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EEOC Issues Proposed Regulations Under the ADA Regarding Wellness Programs

By Eileen Oakes Muskett

On April 20, 2015, the Equal Employment Opportunity Commission (EEOC) published a proposed rule that would amend its regulations and provide guidance regarding the Americans with Disabilities Act (ADA) as it relates to employer wellness programs. These proposed regulations provide much-needed guidance to employers regarding the extent to which they may use incentives to encourage employees to participate in wellness programs and also provide guidance on the limited use of disability-related inquiries and medical examinations. The following is a summary of these proposals.

Voluntary Participation

The EEOC reaffirms its position that, pursuant to the ADA, employee participation in wellness programs that include disability-related inquiries or medical examinations must be voluntary. For participation in a wellness program to be considered voluntary, an employer may not:

- Deny coverage under any of its group health plans or benefits packages.
- Limit the extent of such coverage.
- Take adverse action against an employee who has refused to participate in the employee health program or failed to achieve certain health outcomes.

For participation in a wellness program to be considered voluntary, employers must provide employees with notice that clearly explains:

- What medical information will be obtained
- How the medical information will be used
- Who will receive the information
- The restrictions in its disclosure
- The methods used to prevent improper disclosure of the medical information

Incentives Are Limited

Offering limited incentives will not render the program involuntary, but the total allowable incentives available under the program must not exceed 30 percent of the total cost of the employee-only coverage, which is the same percentage limitation set under the Affordable Care Act. As long as the incentive for a participatory wellness program is available to all similarly situated employees, regardless of any health factor, the incentive will also not violate HIPAA or ACA. In addition, an employer may not coerce, intimidate or threaten employees who do not participate in the program, as doing so would render consent to participate involuntary.

Promote Health or Prevent Disease

Wellness programs also must be reasonably designed to promote health or prevent disease, meaning

the program has a reasonable chance of improving health or preventing disease in participating employees. The proposed regulations also make it clear that the wellness program may not be a subterfuge for discrimination under the ADA or other anti-discrimination laws or a "highly suspect method" to promote health or prevent disease.

Confidentiality

The EEOC clarified the scope of confidentiality and the use of medical information gathered in the course of providing voluntary health services to employees. Both employers that sponsor wellness programs and administrators of such programs are obligated to ensure medical information collected through an employee health program remains confidential and the identities of the individuals should not be disclosed except as needed to administer the health plan.

The interpretative guidance provides that a wellness program that is part of a group health plan and required to comply with HIPAA will comply with the ADA privacy requirements if it certifies to the group health plan that it will not use or disclose the information for purposes not permitted by its group health plan documents and the HIPAA Privacy Rule and then abiding by that certification. If the employer is not performing plan administration on behalf of the group health plan, then the aggregate information received by the employer under the wellness program must be de-identified in accordance with HIPAA and other disclosures, normally permitted under the ADA for employee health programs, may not be permissible under the HIPAA privacy rule without written authorization by the employee.

No Discrimination

Finally, the proposed regulations remind employers that even if the wellness programs comply with the incentive limits set forth in the ADA regulations, the employer must still ensure that the program does not discriminate on the basis of race, sex, national origin, genetic information, age or any other grounds prohibited by other anti-discrimination statutes.

Comments regarding these proposals may be submitted by June 19, 2015, to the EEOC for consideration. See the Federal eRulemaking Portal at www.regulations.gov for more information. Where employers have questions regarding their wellness programs, they should seek experienced counsel to guide them through the myriad of potential legal issues associated with improperly constructed or implemented programs. Stay tuned to Fox Workplace Watch for updates concerning these proposed regulations.

For more information about this alert, please contact Eileen Oakes Muskett at 609.572.2355 or emuskett@foxrothschild.com or any other member of the firm's Labor & Employment Department.