Labor and Employment Alert: EEOC Proposes Rules for Wellness Programs (Could Have Been Better, Could Have Been Worse)

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If your company has a wellness program, you are probably familiar with the IRS and DOL limits on financial incentives and the requirement to offer alternatives to employees who don't meet wellness standards (summarized in our June 5, 2013 *Client Alert*). You probably also know that compliance with the IRS and DOL rules only means that your wellness program complies with the Internal Revenue Code and ERISA; it does not address compliance with the Americans with Disabilities Act (ADA).

For years, the Equal Employment Opportunity Commission (EEOC) declined to provide formal guidance on the application of the ADA to wellness programs. In this vacuum, the business community was startled by the EEOC's attempt last fall to get a temporary restraining order (TRO) to stop Honeywell from administering what most viewed as a mainstream wellness program (described in our October 30, 2014 *Client Alert*). The court denied the TRO and the EEOC was widely criticized for litigating when it had failed to publish guidance.

Now, the EEOC has finally proposed regulations addressing the application of the ADA to wellness programs. The regulations, if finalized as proposed, would allow meaningful financial incentives but would add new conditions that would further complicate the design and administration of wellness programs.

Background

The ADA generally prohibits an employer from requiring medical examinations and making inquiries as to the disabilities of its employees. This prohibition is subject to two potentially relevant exceptions which allow: (1) voluntary medical examinations and inquiries; and (2) medical examinations and inquiries used for health plan underwriting and administration. The EEOC's proposed regulations interpret the first exception (voluntary medical examinations and inquiries). The EEOC rejects the application of the second exception to wellness programs and makes a point of criticizing a court case, *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), that applies the underwriting exception to a wellness program.

EEOC's view of financial incentives for wellness program participation

In the preamble to the proposed regulations, the EEOC acknowledges that financial incentives and financial penalties are functionally equivalent for regulatory purposes. While the EEOC would permit financial incentives (or penalties) of up to 30% of the cost of single coverage, the EEOC's proposed 30% limit differs in several respects from the limit on financial incentives (and penalties) under the IRS and DOL wellness program rules. **IRS and DOL rules**

EEOC proposed rules

Limit on incentives: Up to 30% of the cost of single coverage or, if family members may participate in the wellness program, the cost of family coverage.

Up to 30% of the cost of single coverage. No higher limit for family participation.

The final rule may be even more restrictive: the EEOC asked for comments on whether it should provide additional protections for low-income employees.

Limit on incentives applies to:

Health-contingent but not participatory wellness programs.

The IRS and DOL do not limit incentives for participation in participatory wellness programs.

Both participatory and health-contingent wellness programs.

The incentives for any combination of participatory and health-contingent wellness programs cannot exceed the limit.

Limit on incentives related to not using tobacco: Up to 50% of the cost of coverage (less the incentives provided for other health-contingent wellness programs).

Included in the overall 30% limit if the employee is asked to test for nicotine.

Unlimited, if the employee self-reports tobacco use (no testing).

Other requirements proposed by the EEOC

- An employer would not be permitted to require employees to participate in its wellness program. Further, an employer would not be permitted to take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees for failing to participate in a wellness program.

Comment: The EEOC invited comments on other requirements it might impose in order to establish the voluntary nature of a wellness program. These include:

A requirement that an employer ask employees to sign authorizations acknowledging voluntary participation (an additional administrative burden with questionable significance to employees).

A requirement that an employee be permitted to submit a certification from a medical professional that he or she is under the care of a physician and any identified risks are under active treatment, in lieu of disclosing health information in a health risk assessment. This would reduce the usefulness of the data mined from health risk assessments.

- Employees who do not participate in the employer's wellness program could not be denied access to any benefit package available to similarly situated employees who participate in the wellness program.

Comment: A financial incentive may take the form of a discount to employee contributions for health coverage. Another form of financial incentive is the reduction of participant medical/prescription drug cost sharing (such as a reduction in deductibles, copays and/or coinsurance percentage). The EEOC proposed regulations would allow that sort of change in participant cost sharing, provided that the change in plan value did not exceed the 30% limit. However, the EEOC would prohibit an employer from limiting access to a benefit package with different covered services based on an employee's participation in a wellness program.

- Health information collected in connection with a wellness program would be subject to privacy protections.

Comment: The EEOC regulation references the HIPAA privacy, security and breach notification rules and compliance with those HIPAA rules would be compliance with the EEOC's regulations.

- Consistent with the IRS and DOL rules, the EEOC would require that a wellness program promote health or prevent disease.

Comment: Health information collected in connection with a wellness program must actually be used to promote employees' health. This might take the form of alerting employees of their health risks or using the health information to design programs to address prevalent health conditions.

- An employer would have to provide a notice explaining what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the program will employ to prevent improper disclosure of the medical information.

Comment: This notice would be in addition to the notice of alternative ways of qualifying for an incentive or avoiding a penalty that the IRS and DOL rules require in connection with health-contingent wellness programs.

What's next?

The public may submit comments at http://www.regulations.gov (identified by RIN number 3046-AB01) through June 19, 2015. In the months before the EEOC publishes final regulations, you may want to consider the EEOC's likely interpretations of the ADA in planning for future wellness initiatives. If you currently require employees to participate in a wellness program or deny health coverage to employees who do not participate in a wellness program, you may want to consult with your benefits counsel.

What's the ROI?

The controversy as to the financial return on investment in wellness programs continues. The DOL commissioned the RAND Corporation to assess workplace wellness programs. RAND's Workplace Wellness Programs Report, released the same day as the EEOC's proposed wellness regulations, is rather dismal. While RAND found that financial incentives have a significant impact on employee participation in wellness programs, RAND found that employees' participation in a wellness program does not have a significant impact on health care costs. Of course, you will find studies reaching a contrary conclusion and you may value your wellness program as a component of employee engagement irrespective of its on impact health care costs.