EEOC Issues Wellness Plan Proposed Regulations as it Steps Up Scrutiny of Employer-Sponsored Plans

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Foster Swift Employment, Labor & Benefits E-News
June 8, 2015

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The key to voluntary employer wellness plans? They must be voluntary. While this appears to state the obvious, according to legal action being waged by the U.S. Equal Employment Opportunity Commission (EEOC) against several businesses, it's not always the case.

For example, in October the EEOC filed suit against Honeywell International. The suit charges, among other things, that the company's wellness program isn't voluntary and violates the Americans with Disabilities Act (ADA). A federal district court judge declined to issue a temporary restraining order preventing Honeywell from proceeding with its wellness program incentives as the EEOC continues its investigations into the company's policies. This, and similar actions by the EEOC, have left employers confused as to whether the plans they offer are "voluntary" and compliant with the ADA.

In an attempt to provide some additional clarity, the EEOC issued highly-anticipated proposed regulations addressing how the ADA applies to employer-sponsored wellness plans, as well as the interaction of the HIPAA wellness program rules. Public comments may be made on the proposed rule until June 19, 2015, after which the EEOC will evaluate the comments it receives and make revisions in response to those comments.

BACKGROUND

As the agency tasked with enforcing the ADA, the EEOC plays a role in regulating employee wellness programs. Title I of the ADA specifically prohibits discrimination against people with disabilities, and that prohibition extends to medical conditions. The types of wellness programs that the EEOC has challenged, and that it argues violate the ADA, include those that require screening and testing for blood pressure, cholesterol and tobacco use, among other things. Because there are financial incentives for workers to participate, the EEOC has argued that these programs are not voluntary.

Wellness programs are widespread. According to benefits consultant Mercer, 88 percent of businesses with 500 workers or more offer wellness programs. We expect this trend to continue, as the Affordable Care Act (the "ACA") encourages employee wellness programs that provide workers financial incentive to participate. Beginning in 2014, the ACA raised the financial incentives that employers can offer workers for participating in workplace wellness programs. The incentives – which can come in the form of rewards or penalties – can total up to 30 percent of health insurance premiums, deductibles and other associated costs. This conflict between the wellness plan incentives found in the ACA, and the enforcement action by the EEOC under the ADA challenging such plans as not "voluntary," has resulted in confusion for employers attempting to fashion compliant wellness programs. The new proposed regulations provide the most specific guidance to date on what "voluntary" means under the ADA, and more clarity regarding the interaction of the ACA and ADA.

THE PROPOSED REGULATIONS

The proposed regulations clarify that an employer may offer limited incentives to a maximum of 30 percent of the total cost of employee-only coverage – either in the form of a penalty or reward – to promote participation in a wellness program that includes disability-related inquiries or medical examinations as long as participation is voluntary. Voluntary means that an employer:

- Does not require employees to participate;
- Does not deny coverage under any of its group health plans for non-participation or limit the extent of such coverage (except pursuant to allowed incentives); and
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

In order to ensure that participation in a wellness program that includes disability-related inquires and/or medical examination is voluntary, an employer must provide employees with notice of:

- 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 employer will employ to prevent improper disclosure of medical information.

The proposed regulations further provide that medical information that is obtained through wellness programs may only be disclosed to an employer in aggregate form, except as is necessary to administer a health plan. Employers must also comply with all HIPAA requirements and ensure that medical information obtained through wellness programs remains confidential.

Special rules have also been proposed for smoking cessation programs. Programs that inquire as to tobacco use would not be subject to the 30 percent incentive limitation, unless those programs include a medical examination (such as drawing blood to test for the presence of nicotine). In addition, the proposed regulations require employers to make reasonable accommodations to allow employees with disabilities to participate in employee health programs, including the ability to earn any reward or avoid any penalty offered as part of the

programs.

Despite the new proposed regulations, this remains a complex and still-evolving issue. While employers are not required to comply with the proposed regulations, those who offer monetary incentives or penalties associated with wellness programs should give strong consideration to doing so, particularly since many of the requirements set forth in the proposed rule are already requirements under the law. Among other things, employers should make sure they:

- Do not require employees to participate in a wellness program;
- Do not deny health insurance to employees who do not participate; and
- Do not take any adverse employment action or retaliate against, interfere with, coerce, or intimidate employees who do not participate in wellness programs or who do not achieve certain health outcomes.

However, it is important to understand that compliance with the proposed rule does not relieve an employer from its obligation to comply with other employment nondiscrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA), and the Genetic Information Nondiscrimination Act (GINA).

Employers face many challenges in structuring their wellness programs to both deliver positive benefits to the staff and the business, and comply with the law. Foster Swift's Labor and Employment Practice Group is monitoring the developments in this area, and will provide additional information once the EEOC issues its final rule. In the interim, please contact an employment law attorney if you have any questions concerning nondiscrimination laws or would like assistance in implementing employee wellness initiatives.