CLIENT ALERT

EEOC Issues Notice of Proposed Rulemaking Related to Wellness Programs

Since 2019, employers faced uncertainty regarding the status of wellness program incentives under the ADA and GINA. On January 7, 2021, the EEOC issued a Notice of Proposed Rulemaking on Wellness Programs Under the ADA and GINA that addresses this issue. The proposed rules deviate somewhat from prior EEOC guidance and positions.

Specifically, the proposed rules apply the ADA's insurance "safe harbor" to health contingent wellness programs offered as part of, or qualified as, an employer-sponsored group health plan, thereby segregating them from health contingent wellness programs offered to all employees, regardless of their participation in the employer's health plan. Instead, the latter are lumped in with non-health contingent wellness programs (i.e., wellness programs that involve a disability-related inquiry or medical exam but are not activity-based or outcome-based) and subject to the ADA wellness rules.

Consistent with the EEOC's announcement in the summer of 2020, the proposed rules require any incentives provided for participatory wellness programs and/or wellness programs not offered as part of a group health plan to be "de minimis." If the rules are finalized as proposed, employers may no longer rely upon the 30% (or 50% for smoking cessation) limit on incentives for these types of programs.

Finally, the proposed rules amend the GINA regulations by, among other things, limiting wellness program incentives for employees who complete health risk assessments that contain information about their spouse or dependents' family medical history or other genetic information to a similar de minimis amount.

The proposed rules are described in more detail below.

Background

As background, under the ADA, wellness programs that involve a disability-related inquiry or a medical examination must be "voluntary." Similar requirements exist under GINA when there are requests for an employee's family medical history (typically as part of a health risk assessment). For years, the EEOC had declined to provide specific guidance on the level of incentive that may be provided under the ADA, and their informal guidance suggested that any incentive could render a program "involuntary." In 2016, after years of uncertainty on the issue, the agency released rules on wellness incentives that resembled, but did not mirror, the 30% limit established under U.S. Department of Labor (DOL) regulations applicable to health-contingent employer-sponsored wellness programs.

While the regulations appeared to be a departure from the EEOC's previous position on incentives, they were welcomed by employers as providing a level of certainty.
However, the rules were subsequently challenged by the AARP, which alleged that the final regulations were inconsistent with the meaning of "voluntary" as that term was used in ADA and GINA. After much back and forth in the lawsuit, in December 2017, the court vacated, effective January 1, 2019, the portions of the final regulations that the EEOC issued in 2016 under the ADA and GINA addressing wellness program incentives. This was, in most part, due to the timing proposed by the EEOC to develop new regulations.
Accordingly, since January 1, 2019, employers have been operating with little guidance or clarity regarding whether incentives provided for participatory wellness programs would be agreeable to the EEOC.

EEOC Proposed Wellness Regulations

ADA Proposed Wellness Regulations

The EEOC's proposed rule seeks to amend two sections of the ADA regulations, related medical examinations and inquiries and the insurance safe harbor. In the preamble to the proposed rule, the EEOC recognizes that the meaning of "voluntary" is in the eye of the beholder but takes the position that if incentives are too high, then employees may feel coerced to disclose protected medical information in order to be rewarded or avoid a penalty. Accordingly, participatory wellness programs that include a disability related inquiry and/or a medical examination or health contingent programs that are not part of, or do not qualify as, a group health plan must not impose terms that would adversely affect the terms, conditions, or privileges of employment for employees who do not participate and, therefore, must limit incentives to a de minimis amount.

While "de minimis" is not specifically defined, the EEOC provides some examples to help guide employers, including:

- Providing a water bottle
- Providing a gift card of "modest" value

Items the EEOC indicates would not be de minimis include:

- Providing a $50 a month premium reduction for completing a health risk assessment
- Paid airline tickets
- Annual gym memberships

The EEOC requested comments on the types of incentives that should/should not be considered de minimis.

The proposed rules list four factors that can be used to determine whether a wellness program is "part of" a group health plan:

1. the program is only offered to employees who are enrolled in an employer-sponsored health plan;
2. any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan;
3. the program is offered by a vendor that has contracted with the group health plan or issuer; and
4. the program is a term of coverage under the group health plan.

The proposed rules included other protections for employees. Specifically, they (1) prohibit employers from retaliating, interfering with, coercing, intimidating, or threatening employees, such as coercing them to participate in the program or threatening disciplinary action if they don't participate, (2) protect employee confidential information obtained by a participatory wellness program or a health-contingent wellness program that is not part of the group health plan by requiring information collected to be aggregated in a form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals, (3) with limited exceptions specific to carrying out wellness program functions, prohibit the employer from requiring the employee to agree to the sale or disclosure of medical information or waive confidentiality protections under the ADA to participate in the program; and (4) clarify that employers must still comply with other federal civil rights laws.

Finally, because the EEOC is now proposing a de minimis incentive standard for most wellness programs, it no longer believes that it is necessary to require employers to issue a unique ADA notice that describes, among other things, the type of medical information that will be obtained and the purposes for which the information will be used.

GINA Proposed Wellness Regulations

Under the proposed GINA rules, employers may provide de minimis incentives to employees who complete health risk assessments that contain information about their spouse or dependents' family medical history or other genetic information. The EEOC uses the same examples of what would be de minimis under the ADA for purposes of GINA, such as providing a water bottle or a modest gift card.

The proposed rule does not prohibit an employer from offering a greater incentive (i.e., a non-de minimis incentive) to employees who provide their own genetic information as long as the employer makes it voluntary for the employee to complete the questions regarding genetic information (and the instructions clearly indicate which questions are voluntary), or to an employee who completes a health risk assessment that includes genetic information, if the employee participates in a disease management program, other program that promotes a healthy lifestyle, and/or meet a particular health goal, as long as the programs are also offered to individuals with current health conditions or health risks.

The EEOC uses an example of an employer who offers $150 for completion of a health risk assessment which requests information about family medical history or other genetic information but makes it clear that the incentive is available regardless of whether the employee completes any questions related to genetic information. The assessment identifies which questions are related to genetic information. Employees can earn $150 if they disclose family medical history and participate in a program designed to encourage weight loss or a healthy lifestyle; however, if the employee does not want to complete the questions related to genetic information, they can still earn the $150 if they attain a certain health outcome by participating in other activities. The incentive complies with GINA.

What's Next for Employers?

The wellness regulations are proposed at this time and it is uncertain when they will be finalized; however, if history is any indication, any final regulations will be challenged in court. While employers are not required to make any changes to their wellness programs at this time, they should continue to monitor developments and work with employee benefits counsel when designing their wellness programs. Release of final regulations may be further delayed if the Biden administration freezes new rules pending further review.

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