

EEOC Proposes Amendments To Regulations On Wellness Programs

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On April 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued a Proposed Rule that addresses how the Americans with Disabilities Act (ADA) may apply to corporate wellness programs in the future. The EEOC's Notice of Proposed Rule Making will be published in the Federal Register on April 20, 2015, triggering a 60-day public comment period.

Under the ADA, a covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program, which includes wellness programs, available to employees at that work site. The Proposed Rule explains what an employee health program is, what it means for a program to be voluntary, what incentives employers may offer, and what requirements apply concerning notice and confidentiality. The Proposed Rule contemplates the following:

- **Employee Health Programs, Generally** – A program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA, or highly suspect in the method chosen to promote health or prevent disease.
- **Optional Participation Without Adverse Consequences** – A program must be voluntary. Voluntary means that a covered entity: (1) does not require employees to participate; (2) does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation or limit the extent of such coverage; and, (3) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of the ADA.
- **Notice** – For employees' participation in a wellness program that is part of a group health plan to be deemed voluntary, the covered entity must provide notice that clearly explains what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information.
- **Incentives** – The offer of incentives to participate in wellness programs that are part of a group health plan and that include disability related inquiries and/or medical examinations, will not render the program involuntary. However, the total allowable incentive available under all programs may not exceed thirty percent of the total cost of employee-only coverage, which is generally the maximum allowable incentive available under HIPAA and the Affordable Care Act for health-contingent wellness programs.
- **Confidentiality** – Medical information collected through an employee health program only may be provided to a covered entity under the ADA in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals.

While the Proposed Rule does not yet have legal effect, employers should review the EEOC's proposal, submit comments to the agency, and consult with their employment law counsel as necessary. Please contact George Morrison (610.782.4911; morrisong@whiteandwilliams.com) or any member of our Labor and Employment Practice Group for more information regarding this alert.

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