Overview of the EEOC NPRM “Application of the ADA to Employer Wellness Programs”

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Presented by

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Equal Employment Opportunity Commission (EEOC)

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EEOC Notice of Proposed Rulemaking: the ADA and Wellness Programs

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NPRM on the ADA and Employer Wellness Programs

- Published in the Federal Register on April 20, 2015.
- Proposes to amend Section 1630.14(d) of the EEOC’s regulations implementing Title I of the ADA.
- Members of the public have 60 days from the date of publication to submit comments.
- EEOC will then consider the comments, revise the NPRM if necessary, and issue a final rule.
NPRM (cont.)

- Questions and Answers: http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm
- Fact Sheet for Small Business: http://www.eeoc.gov/laws/regulations/facts_nprm_wellness.cfm

Overview

- What are wellness programs?
- What does the ADA say about such programs?
- What other laws regulate employer wellness programs?
- What does the NPRM do?

Employer Wellness Programs

- According to a 2013 study by Rand Health, about 50 percent of U.S. employers offer wellness programs, which may include:
  - Employee Assistance Programs (EAPs)
  - Nutrition classes
  - Onsite exercise facilities
  - Weight loss and smoking cessation programs
  - Coaching to help employees meet health goals
  - Monitoring for conditions such as high blood pressure, high cholesterol, or diabetes
Employer Wellness Programs (cont.)

• Many employers use financial and other incentives (e.g., a reduction or increase in health care premiums, cash, or prizes) to encourage participation in these programs or to encourage employees to achieve certain health outcomes (e.g., lower blood pressure or cholesterol).

• Some wellness programs simply require employees to undertake some activity to earn an incentive, but others require employees to answer questions about their health or take medical examinations.

Title I of the ADA

• The ADA says that employers may ask disability-related questions or conduct medical exams as part of wellness programs as long as the inquiries or exams are voluntary.

• In prior guidance, EEOC stated that a wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

Title I of the ADA (cont.)

• Until now, EEOC had not provided guidance on the extent to which incentives may affect the voluntary nature of wellness programs.

• However, the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act, allows incentives
Title I of the ADA (cont.)

- Like all benefits and privileges of employment, wellness programs that do not include disability-related inquiries/medical examinations must:
  - Not discriminate in violation of the EEO laws
  - Offer reasonable accommodations that enable employees with disabilities to participate and earn whatever incentive an employer offers

HIPAA/Affordable Care Act Requirements

- Generally, group health plans must not discriminate against participants based on a health factor.
- An exception allows premium discounts or rebates or modifications to cost sharing in return for adherence to certain programs of health promotion and disease prevention.

HIPAA/Affordable Care Act Requirements (cont.)

- The nondiscrimination provisions discuss two types of wellness programs:
  - Participatory: These programs either do not provide a reward or do not include any conditions for obtaining a reward based on an individual satisfying a standard related to a health factor.
  - Health-contingent: These programs, which may be either activity-only or outcome-based, require individuals to satisfy a standard related to a health factor to obtain a reward or avoid a penalty.
HIPAA/Affordable Care Act Requirements (cont.)

- Examples of participatory wellness programs –
  - Completing a health risk assessment
  - Attending a smoking cessation or weight loss class regardless of whether employee actually stops smoking or loses weight
- Examples of health contingent wellness programs
  - Attaining a certain blood pressure, cholesterol, or blood glucose level
  - Walking a certain amount each week

HIPAA/Affordable Care Act Requirements (cont.)

- Incentives not limited for participatory programs
- Incentives under health-contingent wellness programs:
  - Cannot exceed 30 percent of the total cost of coverage under the plan, including both employee and employer contributions
  - Can be as much as 50 percent to the extent the additional percentage is attributable to tobacco prevention or reduction.
  - Reasonable alternative standards must be available for obtaining reward/avoiding penalty.

What Does the NPRM Do?

- Explains what an employee health program is.
- Defines what it means for an employee health program to be voluntary.
- Clarifies that an employer may offer limited incentives as part of wellness programs that are part of a group health plan and that include disability-related inquiries and/or medical examinations.
- Explains confidentiality requirements applicable to medical information obtained as part of voluntary employee health programs.
- Explains relationship of rules governing wellness programs to other EEO laws.
What Is a Health Program?  
(Section 1630.14(d)(1))

• A health program must be “reasonably designed to promote health or prevent disease.” This means it:
  – must have a reasonable chance of improving health or preventing disease, and
  – must not be overly burdensome, a subterfuge to evade the ADA or other EEO laws, or highly suspect in the manner chosen to promote health or prevent disease.

When Is a Health Program “Voluntary”?  
(Section 1630.14(d)(2)(i)—(iii))

• For a health program that includes disability-related inquiries or medical examinations to be voluntary, an employer may not:
  – require employees to participate;
  – deny access to health coverage for non-participation;
  – limit coverage under its health plans or particular benefits packages within a group health plan for such employees, except in certain circumstances; and
  – take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees as prohibited under the ADA.

When Is a Health Program “Voluntary”  
(Section 1630.14(d)(2)(iv))

• A wellness program that is part of a group health plan must also provide employees with a notice clearly informing them:
  – What medical information will be obtained;
  – How it will be used;
  – Who will receive it; and
  – How it will be kept confidential.
Recent Cases Challenging Wellness Programs Under the ADA

• EEOC v. Orion Energy Systems
  – EEOC alleges Orion shifted entire cost of health insurance to employee and then fired her because she refused to participate in a wellness program that included disability-related questions and medical exams.
  – Suit claims the inquiries/exams are not job-related/consistent with business necessity and that the program is not voluntary.
  – Also claims for retaliation and interference with ADA rights.

Recent Cases Challenging Wellness Programs (cont.)

• EEOC v. Flambeau, Inc., Civil Action No. 3:13-cv-00638 (W.D. Wisc.)
  – Wellness program provides for cancelation of health insurance, shifting of entire cost of coverage, and other unspecified discipline for employees who do not submit to biometric screening and complete health risk assessment.
  – EEOC contends the inquiries/exams are not job-related/consistent with business necessity and that the program is not voluntary.

What Incentives Are Permitted? (Section 1630.14(d)(3))

• Generally, an employer may offer incentives as part of a wellness program that is part of a group health plan and that includes disability-related inquiries and medical examinations as long as the incentive does not exceed 30 percent of the total cost of employee-only coverage.
  
• The total cost of coverage includes both the employee’s and the employer’s share of the health plan premium.
What Confidentiality Requirements Apply?  
(Section 1630.14(d)(4)—(6))

- Employers receive information only in aggregate terms that do not reveal, and are not reasonably likely to reveal, identity of specific employees.
- Wellness programs that are HIPAA covered entities can generally meet this obligation by complying with the HIPAA Privacy Rule.
- Employers may generally comply by certifying that they will not use or disclose any individually identifiable information for employment purposes.
- Interpretive guidance accompanying the regulation describes some confidentiality best practices.

Interaction of NPRM with other EEO Laws  
(Section 1630.14(d)(7))

- Compliance with provisions in proposed section 1630.14(d), including limits on incentives, does not ensure compliance with other EEO laws.
- For example, an wellness program may not discriminate based on race, sex, national origin, age, or genetic information.

Other Issues

- Employers must provide reasonable accommodations for individuals with disabilities to participate in wellness programs and to earn whatever incentives an employer offers.
- Reasonable accommodations might include:
  - Sign language interpreters to attend a nutrition class
  - Materials in an accessible format (e.g., electronic, Braille, or large print)
  - Alternatives to blood tests
Outstanding Questions

• The NPRM does not address whether employers may offer incentives for family member participation in wellness programs.
• This issue will be the subject of future rulemaking under Title II of the Genetic Information Nondiscrimination Act (GINA).

Outstanding Questions (cont.)

• The preamble to the NPRM poses a number of specific questions including—
  – Whether EEOC should issue regulations governing wellness programs that are not part of a group health plan.
  – Whether additional protections are needed to ensure incentives are not coercive.
  – Whether consent should be required in addition to notice.
  – Whether notice requirements of proposed section 1630.14(d)(2)(iv) should apply to wellness programs that offer only de minimis incentives.
  – What best practices ensure that wellness programs will not be used to impermissibly shift costs.

For More Information on HIPAA

• HIPAA’s nondiscrimination requirements:
  – U.S. DOL, Employee Benefits Security Administration
    http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.htm
• HIPAA Privacy and Security Rules
  – U.S. Department of Health & Human Services
    http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html
    http://www.hhs.gov/ocr/privacy/hipaa/understanding/srsummary.html
For Questions About the NPRM

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