

# EEOC Issues Final Rule on Employer Wellness Programs

Prepared by:

Robert J. Simandl, Daniel Simandl and Elizabeth Ward



**SIMANDL LAW GROUP, s.c.**

## INTRODUCING

Lorman's New Approach to Continuing Education

# ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 60-90 live webinars added every month
- ✓ **Unlimited OnDemand and MP3 Downloads** - Over 1,000 courses available
- ✓ **Videos** - Just released
- ✓ **Slide Decks** - More than 700 available
- ✓ **White Papers**
- ✓ **Reports**
- ✓ **Articles**
- ✓ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



**Get Your All-Access Pass Today!**

# SAVE 20%

Learn more: [www.lorman.com/pass/?s=special20](http://www.lorman.com/pass/?s=special20)

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

\*Discount cannot be combined with any other discounts.

## **EEOC Issues Final Rule on Employer Wellness Programs**

Recently, the Equal Employment Opportunities Commission (EEOC) issued the final version of its rule regulating employer-sponsored wellness plans. The Final Rule limits the incentives that may be offered through a wellness program, defines what a "voluntary" program is for purposes of the Americans with Disabilities Act, and imposes additional notice and confidentiality requirements on employers. The Final Rule, which becomes effective January 1, 2017, applies to any program that asks disability-related questions or requires medical examinations regardless of whether an employer offers a group health plan.

By way of background, the Americans with Disabilities Act (ADA) permits employers to conduct medical examinations or inquiries if the examination or inquiry is: (1) job-related and consistent with business necessity; or (2) "voluntary" as part of an employee health plan. Employers generally use financial incentives or rewards to encourage participation in wellness programs. The EEOC position has been that a wellness program is "voluntary" as long as the employer neither requires participation nor penalizes an employee for not participating. However, until now the EEOC had not specifically defined a "voluntary" wellness program or addressed whether, or to what extent, a financial incentive or reward for participation would cause a wellness program to be involuntary.

### **"VOLUNTARY" WELLNESS PROGRAM**

As indicated above, the ADA permits employers to conduct medical examinations or inquiries if the examination or inquiry is a "voluntary" part of an employee health plan. Under the Final Rule, for a wellness program to be "voluntary" the following conditions must be satisfied:

- An employer cannot force an employee to take part;
- An employer cannot deny health coverage to an employee, or restrict an employee's choice to take part in a particular plan;
- An employer cannot retaliate or take adverse action against an employee for not participating and/or for failing to achieve certain health outcomes; and
- An employer must adhere to the incentive limitations.

The Final Rule also imposes a notice requirement to establish a "voluntary" program. Employers must explain to their workforce what medical information is sought, who may receive the information obtained from a questionnaire or examination, and how the information may be used.

### **A REASONABLE DESIGN**

The medical examination or inquiry must also be part of a health plan in order to be permissible under the ADA. To be part of a health plan the wellness program must be "reasonably designed to promote health or prevent disease." Under the Final Rule, a wellness program is not reasonably designed if the program:

- Involves an overly burdensome amount of time for participation;
- Requires unreasonable, intrusive procedures;
- Acts as a subterfuge for compliance with the ADA; or
- Forces employees to incur significant costs for medical examinations.

Based on the Final Rule, a program that asks employees to answer questions about their health conditions is acceptable. But if an employee does so, perhaps on a health risk assessment (HRA), the program will not be considered "reasonably designed to promote health or prevent disease" unless the employer provides feedback to the employee about any identified risk factors. Medical examinations to obtain information on health risks are also permissible provided the information is used to design a program that addresses at least one health risk or associated risk identified through the examinations. For example, medical examinations to determine high cholesterol or elevated blood pressure are permissible if the information is used to create programs to reduce the risks of heart disease.

## **LIMITATIONS ON INCENTIVES**

The Final Rule establishes specific limitations on incentives offered under a wellness program. According to the EEOC, the purpose of the limitations is to prevent employers from coercing employees into participation and from penalizing those who elect not to participate. Pursuant to the Final Rule, a reward (or penalty) cannot exceed 30 percent of the cost of employee, or self-only, coverage. The 30 percent limitation is calculated as follows:

- If the employer offers only one group health plan, an enrolled employee may only receive 30 percent of the total cost of self-only coverage.
- If the employer offers more than one group health plan, the 30 percent limitation is based on the group health plan with the lowest cost for self-only coverage.
- If the employer does not offer a group health plan, the 30 percent limitation is based on the cost of self-only coverage for a 40-year-old non-smoker under the second lowest SilverPlan on an applicable Exchange.

For smoking cessation programs, the 30 percent limitation applies if the employer requires testing to establish whether an individual is a tobacco user (for example, biometric screening to test for nicotine) but would not apply if the employer only asks the individual if he/she is a tobacco user.

## **CONFIDENTIALITY**

The Final Rule does not modify the current confidentiality requirements under the ADA, but does impose two (2) additional criteria. First, information obtained from medical examinations or questionnaires can only be provided to the employer in the aggregate. Individual employee's information, or information from which an individual can reasonably be identified, can only be disclosed when necessary in the administration of the program. Second, an employer cannot force an employee to authorize disclosure of information obtained through the wellness program. The Final Rule also clarifies that no sale, exchange, sharing, transfer, or other disclosure of an individual's health information is acceptable under the ADA.

## **HIPAA VS THE EEOC FINAL RULE**

The HIPAA rules governing wellness programs differ in scope from the EEOC's Final Rule. HIPAA prohibits group health plans from discriminating against participants based on a health factor. However, a specific exception exists that allows employers to provide premium discounts, rebates, or modifications to otherwise applicable cost sharing for participation in a wellness program.

Under the HIPAA nondiscrimination rules, as modified by the Affordable Care Act, wellness programs are separated into two (2) categories: participatory and health-contingent. A participatory wellness program either does not include any incentives or rewards or does not make obtaining the reward contingent on a health factor. The regulations implementing HIPAA do not impose any incentive limits on "participatory" programs. In comparison, the EEOC rule imposes the incentive limit on any plan or program that includes disability-related inquiries and/or medical examinations.

A health-contingent wellness program, as defined by the HIPAA nondiscrimination rules, rewards employees for achieving certain health outcomes (such as lowering their blood pressure) or for performing certain activities (such as walking 10,000 steps a day). Because the reward (or penalty) is contingent on a health factor, these programs must comply with limitations on incentives under the HIPAA nondiscrimination rules. Similar to the EEOC Final Rule, the HIPAA nondiscrimination rule provides that the reward (or penalty) cannot exceed 30 percent of the cost of employee, or self-only coverage. However, unlike the EEOC Final Rule, if a spouse or dependents are allowed to participate in the wellness program, the HIPAA nondiscrimination rule allows the employer to calculate the 30 percent limitation based on the cost of the coverage elected by the employee. Further, the HIPAA rules permit greater incentives - up to 50% for smoking cessation programs.

## **ACTION STEPS**

The Final Rule applies to any wellness plan or program that asks disability-related questions or medical examinations. Thus, employers should take the following steps to ensure that their wellness programs, including participatory wellness programs, as defined by the HIPAA nondiscrimination rules, comply with the EEOC Final Rule:

- Review the terms and conditions to ensure the program is "voluntary" as defined by the Final Rule;
- Prepare the employee notice required under the Final Rule;
- Review the incentives, including any reductions in cost-sharing, cash and in-kind rewards, to ensure that the incentives comply with the limitations under the Final Rule and the HIPAA; and
- Review privacy practices and procedures to ensure compliance with the confidentiality requirements under the Final Rule.

