Rules Change for Wellness Programs

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Background

Many employers encourage employee participation in a wellness program. New final regulations were just issued that change the rules for employers offering employee wellness programs. Changes include expanded restrictions on wellness incentives, additional notice requirements, new prohibitions on employer actions, and new confidentiality requirements.

What's Changed?

Wellness Program Included in Health Plan. A wellness program may be part of a group health plan, or may be offered outside of a group health plan. Employers have, in the past, made their wellness programs a benefit provided through their group health plan in order to ensure that the wellness program would be considered a "bona fide" employer group health plan that is not subject to certain provisions of the Americans With Disabilities Act ("ADA"). New final ADA regulations explicitly state that the ADA's bona fide employer group health plan safe harbor provision does not apply to wellness programs, even if they are part of an employer's group health plan, if the wellness program includes disability-related inquiries (such as in a health risk assessment or medical history) or medical examinations (such as biometric screenings).

Cash and Non-Cash Incentive Limits. The new regulations under the Genetic Information Nondiscrimination Act ("GINA") and the ADA allow employers to offer employees and their spouses cash and non-cash inducements totaling up to 30% of the costs of self-only coverage (meaning the total annual premium for employee-only coverage including both the employer's and employee's share) in some circumstances. Under the GINA rules, no incentives are allowed in exchange for the current or past health status information of employees' children, or in exchange for genetic information (e.g., family

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medical history or results of genetic tests) of an employee, an employee's spouse, or an employee's children. Under the ADA rules, the 30% limit applies both to participatory (i.e.., individual must do something to get reward, such as have biometric screenings) and health-contingent wellness plans (i. e., individual must achieve a specified health goal to get reward, such as lose 10 pounds.) In contrast, the existing Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Patient Protection and Affordable Care Act ("ACA") regulations only limit financial inducements for health-contingent wellness programs, and a wellness program that includes tobacco cessation incentives can have total incentives as high as 50% of the total cost of employee-only coverage.

Now, a tobacco-related wellness incentive of up to 50% that complies with HIPAA and the ACA would be permitted under the ADA and GINA regulations only:

- to the extent that the additional percentage is attributed solely to the tobacco use prevention or reduction aspects of the wellness program; and
- the employee is merely asked whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program), and there is no disability-related inquiry or medical examination required to qualify for the tobacco-related incentive.

A biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination. The mere fact that someone smokes is not information about a disability, however. The ADA financial incentive cap of 30% would therefore apply to a wellness program that includes a screening, but not one that just asks about tobacco use.
Two-Tiered Coverage. The preamble to the final ADA regulations also state that it would violate the ADA if an employer denied an employee access to a specific type of health coverage because the employee does not answer disability-related inquiries or undergo medical examinations. This would prevent employers from denying access to a better tier of coverage under the group health plan to employees that refuse to participate in a medical examination that tests for tobacco usage, for example. An employer may not retaliate against, interfere with, coerce, intimidate, or threaten to discipline an employee who does not participate in a wellness program that includes disability-related inquiries or medical examinations.

Notice Requirement. Wellness programs also commonly use health risk assessments that ask questions about lifestyle-related health risk factors, and biometric screenings that measure the employee's health risk factors such as body weight, cholesterol, blood glucose, and blood pressure levels. To ensure the wellness program is voluntary under the ADA, an employer must provide employees with a notice that clearly explains what medical information will be obtained through wellness program, how that information will be used, and the restrictions on disclosure. This means some employers may have to create a new notice to comply with the ADA. Where the wellness program is included in the employer's group health plan, the HIPAA Notice of Privacy Practices will typically meet this requirement.

Confidentiality Requirements. Two new ADA confidentiality requirements also apply. An employer may only receive information collected by a wellness program in aggregate form that doesn't disclose, and isn't reasonably likely to disclose, specific individuals' identities except when such individual data is necessary to administer a health plan. Additionally, an employer generally cannot require employees to agree to the sale, exchange, sharing, transfer or other disclosure of their medical information or to waive confidentiality protections as a condition of wellness plan participation or to receive an incentive. Under HIPAA, employers were required to notify the employee in advance if their medical information could be used in these ways (e.g., medical data used to further medical research). Under the ADA, advance notice is no longer enough.

Other Types of Discrimination. The preamble to the ADA regulations states that, even if a wellness program complies with the incentive limits, the employer would violate Title VII or the ADEA if that program discriminates on the basis of race, sex (including pregnancy, gender identity, transgender status, and sexual orientation), national origin, age, or any other grounds prohibited by those statutes. If a wellness program requirement (such as achieving a particular blood pressure or glucose level or body mass index) disproportionately affects individuals on the basis of some protected characteristic, an employer may be able to avoid a disparate impact claim by offering and providing a reasonable alternative standard. Stated differently, if a wellness incentive is provided as part of a health-contingent wellness program, and pregnant women or minorities (for example) are disproportionately adversely affected, the employer should offer a different method for those individuals to obtain the incentive without achieving the specified health target.

Caution on Timing

The new rules apply January 1, 2017, for wellness programs that use activities during the year beginning on January 1, 2017 to determine eligibility for wellness incentives. This short timeframe can present challenges for employers. Employers need to review the terms of their wellness programs now, in order to ensure wellness program communications distributed as part of their annual open enrollment process reflect a wellness program that will comply with the new ADA and GINA regulations.

For more information please contact the author of this client alert.