EEOC Issues Final Rules on Employer Wellness Programs

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On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) issued two final rules describing how employer wellness programs must comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA). Many employers offer wellness programs to their employees designed to facilitate healthy lifestyles. These programs sometimes include medical questionnaires or health risk assessments, such as questions about weight, cholesterol and other health factors. The new rules are designed to provide guidance on confidentiality and privacy issues, as well as on the extent to which employers may use incentives to encourage participation in wellness programs that require certain health disclosures.

The ADA and GINA generally prohibit employers from obtaining medical information from employees and job applicants. These laws provide, however, that employers may utilize health questionnaires as part of wellness programs, so long as participation is voluntary. Last year, the EEOC proposed rules to address whether offering financial incentives in connection with wellness programs renders the programs involuntary. The final ADA rule says that employers may offer incentives of up to 30% of the total cost of self-only coverage under the group health plan (including both the employee's and employer's contribution), to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations, provided that participation is voluntary. This benchmark differs from the maximum allowable incentive available under the Health Insurance Portability and Accountability Act (HIPAA), which is 30% of the total cost of coverage under a plan in which the employee and any dependents are enrolled (compared to self-only costs under the ADA rule).

The final GINA rule provides that the maximum incentive for a spouse's participation in a wellness program cannot exceed 30% of the cost of self-only coverage (including both the employee's and employer's contribution), the same incentive allowed for the employee. The rule provides the following example: if an employee is enrolled in a group health plan through the employer at a total cost of $14,000 for family coverage, that plan has a self-only option for a total cost of $6,000, and the employer provides the option of participating in a wellness program to the employee and spouse if they participate in the plan, the employer may not offer more than $1,800 to the employee and $1,800 to the spouse. Employers cannot offer incentives for information about employees' children or for certain specified genetic information.

In addition, the rules add two new provisions relating to confidentiality. First, employers may only receive aggregated health information collected in connection with a wellness program that is not reasonably likely to disclose the identities of specific individuals. Second, employers may not condition incentives on employees agreeing to the sale or disclosure of their medical information.

These final rules will go into effect beginning in 2017 and apply to all employer-provided wellness programs, including those that are not conditioned on enrollment in a particular health plan.

In connection with these changes, employers should evaluate their existing incentives for participation in company-provided wellness programs. The new rules make clear that the 30% benchmark applies to both financial and in-kind incentives, such as prizes and insurance premiums. Further, the new rules explain that health questionnaires must "reasonably be designed to promote health or prevent disease." This means not all inquiries are lawful, and it is worthwhile assessing whether the information sought is overly burdensome or intrusive.

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