

*Employee Benefits Compliance Alert – April 22, 2015*

## EEOC provides new guidance for wellness programs



The EEOC recently issued proposed rules about wellness programs included in group health plans and the guidelines that must be followed if the program asks employees to answer disability-related questions or take a medical examination. The proposed rules impose much greater restrictions on wellness programs than existed under the previously issued HIPAA rules.

On April 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued proposed rules about wellness programs included in group health plans and the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations, such as health risk assessments or biometric tests. In its proposed rules, the EEOC intended to reconcile the differences between the current wellness program rules under Health Insurance Portability and Accountability Act (HIPAA) with the Americans with Disabilities Act (ADA).

### Employer wellness program incentive requirements

The proposed rules provide that an employer may offer limited incentives up to a maximum of 30% of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or biometric examinations. In addition, the proposed rules extend the incentive limits to participatory wellness programs, which are those that do not include any condition for obtaining a reward-based incentive that turns on an individual

satisfying a standard related to health. For example, under the proposed rules, an incentive tied to an employee completing a health risk assessment or biometrics screening must comply with the incentive limits even though that would not be required under HIPAA. Lastly, the proposed rules specify that if an employer conducts a biometric exam to test for nicotine, the permissible incentive would be capped at 30% instead of 50%. The 50% maximum incentive that currently applies to tobacco cessation programs would only apply to programs that merely ask employees if they use tobacco.

Assuming the guidance becomes final, employers with wellness programs incentives tied to disability-related inquiries and/or medical examinations will need to comply with the incentive limits as defined in the proposed rules in order to be considered ADA compliant.

### Employer wellness program voluntary requirement

Although the ADA limits the circumstances in which employers may ask employees about their health or require them to undergo medical examinations, it allows such inquiries and examinations if they are voluntary.

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The proposed rules list the following requirements that must be met in order for participation in programs that include disability-related inquiries or medical examinations to be considered voluntary:

- The employer may not require employees to participate;
- The employer may not deny access to health coverage or generally limit coverage under its health plans for non-participation;
- The employer may not take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees; and
- If the wellness program is part of a group health plan, the employer must provide a notice to employees that:
  - Describes the type of medical information that will be obtained and the specific purposes for which the information will be used;
  - Describes the restrictions on disclosure of the employee's medical information and the methods that the covered entity will use to ensure that the medical information is not improperly disclosed; and
  - Is understandable to the employee.

Employers implementing wellness programs with disability-related inquiries and/or medical examinations are cautioned to design them so that they do not require employee participation or limit coverage under health plans for participation.

### Employer wellness program medical information confidentiality requirement

If a wellness program collects disability-related information or requires a wellness exam, employers must provide employees with a notice that describes what medical information will be collected, who will have access to it, how it will be used, and how it will be kept confidential. Generally, these requirements will already be met by any employer subject to HIPAA. If an employer is not a HIPAA-covered entity, the ADA requires a signed certification as provided under HIPAA that the employer will not use or disclose individually identifiable medical information for employment purposes.

The proposed rules require that medical information collected as a part of a wellness program be received by employers only in aggregate form that does not reveal the employee's identity (except as needed to administer

the plan), and that information must be kept confidential in accordance with ADA requirements. Employers that sponsor wellness programs and administrators of wellness programs acting as agents of employers must comply with this confidentiality requirement.

### Employer wellness program reasonable accommodations for employees with disabilities

The proposed rules note that employers are still required to give reasonable accommodation to employees with disabilities with respect to wellness program financial incentives. Providing a reasonable alternative standard and notice, as required by HIPAA, would likely (although not conclusively) fulfill this obligation. The proposed rule also clarifies that ADA reasonable accommodation be provided to employees taking part in participatory wellness programs, even though HIPAA would not require a reasonable alternative standard and notice for those programs.

Examples of reasonable accommodation provided by the EEOC include the following:

- An employer that offers an incentive for employees who attend a nutrition class must provide a sign language interpreter for deaf employees (absent undue hardship).
- If an employee has a blood condition that would make drawing blood dangerous, an employee may need to provide an alternative to a blood test.

### Comments invited on additional new provisions

The proposed rules request comments on a number of outstanding proposals, including:

- Whether a wellness program that could cause health coverage to be unaffordable under ACA would be considered involuntary. The proposed rules state that “[w]here such incentives would render a plan unaffordable for an individual, it would be deemed coercive and involuntary to require that individual to answer disability-related inquiries.” Theoretically, the same wellness plan incentives could be voluntary for some employees, and non-voluntary for other employees, depending upon affordability.
- Whether additional protections for low-income employees are needed.

## Employer impact

The EEOC will be accepting comments on the proposed rules until June 19, 2015. In the meantime, employers should review their wellness programs to determine if they are compliant with the proposed rules and other wellness regulations. Employers with questions should contact their Wells Fargo Insurance representative.

The proposed rules do not address the extent to which Title II of GINA impacts an employer's ability to condition incentives on a family member's participation in a wellness program. The EEOC will address this issue in a future proposed rule. It is important to note that compliance with these proposed rules does not relieve an employer of its obligation to comply with other employment nondiscrimination laws.

The EEOC provides a Fact Sheet for Small Business and Questions and Answers to supplement the proposed rules. For further information on HIPAA wellness regulations, please see our client advisory on this topic as well as our June 2013 and September 2014 Legislative Updates.

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