



Wellness programs: A new layer of compliance

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The Equal Employment Opportunity Commission has proposed rules addressing the extent to which employers may offer incentives to promote participation in wellness programs without violating the Americans with Disabilities Act.

The ADA Proposed Rules apply if a wellness program includes disability-related inquiries or medical examinations, including inquiries or examinations that are part of a health risk assessment.

Such assessments are reported to be the most common form of incentivized employee wellness programs, according to a study sponsored by the departments of Labor and Health and Human Services. Thus, many employers would likely be impacted by these new rules if finalized.

In 2013, the Labor, Treasury and Health and Human Services departments jointly issued regulations governing wellness programs under the nondiscrimination requirements of the Health Insurance Portability and Accountability Act of 1996. The HIPAA Wellness Rules specifically provide, however, that compliance with the HIPAA nondiscrimination requirements is not determinative of compliance with other Federal laws such as the ADA.

Thus, employers have faced uncertainty about whether providing incentives permitted under the HIPAA Wellness Rules would subject them to liability under the ADA, especially after the EEOC filed several lawsuits against employers based on wellness program designs. The ADA Proposed Rules, if finalized, will add an additional layer of

compliance to the HIPAA Wellness Rules, but will also offer more certainty to employers when designing a wellness program.

With certain exceptions, the ADA prohibits employers from making disability-related inquiries or requiring medical examinations. One such exception is for voluntary workplace wellness programs. Existing regulations, however, provide little guidance on what employee programs are acceptable and, in particular, what is considered “voluntary.”

The ADA Proposed Rules attempt to remedy this by describing what employee health programs are acceptable and by defining what it means to be “voluntary” — including by addressing the extent to which incentives can be used without rendering a wellness program involuntary. These ADA rules apply to a wellness program only if the program includes disability-related inquiries (including medical history) or medical examinations.

Many of the ADA Proposed Rules overlap with the existing HIPAA Wellness Rules, but the ADA Proposed Rules differ in three important ways:

- A limit on incentives (reward or penalty) to 30% of the total cost of employee-only coverage is extended to all wellness programs, including participatory programs, and not just health-contingent programs;
- It appears the 30% limit on incentives applies to tobacco prevention or reduction programs to the extent they include disability-related inquiries or medical examinations; and
- A notice to employees is required regarding the intended use and protection of any disclosed medical information.

In addition, the EEOC reminds employers that the ADA prohibits discrimination with respect to access to any benefit program, and therefore reasonable accommodation must be provided with respect to participation in any wellness program, absent undue hardship, regardless of whether there are disability related inquiries or medical examinations.

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