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EMPLOYMENT LAWSCENE ALERT: MAKING SURE YOUR WELLNESS PROGRAM COMPLIES WITH THE LAW

Litigation against employers by the EEOC regarding the implementation of wellness programs is ongoing in federal court, but no instructive decisions have been issued by the courts. Employers wishing to implement a wellness program but stay out of litigation may feel like they have little guidance on the issue, but there are some instructions out there on how to avoid, at the very least, disability discrimination lawsuits brought by the EEOC.

In April 2015, the EEOC published proposed interpretive guidance on how employers can run wellness programs without running afoul of the Americans with Disabilities Act (ADA). The EEOC's guidance is an attempt to balance the ADA's goal of limiting employer access to medical information and the Affordable Care Act's goal promoting wellness programs. The proposed rule does not touch on how wellness programs may be affected by any other laws prohibiting discrimination, such as Title VII, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act (GINA).

As a brief review, the ADA prohibits discrimination against individuals with disabilities and restricts the medical information employers may obtain from employees and applicants. Wellness programs are generally programs and activities that promote a healthier lifestyle or prevent disease, which in turn attempts to improve employee health and reduce healthcare costs. Wellness programs may also incorporate health risk assessments and biometric screenings that measure an employee's health risk factors. Incentives are usually offered for either participation (participatory wellness programs) or for achieving certain health goals (health-contingent wellness programs). Incentives are both financial and in-kind incentives, such as time-off awards, prizes, and other items of value. These wellness programs, however, must comply with the ADA, among other employment laws.

The focus of the EEOC's attack upon employers' wellness programs has been on whether such programs are voluntary. The ADA generally restricts employers from obtaining medical information from employees through disability-related inquiries or medical examinations. However, the ADA and GINA do permit employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program. Voluntary is defined as neither requiring participation or penalizing employees who

do not participate. The main effect of the EEOC's proposed regulations is the extent to which incentives affect the voluntary nature of wellness programs.

In its guidance, the EEOC has decided that it will allow certain incentives related to wellness programs, while limiting others to prevent economic coercion that could render the program involuntary. This can be achieved, according to the proposed rule, by allowing an employer to offer incentives up to a maximum of 30% of the total cost of employee-only coverage to promote participation. Under the proposed rule, employers are not allowed to require participation or deny coverage to or take an adverse employment action against any employee who does not participate. Employers would be further required to provide a notice that clearly explains 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 covered entity will employ to prevent improper disclosure of the medical information. The proposed rule also allows disclosure of medical information obtained by the wellness program to employers only in aggregate form, except as needed to administer an employer's health plan.

Finally, wellness programs must provide reasonable accommodations to employees with disabilities so that such employees have the ability to participate in wellness programs and earn the incentives offered by the employer. This is in line with the employer's duty to accommodate under the ADA.

Despite the EEOC's guidance, there remain unanswered questions. For example, the incentive language allows for up to 30% of the cost of employee-only coverage, but there is no guidance on whether incentives can be offered to encourage other family members who are covered under the insurance to participate in wellness programs. It is also expected that separate guidance on how GINA and wellness programs can coexist will be forthcoming.

Although the notice and comment period on the proposed rule has ended, the final rule is not likely to be issued until the fall. Employers should keep apprised of this rule making to make sure that their wellness programs do not find the attention of the EEOC.