The New EEOC Rules on Employer Wellness Programs

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THE NEW EEOC RULES ON EMPLOYER WELLNESS PROGRAMS

By: Quentin Smith

I. INTRODUCTION.

A little over a month ago, on May 17, 2016, the Equal Employment Opportunity Commission (EEOC) issued its final rules on the treatment of wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The new rules explain the differences between the ADA and GINA requirements for voluntary health programs and the Health Insurance Portability and Accountability Act (HIPAA) and Affordable Care Act (ACA), which govern wellness programs that are part of a group health program. The new notice and rules regarding financial inducements go into effect in January 2017, and will apply to all workplace wellness programs. Other provisions in the new rules are intended to clarify existing obligations and apply immediately. So, it is important for employers who offer wellness programs to understand the new ADA and GINA rules and to plan accordingly.

II. BACKGROUND.

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Many wellness programs ask employees to answer questions on a health risk assessment (HRA) and/or to undergo biometric screenings for risk factors such as high blood pressure or cholesterol. Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Many employers use wellness programs as a strategy to reduce healthcare costs by promoting healthy lifestyles and preventing disease.

The ACA included several provisions that are intended to encourage the use of wellness programs. The first provision in the ACA increased the financial incentive that employers could offer to employees for "health-contingent" wellness programs from 20% of the cost of coverage to 30%. A "health-contingent" program offers incentives to employees who perform activities (*e.g.*, walking 10,000 steps per day) or achieve certain health outcomes (*e.g.*, lowering blood pressure). The ACA also gave the Secretary of Health and Human Services (HHS) the discretion to increase the threshold up to 50%. Subsequently, the ACA regulations issued in 2013 authorized an award of up to 50% for tobacco cessation programs.

These caps apply only to health-contingent wellness programs in a health plan and not to "participatory" wellness programs. The regulations implementing HIPAA do not impose any incentive limits on "participatory" programs, such as programs that ask employees to complete an HRA or attend a smoking cessation program. As long as these programs are available to all similarly-situated individuals, and incentives are made regardless of a health factor (e.g., participating employees receive the same incentive regardless of the answers provided on an HRA about their health status, medical condition, medical history, or disability), participatory programs do not HIPAA and the ACA.

Participatory wellness programs that use HRAs or biometric screenings, though, also implicate the ADA and GINA, which generally prohibit employers from obtaining and using information about an employee's own health conditions or about health conditions of their family members, including spouses. Both the ADA and GINA allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings, to determine risk factors if done as part of a voluntary wellness program. The key issue that needed to be addressed by the EEOC regulations was whether offering an incentive for employees or their family members to provide health information as part of a wellness program would render the program involuntary.

Uncertainty about the standard of "voluntariness" left many employers concerned about possible EEOC enforcement action with respect to their wellness programs even though those programs were meeting the requirements of the ACA. In recent years, the EEOC has been ramping up its enforcement actions targeting employer wellness programs. To alleviate employer concerns and to provide clearer guidance, in April 2015, the EEOC issued proposed rules governing the use of financial incentives in connection with wellness programs under the ADA, and, in October 2015, it issued proposed rules on financial incentives for an employee's spouse to participate in a wellness program under GINA. After receiving thousands of comments on the proposed rules, the EEOC has simultaneously released final versions of both rules.

III. THE FINAL ADA RULE ON WELLNESS PROGRAMS.

In its final ADA rule, the EEOC sought to provide consistency with HIPAA and the ACA rules on wellness programs, while also ensuring that incentives would not be so high as to become coercive and render participation in the program involuntary. As a threshold matter, the EEOC made the final rule—including the limitation on incentives—applicable to wellness programs that are outside an employer-sponsored group health plan. Additionally, any disability-related inquiries or medical examinations that are part of a wellness program must be "reasonably designed to promote health or prevent disease." To meet this "reasonably designed" standard, a program cannot require an overly-burdensome amount of time for participation, involve unreasonably-intrusive procedures, be a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or require employees to incur significant costs for medical examinations.

A wellness program that asks employees to answer questions about their health conditions or have a biometric screening or other medical examination for the purpose of alerting them to health risks is reasonably designed to promote health or prevent disease. Collecting and using aggregate data from employee HRAs to design and offer programs aimed at specific conditions prevalent in

the workplace, such as diabetes, also meets the standard. However, asking employees to provide medical information on an HRA without providing any feedback about risk factors or without using aggregate data to design programs would not be reasonably designed to promote health or prevent disease. A wellness program also is not reasonably designed if it merely exists to shift costs from the employer to employees based on their health problems or if it is issued by the employer only to predict its future health costs.

The final ADA rule also lists several requirements that a wellness program that utilizes HRAs or medical examinations must meet to be considered "voluntary." First, the employer may not require any employee to participate. Second, the employer may not deny any employee who does not participate in a wellness program access to health coverage or prohibit any employee from choosing a particular plan. (For example, an employer cannot allow employees to enroll in a certain type of group health plan, like a PPO, only if they complete an HRA or biometric screening.) Third, an employer may not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten any employee who chooses not to participate in a wellness program or fails to achieve certain health outcomes. Fourth, the employer must provide a notice that clearly explains what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure. Fifth, the employer must comply with certain incentive limits.

Regarding this fifth requirement, if a wellness program is only open to employees enrolled in an employer-sponsored health plan, the allowable incentive (financial or in-kind) cannot exceed 30% of the total cost of self-only coverage of the plan in which the employee is enrolled. For example, if the total cost for self-only coverage for the plan the employee is enrolled in is $7,500 per year, the employer can reward the employee up to $2,250 for participating in the wellness program and/or for achieving certain health outcomes (or penalize the employee up to the same amount for not participating and/or failing the meet health outcomes). The employer also could

offer the same level of incentive if it offered only one group health plan but allowed any employee to participate in the wellness program regardless of whether he or she is enrolled in the health plan.

When an employer offers more than one group health plan but participating in a wellness program is open to all employees regardless of whether they are enrolled in a plan, the employer may offer a maximum incentive of 30% of the lowest cost major medical self-only plan that it offers. For example, if an employer offers three different major medical group health plans ranging in cost for self-only coverage from $5,000 to $8,000 and wants to offer an incentive to employees for participating in a wellness program and completing an HRA, the employer could offer a maximum incentive of $1,500, which is 30% of its lowest cost plan.

An employer may offer an incentive to employees to participate in a wellness program even if it does not offer health insurance. If an employer does not offer health insurance but wants to offer an incentive for employees to complete an HRA or have annual tests that check their glucose or cholesterol levels, the employer could offer an incentive up to 30% of the cost that a 40-year-old non-smoker would pay for self-only coverage under the second lowest cost Silver Plan on the state or federal health care exchange in the location that the employer identifies as its principal place of business. If such a plan would cost an employee $6,000, the employer could offer a maximum incentive of $1,800.

The final ADA rule makes a distinction between smoking cessation programs that require employees to be tested for nicotine use and programs that merely ask employees if they smoke. A wellness program that merely asks employees whether or not they use tobacco is not a wellness program that asks disability-related questions. Therefore, the 30% incentive limit does not apply and an employer can offer an incentive up to 50% of the cost of self-only coverage, consistent with HIPAA and the ACA. However, where an employer requires any biometric screening or other medical procedure that tests for the presence of nicotine or tobacco, the 30% incentive limit applies.

Finally, the final ADA rule adds a couple of new confidentiality requirements. An employer may only receive information collected by a wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals except as needed to administer a health plan. Also, an employer many not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or to waive confidentiality protections under the ADA as a condition for participating in a wellness program or receiving an incentive for participating, except to the extent permitted by the ADA to carry out specific activities related to the wellness program.

IV. THE FINAL GINA RULE ON WELLNESS PROGRAMS.

Some employers extend wellness programs to employees' family members, particularly those enrolled in employer group health plans. Such wellness programs that use HRAs or biometric screenings of family members implicate GINA, which prohibits employers from acquiring an employee's genetic information (including family medical history) except in limited circumstances. One exception permits employers offering health or genetic services, including those offered as part of a voluntary wellness program, to request genetic information. The final GINA rule clarifies that an employer may offer a limited incentive for an employee's spouse to provide information about the spouse's current or past health status as part of a voluntary wellness program.

The final GINA rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employer—including as part of a wellness program—and provides information about his or her past information. This kind of information is usually provided by the spouse as part of an HRA, which may include a questionnaire or medical examination. Like the final ADA rule, the final GINA rule applies to all wellness programs, irrespective of whether the wellness program is offered through a group health plan.

The allowable financial incentive for an employee's spouse to provide information about his or her health status is 30% of the total cost of the employee's self-only coverage. The financial inducements can be stacked so that the combined total inducement for an employee and his or her spouse can be no more than twice the cost of 30% of self-only coverage. If a wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is 30% of the total cost of self-only coverage under the group health plan in which the employee and family members are enrolled. For example, if an employee is enrolled in a family plan at a total cost of $14,000 and that plan has a self-only option for a total cost of $6,000, the maximum inducement for the employee's spouse to provide health information is $1,800.

Also, like the final ADA rule, the final GINA rule provides that when an employer offers more than one group health plan but participating in the wellness program is open to all employees regardless of whether they are enrolled in a health plan, the maximum inducement for a spouse to provide health information is 30% of the lowest cost major medical self-only plan the employer offers. Also, if the employer does not offer a group health plan, the maximum inducement for the spouse to provide health information is 30% of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan through the state or federal exchange in the location that the employer has identified as its principal place of business. All of the inducement limits are exactly the same as the limits on incentives available to employees under the final ADA rule.

The final GINA rule prohibits inducements for information about the children of employees. The EEOC explains that the possibility that an employee may be discriminated against based on genetic information is greater when the employer has access to health information of the employee's children, because there is a significantly higher likelihood of discovering information

about an employee's genetic makeup or predisposition to disease from health information about the employee's children as opposed to discovery such information about the employee from the health information about his or her spouse. However, this does not mean that employers are prohibited from offering health or genetic services, including participation in an employer-sponsored wellness program, to an employee's children on a voluntary basis. Employers may offer such services but may not offer any inducement in exchange for health information about the child.

V. CONCLUSION.

The primary criticism of the EEOC's final rules regarding wellness programs is that they tie the maximum financial inducement for participation to the lowest cost of self-only coverage, which is inconsistent with the ACA regulations. The EEOC is nevertheless expected to be vigilant in seeking to enforce its final ADA and GINA rules. Therefore, employers should carefully review any current or planned wellness programs that offer financial incentives for an employee and/or his or her spouse to provide medical information to ensure that those financial incentives comply with the new ADA and GINA rules.