

EEOC'S PROPOSED REGULATIONS ON WELLNESS PROGRAMS

Recently the EEOC published a Notice of Proposed Rulemaking (NPRM) describing how Title I of the Americans with Disabilities Act (ADA) applies to employer wellness programs that are designed to help employees attain healthier lifestyles and reduce health care costs.

What the EEOC's Proposed Regulations Mean for Employer Wellness Plans

By Jenny Holt Teeter and Dylan H. Potts

On March 30, 2015, the EEOC proposed regulations that would focus on the interplay between the ADA and the Affordable Care Act and "amend the regulations implementing the equal employment provisions of the ADA to address the interaction between Title I of the ADA and financial incentives as part of wellness programs offered through group health plans."

The EEOC's newly proposed rule offers guidance for employers who offer wellness programs intended to encourage healthier lifestyles or prevent disease. The EEOC sought to clarify the rules under the Americans with Disabilities Act ("ADA") in regards to wellness programs.

Wellness programs must be voluntary: an employee may not be coerced into participation.

According to the U.S. Department of Labor, which issued a joint rule on wellness program incentives along with other federal agencies in 2013, the ACA "creates new incentives and builds on existing wellness program policies to promote employer wellness program and encourage opportunities to support healthier workplaces." While the Affordable Care Act (ACA) allowed employers to increase financial incentives for employee participation in wellness programs, the EEOC filed three lawsuits in 2014

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targeting employer wellness plans.

The EEOC's first wellness program ADA suit, filed in Wisconsin federal court, said that an employee was forced to pick up the full amount of her employee health care premiums and was later fired after objecting to medical exams and disability-related questions as part of Orion Energy Systems Inc.'s wellness program.

In the second suit, filed in Wisconsin on Sept. 30, the EEOC alleged that plastics manufacturer Flambeau Inc. illegally required a worker to either undergo a health risk assessment and biometric test or suffer costly consequences.

The EEOC also turned to a federal court in Minnesota in October, invoking the ADA and the Genetic Information Nondiscrimination Act and asking the court to bar Honeywell International Inc. from seeking to impose penalties on workers that wouldn't undergo biometric testing. The court subsequently refused to issue a temporary restraining order or a preliminary injunction.

The EEOC's proposed rule makes clear that wellness programs are permitted under the ADA, but that they may not be used to discriminate based on disability. The ADA rules limit the circumstances under which that an employer may ask employees about their health or require them to undergo medical examinations.

EEOC Proposed Rules for Wellness Plans

Employers may not subject employees to interference with their ADA rights, threats, intimidation, or coercion for refusing to participate in a wellness program or for failing to achieve certain health outcomes. Individuals with disabilities must be provided with reasonable accommodations that allow them to participate in wellness programs and to earn whatever incentive an employer offers. When an employer implements a wellness program, they must design plans that reasonably promote health or prevent disease. The plans may not be unduly burdensome and must not violate the ADA. A program that collects information on a health risk assessment to provide feedback to employees about their health risks is reasonably designed. If the program does not provide feedback, then it is not reasonably designed.

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April 17, 2015



Voluntariness is a must. An employee may not be required to participate in a wellness program, may not be denied health insurance, given reduced benefits, or disciplined for not participating. Employers may not interfere with the ADA rights of employers who do not wish to participate in wellness programs. Coercion, intimidation or threats may not be used to achieve certain health outcomes. Employers must provide notice about what medical information will be collected, who will receive it, how the information will be used, and how it will be kept confidential.

Limited incentives for employee participation in wellness programs are allowable. The incentive that may be offered may not exceed **30 percent of the total cost of employee-only coverage.**

The collected medical information must be kept confidential by complying with HIPAA. Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees. Employers that are not HIPAA covered entities may generally comply with the ADA by receiving a signed certification from employees, as provided by HIPAA regulations, which states that they will not use or disclose individually identifiable medical information for employment purposes and abiding by that certification.

Employers must provide reasonable accommodations to disabled employees who wish to participate. For example, an employer offers an incentive for employees to attend a nutrition class. If a deaf employee wishes to attend, an employer must, absent undue hardship, provide a sign language interpreter.

Tips for Employee Sponsored Wellness Programs

- ❖ Wellness programs must be reasonably designed to promote health or prevent disease.
- ❖ Wellness programs must be completely voluntary.
- ❖ Employers may offer limited incentives for employees to participate in wellness programs or to achieve certain health outcomes.
- ❖ Medical information obtained as part of a wellness program must be kept confidential.
- ❖ Employers must provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employer offers.

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