IAA Legislative Ledger

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EEOC's Proposed Wellness Rules

The proposed rule creates requirements for wellness programs that are part of a group health plan or offered outside of a group health plan. Not all of the requirements apply to all the different types of wellness programs. The notice and use of incentive rules apply only to wellness programs that are part of a group health plan. Please send in your concerns or suggestions to the EEOC during this comment period.

Important Title I of the ADA Concepts

1) An employee health program must be reasonably designed to promote health or prevent disease.
2) The ADA restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations.
    a. The statute provides an exception to the rule by stating that a "covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." The EEOC Commission's interpretation of the term "voluntary" is central to the interaction between the ADA and HIPAA's wellness program provisions, as amended by the Affordable Care Act.

Reasonably Designed to Promote Health
According to the EEOC guidance, the wellness program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome. A program is not reasonably designed to promote health or prevent disease if it imposes, as a condition to obtaining a reward, an overly burdensome amount of time for participation, requires unreasonably intrusive procedures, or places significant costs related to medical examinations on employees. *(This is where your and other public comments could help tighten "unreasonable or overly burdensome" definition)*

Health Risk Assessments - The proposed rules differentiate between HRAs that meet EEOC's definition of "reasonably designed to promote health or prevent disease" and those that do not. HRAs that collect medical information on a health questionnaire without providing employees follow-up information or advice, such as providing feedback about risk factors or using aggregate information to design programs or treat any specific conditions, would not be reasonably designed to promote health.

What is Considered Voluntary?
An employee health program that includes disability-related inquiries or medical examinations (including disability-related inquiries or medical examinations that are part of a health risk assessment) is voluntary as long as 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 (except pursuant to allowed incentives, e.g., 30%) for employees who do not participate;

3) Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees under ADA provisions; and
4) Where a health program is a wellness program that is part of a group health plan, it provides employees with a notice that:
    a. Is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;
    b. Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
    c. Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed.

The guidance further clarifies that an employer may not retaliate against an employee who refused to participate in a health program, may not coerce an employee into participating in a health program or into giving the employer access to medical information collected as part of the program, and may not threaten an employee with discipline if the employee does not participate in a health program.
Note: If an employer offers two health plan options (one more generous than the other) and the generous one is only available to employees who participate in the wellness program, this practice will not be consistent with the proposed EEOC rules, according to an EEOC representative.

Incentives

The proposed rule permits an employer to offer limited incentives up to a maximum of 30% of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations as long as participation is voluntary (see above for the definition of voluntary).

According to the EEOC's understanding of HIPAA (i.e., HIPAA Nondiscrimination rules referred to as HIPAA wellness), the HIPAA wellness rule incentives apply to health contingent wellness programs that require individuals to satisfy a standard related to a health factor to obtain a reward or engage in an activity. Activity-only programs require individuals to perform or complete an activity related to a health factor in order to obtain a reward, but do not require an individual to attain or maintain a specific health outcome.

Outcome-based programs require individuals to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) to obtain a reward.

Under the HIPAA rules, the total reward offered to an individual under all health-contingent wellness programs cannot exceed 30 percent of the total cost of employee-only coverage under the plan, including both employee and employer contributions towards the cost of coverage (or 50% to the extent that the additional percentage is attributed to tobacco prevention or reduction).

The HIPAA rules do not apply to participatory wellness programs that are not health contingent. Participatory wellness programs either do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard related to a health factor. A considerable number

of employers adopted wellness programs that require employees to obtain an annual exam and have not included any penalties for this in the 30% limit.

By contrast, the EEOC's proposed 30% limitation applies to participatory wellness programs that include disability-related inquiries or medical examinations as well as health-contingent programs requiring participants to satisfy a health standard.
Since annual exams would fall within the definition of medical examinations, it appears that the EEOC 30% limitation applies to wellness programs requiring annual exams. Another difference from the HIPAA wellness rules is that the EEOC rule limits the reward to the cost of employee only coverage, whereas the HIPAA permits the reward to extend to spouses and dependents. Note: EEOC is likely to receive considerable comments on this discrepancy.

Wellness programs not subject to the ADA incentive limits
According to the proposed guidance, attending nutrition, weight loss or smoking cessation classes are not subject to the
ADA incentive rules because these wellness programs do not require disability-related inquiries or medical examinations in order to earn an incentive.

Smoking cessation - A smoking cessation program that merely asks employees whether or not they use tobacco is not viewed as an employee health program that includes disability-related inquiries or medical examinations and therefore is not subject to the 30% limitation. However, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination, according to the EEOC proposed rule and would be subject to the 30% incentive maximum.

Reasonable Alternative

T h e EEOC rules require reasonable accommodations to enable employees with disabilities to earn whatever financial incentive an employer or other covered entity offers. The EEOC believes that satisfying the HIPAA reasonable alternative standard and notice as part of a health contingent program would likely fulfill a covered entity's obligation to provide a reasonable accommodation under the ADA. However, unlike the HIPAA rules, a covered entity also would have to provide a reasonable accommodation for a participatory program.

As always, please call if you have questions.

Thank you,
Paul Kelly, President