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## EEOC Issues Proposed Guidance as to Wellness Plan Incentives

4.22.2015

The Americans with Disabilities Act (“ADA”) generally prohibits employers from making disability-related inquiries or requiring medical examinations. A common exception to that general prohibition permits voluntary medical examinations as part of an employee health program. The Equal Employment Opportunity Commission (“EEOC”) recently issued a proposed update to its regulations regarding employer wellness programs. The EEOC’s proposed rule addresses: (1) the extent to which employers may offer incentives to employees to participate in wellness programs; and (2) whether employers that comply with regulations implementing the Health Insurance Portability and Accountability Act (“HIPAA”) will also be in compliance with the ADA.

### Wellness Program Incentives

Many employers offer incentives to their employees to encourage participation in a wellness program. Some employers even offer incentives based on whether an employee achieves certain health outcomes. The proposed rule provides that an “employee health program, including any disability-related inquiries and medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease.” It further states that for a program to be “voluntary,” an employer may not require an employee to participate in the program and may not deny coverage or limit the extent of coverage because of non-participation.

But what does it mean for participation to be “voluntary”? Previous guidance stated that a wellness program was voluntary if “an employer neither requires participation nor penalizes employees who do not participate.” The EEOC is now proposing a cap on the allowable incentive. Specifically, the use of incentives, regardless if in the form of a reward or penalty, will be considered voluntary if the maximum allowable incentive does not exceed 30 percent of the total cost of employee-only

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coverage.

The EEOC also noted that “compliance with rules concerning voluntary employee health programs does not ensure compliance with all the anti-discrimination laws EEOC enforces.”

### HIPAA Compliance

The EEOC indicated that it has a responsibility to interpret the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and HIPAA's and the Affordable Care Act's provisions promoting wellness programs.

Accordingly, wellness programs that are part of group health plans must comply with the ADA and must also comply with HIPAA requirements. Although HIPAA generally prohibits discrimination against participants in terms of premiums, benefits, or eligibility based on health factors, it provides an exception that permits financial incentives in connection with health promotion and disease prevention programs.

Employers may offer “wellness programs” in order to improve employees' health and reduce health care costs. These programs include nutrition classes, exercise facilities, weight loss programs and smoking cessation programs. Wellness programs may also include health risk assessments and biometric screenings that measure health risk factors such as body weight, cholesterol, and blood pressure levels.

Under the ADA, employers are only permitted to make health-related inquiries or require employees to undergo medical examinations in limited situations, such as when they are voluntary and part of an employee health program.

### Word of Caution

These are the only proposed rules. Comments will be accepted for 60 days from the date of publication. However, employers that have or are considering implementing wellness programs must be careful to ensure that they comply with the current and any future ADA regulations, as well as HIPAA requirements.

If you would like more information about submitting comments, please do not hesitate to contact your Butzel Long Labor and Employment attorney.