.

Interestingly, the draft regulations provide the incentive limits and confidentiality notice only
apply to wellness programs that are a group health plan or are part of a group health plan. For our purposes, most common wellness programs are considered group health plans because they provide some measure of medical care or are otherwise linked to medical benefits by way of a premium discount, lower cost sharing, or account funding.

**Outstanding GINA Issues**

Compliance with the Genetic Information Nondiscrimination Act (GINA) was not addressed in the draft regulations. The potential issue raised by GINA in connection with wellness programs involves health risk assessments (HRA) completed by an employee’s spouse. EEOC had alleged that if a spouse completes an HRA, it will violate GINA because a medical condition of an employee's spouse would be considered genetic information of the employee because the spouse is considered a "family member" (even though an employee and spouse will not generally share genetic material). Although this is generally considered outside the spirit of the law because most spouses do not in fact share genetic information, it remains an outstanding issue.

**Next Steps for Employers**

Employers are not required to immediately comply with the EEOC’s draft regulations. However, the EEOC would be unlikely to challenge a program that complies with the draft regulations and a court would likely find such a program ADA compliant. Employers should review existing wellness plan designs and incentive amounts. Employers should also consider phasing out gateway plans as the EEOC is unlikely to change its longstanding position with respect to those programs. Otherwise, the EEOC is accepting comments on the draft regulations through June 19. Some of the issues EEOC is requesting comment on include whether additional protections for low-income employees are needed and whether incentives provided in a wellness program cannot be so large as to render the health insurance coverage unaffordable under the ACA. The regulations are available in full at [http://federalregister.gov/a/2015-08827](http://federalregister.gov/a/2015-08827).

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