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EEOC Issues Proposed Rules Under ADA for Employer Sponsored Wellness Plans

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Rapid Report

On April 20, 2015, the Federal Register will publish rules proposed by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA) that provide guidance concerning the use of Wellness Plans by employers.

The ADA significantly limits an employer's ability to obtain employee health information that may disclose a disability. Wellness programs generally require the disclosure of health information by participants. The proposed rules would permit the use of programs that promote healthier lives and reduce health care costs, while limiting the potential misuse by an employer of its employees' medical information that may disclose disabilities.

The proposed rules would permit an employee health plan, provided it is reasonably designed to promote health and prevent disease, and it is not overly burdensome, a subterfuge for violating the ADA or other non-discrimination laws, or "highly suspect" in the methods chosen to promote health or prevent disease.

To be permissible, the employee health plan would also have to be voluntary. By "voluntary," the EEOC means not only that employees cannot be required to participate, but also that employers may not deny coverage or certain benefit packages, limit coverage, or take any adverse action against employees who choose not to participate or fail to achieve specific health outcomes. There could be no retaliation, coercion, intimidation or threats by the employer.

To further ensure that participation is voluntary, the proposed rules would also limit the incentives that can be offered to participating employees and the penalties for not participating in a program that requires responses to disability-related inquiries, including those that assess health risks, and/or medical examinations to no more than 30 percent of the total cost of employee-only coverage (financial or in-kind).

The EEOC explains that incentives that are "too high" may make participation in the program involuntary. The interpretive guidance recognizes that not all wellness programs involve disability-related inquiries or medical examinations to earn an incentive (i.e., weight loss or smoking cessation programs). If the program does not require responses to disability-related inquiries or medical examinations, the 30-percent cap does not apply (although smoking cessation programs may be subject to a 50-percent cap under other laws).

The employee health program would also be required to provide written notice (in language that the employee will likely understand) of the type of medical information that will be obtained, its specific use and a description on the disclosure restrictions related to medical information, including with whom it will be shared and the means of preventing unauthorized disclosure.

The proposed rules state that medical information collected as part of employee participation in a wellness plan may only be provided to the employer in "aggregate terms that do not disclose or are not reasonably likely to disclose, the identity of any employee" except as needed to administer the plan and except as permitted under other privacy rules. Both the employer and the plan administrator acting as an the employer's agent would be responsible for compliance. HIPAA privacy rules would also continue to apply as well.

Compliance with the proposed rules would not alleviate an employer's obligations under other non-discrimination laws, and employers would be required to provide reasonable accommodations to employees with disabilities so that they can fully participate in the program and earn incentives.

Interested parties will have 60 days from publication to provide comments to the EEOC. If you have any questions about your wellness plan under the ADA, contact the author or another Plunkett Cooney employment attorney.