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Equal Employment Opportunity Commission vs. Affordable Care Act

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The Equal Employment Opportunity Commission recently released proposed regulations under the Americans with Disabilities Act addressing wellness programs offered as part of a group health plan.

The recent guidance was prompted by strong criticism from the business community and political leaders of the EEOC's aggressive application of wellness program criteria that were patently inconsistent with wellness program criteria promulgated several years ago as part of the Affordable Care Act.

Specifically, the EEOC had recently attempted to obtain a temporary restraining order against a wellness program sponsored by Honeywell International Inc., which fully complied with all of the ACA's rules.

Although the order was denied, the EEOC's aggressive adjudication of Honeywell's ACA-compliant wellness program, coupled with the EEOC's lack of definitive guidance on the permissible design of incentives and/or penalties tied to wellness programs, left employers in a tenuous position as to their existing ACA-compliant wellness programs.

Background

The ADA limits an employer's ability to subject employees to disability-related inquiries (e.g., health risk assessments) or medical examinations (e.g., biometric screening) unless the inquiries or exams are job-related and consistent with business necessity.

The ADA has historically permitted an employer to make disability-related inquiries or conduct medical examinations that are part of a "voluntary" wellness program.

Under previous EEOC guidance, a wellness program is considered voluntary as long as the employer neither requires participation nor penalizes employees who do not participate.

However, the EEOC offered no guidance addressing the extent to which wellness incentives or penalties might affect the voluntary nature of a wellness program.

The ACA provides differing guidelines for "participation-only" vs "health contingent programs."

Participation-only programs are subject to very few restrictions under the ACA because, by their nature, they only require an employee to "participate" rather than to achieve any objective level of progress or success with respect to health conditions.

For example, completion of a health risk assessment or biometric screening only addresses participation - rather than "results." The ACA imposes a more restrictive approach to health-contingent programs, where the employee is actually required to accomplish specified levels of progress or success with their health condition in order to enjoy the program incentives.

For example, a mandatory smoking cessation program, where the employee must achieve an objective reduction or cessation of smoking, or a biometric monitoring activity - where rewards are based on objective decreases in blood pressure, weight, triglycerides, etc. - would be considered health-contingent.

Proposed guidance

The EEOC affirmed in its recent proposed guidance that compliance with ACA wellness program criteria is not determinative of compliance with the ADA, but acknowledged its responsibility to interpret the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and the ACA's goals of promoting wellness programs.

As a result, employers that sponsor wellness programs now have two sets of rules to consider in designing and administering compliant wellness programs.

The EEOC clarifies that a wellness program is voluntary as long as an employer does not:

1. Require employees to participate.

2. Deny coverage under any group health plan for employees who do not participate.

3. Take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

Further, an employer must provide employees with a notice indicating:

1. The medical information to be obtained (e.g., in a biometric screening or health risk assessment).

2. The recipients of the medical information.

3. The uses of the medical information.

4. The restrictions on its disclosure.

5. The methods employed to prevent improper disclosure.

The EEOC also adds a requirement that the employee health/medical information collected through a wellness program may be provided to the employer-plan sponsor only in aggregate terms that does not disclose the identity of specific individuals.

Any individually identifiable information collected as part of a wellness program is subject to the Health Insurance Portability and Accountability Act of 1996.

Key differences between the ACA and EEOC guidance

* Where a wellness program consists of a health risk assessment and/or biometric screening, EEOC requires the program design to promote health and prevent disease.

Specifically, collecting medical information from a biometric screening or health risk assessment without providing employees follow-up information or advice, such as providing feedback about risk factors or using aggregate information to design a program or treat any specific conditions, would not be reasonably designed to promote health under the EEOC's proposed guidance. The ACA does not require this sort of follow-up information or advice.

* The EEOC limits incentives to a maximum of 30 percent of the total cost of employee-only coverage, whether in the form of a reward or a penalty, financial or in-kind, and applies the 30 percent limit to both participation-only and health contingent programs.

In comparison, the ACA rules permit the 30 percent reward to be based on the level of coverage actually elected by the employee (e.g., employee plus spouse, employee plus family, etc.), and the ACA has no limit on the incentive amount for participation-only programs.

For example, a wellness program that provides a reward to employees who complete a health risk assessment (i.e., participation-only program), without any further action or result required by the employee, is subject to the 30 percent limit on the incentive

amount under the proposed EEOC guidance, even though the ACA would not apply any limit on the incentive amount.

* The EEOC does not permit the ACA's additional 20 percent incentive for wellness programs related to tobacco cessation. According to the EEOC, a smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco after completion of a program) and bases incentives on the affirmative or negative answer, is not an employee health plan that includes disability-related inquiries or medical examination.

By contrast, a biometric screening or other medical examination that tests for the presence of tobacco or nicotine is a medical examination, and the ADA's 30 percent financial incentive rules would apply to a wellness program that included such a screening.

* The EEOC requires wellness programs to provide reasonable accommodations for both participation-only and health contingent programs. The ACA requires reasonable accommodations only for health contingent programs.

For example, absent undue hardship, an employer would have to provide a sign language interpreter to an employee who attends a nutrition class if the employee is deaf.

In conclusion, while the recent EEOC guidance is subject to change when issued in final form, employers should carefully review their wellness programs to ensure compliance with both the ADA and the ACA rules.

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