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New EEOC Rules - Implications for Wellness Programs

The Equal Employment Opportunity Commission (EEOC) has issued final rules that describe how the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) apply to employer-sponsored wellness programs. With the rules, the EEOC also issued a press release, Q&As on the ADA and GINA rules, and fact sheets on the ADA and GINA. The new rules provide guidance to both employers and employees about how workplace wellness programs can comply with the ADA and GINA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA).

Wellness Programs - Background

Many employers offer compliant wellness programs under their group health plans (GHPs) as a way to help control healthcare costs, encourage healthier lifestyles, and prevent disease. Some programs ask employees to answer questions on a health risk assessment (HRA) or to undergo biometric screenings for risk factors (such as body weight, high blood pressure, blood glucose or cholesterol). Some of these programs offer financial and other incentives for employees to participate or to achieve certain health outcomes. Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, on-site exercise facilities or coaching to help employees meet health goals.

Wellness program incentives can be framed as rewards or penalties and often take the form of prizes, cash, or a reduction or increase in healthcare premiums or cost-sharing, or contributions to account based plans. These wellness programs are intended to promote health and not to discriminate in employment or health coverage which is prohibited by the ADA and GINA. These programs are also specifically designed to comply with HIPAA and the ACA.

Wellness Programs - Legal Concerns

Employee wellness programs must be carefully designed to comply with the ADA, GINA and other federal laws that prohibit discrimination based on race, color, sex (including pregnancy), national origin, religion, compensation or age. Additionally, wellness programs that are part of GHPs must be designed to comply with HIPAA's nondiscrimination rules issued by DOL, HHS, and IRS, as amended by the ACA, which provide the basic legal framework for wellness program design. Under HIPAA, health-contingent wellness programs are required to follow certain standards related to nondiscrimination (not specifically covered here), including a standard that limits the amount of incentives that can be offered. The maximum reward under HIPAA for health-contingent wellness programs is 30% of the cost of health coverage (or 50% for programs designed to prevent or reduce tobacco use).

The ACA includes provisions encouraging wellness programs aimed at controlling healthcare costs by reducing smoking, obesity, hypertension, and other risk factors that can lead to expensive illnesses. Both the ACA and HIPAA specifically allow employers to reward workers who participate in wellness programs and penalize those who don't. Even prior to passage of the ACA, employers sought guidance from the EEOC regarding how the ADA and GINA apply to wellness programs. The ADA prohibits requiring medical tests as part of employment. Employers can't make medical inquiries unless it's consistent with job-necessity, or part of a voluntary wellness program. Previously, one of the EEOC arguments was that requiring medical tests (such as HRA questionnaires, medical screenings, weight-loss or smoking-cessation programs) violates the ADA, based on the view that it is no longer voluntary if employees face penalties or loss of insurance for non-participation. Another argument was that the testing imposes penalties on employees whose spouses do not provide their medical information, and therefore violates GINA.

The EEOC arguments conflicted with the message of HIPAA and the ACA which encourages the adoption and expansion of wellness programs designed to benefit the health of employees and their families. Employers were concerned about the impact of the EEOC's action on any employer that offers wellness programs with incentives for biometric screenings. The new EEOC final rules now provide long-awaited guidance on how to structure wellness programs without violating the ADA or GINA, in a way that is also consistent with HIPAA and the ACA. Employers that sponsor wellness programs should work with their advisors to determine what changes, if any, should be made to their wellness programs' design to comply with the EEOC's final rules.

Purpose of the ADA and GINA

The ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses. Both laws, however, allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings to determine risk factors, if the employer is providing health or genetic services as part of a voluntary wellness program.

- The Americans with Disabilities Act (ADA) prohibits employers with 15 or more employees from discriminating against individuals with disabilities. Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a voluntary wellness program.
- The Genetic Information Nondiscrimination Act (GINA) prohibits employers with 15 or more employees from using genetic information when making decisions about employment, and it restricts covered employers from disclosing genetic information. It also restricts employers from requesting, requiring or purchasing genetic information, unless one or more of six narrow exceptions applies. One of those narrow exceptions applies when an employee voluntarily accepts health or genetic services offered by an employer, including services offered as part of a wellness program.

Purpose of the Final EEOC Rules

The final rules provide much needed guidance for employers on how to structure employee wellness programs without violating the ADA and GINA. Most importantly, the final ADA rule provides guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions or to undergo medical examinations. The final GINA rule clarifies that an employer may offer a limited incentive to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. The ultimate conclusion of both new rules is that requiring an employee's or an employee's spouse's medical information to be provided to a wellness program can be considered "voluntary" even though employees can ultimately be charged more for their health coverage if they refuse to provide the information.

Effective Date of Final Rules

The provisions of the final rules related to the incentive limits, the ADA notice requirement and the GINA spousal rules will apply as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement. According to the EEOC, other wellness program provisions (such as the reasonable design and confidentiality requirements) are clarifications of existing obligations and apply both before and after May 17, 2016. Thus, these rules require immediate attention.

Program Must be Voluntary

In order for participation to be considered voluntary, an employer:

- May not require participation;
- May not deny access to health insurance or benefits to an employee who does not participate;
- May not retaliate against, interfere with, coerce, intimidate or threaten any employee who does not participate or who fails to achieve certain health outcomes;
- Must provide a notice that explains the medical information that will be obtained, how it will be used, who will receive it and the restrictions on disclosure; and
- Must comply with the incentive limits described in the final rules.

Scope of New Rules

The EEOC ADA and GINA rules apply to all employer wellness programs, regardless of whether the wellness program is part of an employer-sponsored health plan or offered by an employer that does not sponsor a health plan or health insurance. The applicable rules under these law must also be observed for employees that may not participate in a health plan.

Reasonable Design

As is true under HIPAA, the EEOC rules seek to ensure that wellness programs actually promote good health and are not just used to collect or sell sensitive medical information about employees and family members or to impermissibly shift health insurance costs to them. The ADA and GINA rules require wellness programs to be reasonably designed to promote health and prevent disease. If the wellness program involves a test, screening, or collection of health-related information, it must provide participants with results, follow-up information, or advice unless the collected information is being used to design a program that addresses the conditions identified. A program would not be reasonably designed if it requires as a condition to obtaining a reward the expenditure of an overly burdensome amount of time for participation, or imposes unreasonably intrusive procedures, or places significant costs on employees. Programs must not simply shift costs from employers to targeted employees based on their health, or be designed simply to give an employer information to estimate future healthcare costs. Reasonable design is determined considering all facts and circumstances.

Reasonable Accommodations

A wellness program must provide reasonable accommodations for employees with disabilities. For example, an employer that offers a reward for a biometric screening that includes a blood draw would have to provide an alternative test or certification requirement if an employee has a disability that makes blood drawing dangerous. Education programs may need to offer options so that vision impaired or deaf employees can participate.

Protecting Confidentiality

The two rules make clear that the ADA and GINA provide important protections for safeguarding health information. The final rules clarify that medical information collected through a wellness program may only be provided to an employer in aggregate terms that do not disclose and are not reasonably likely to disclose the identity of specific individuals. The rules also require employers to protect the confidentiality of any information obtained through disability-related inquiries or medical examinations. Generally, complying with HIPAA's privacy and security rules will be sufficient for this purpose. Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information to participate in a wellness program or to receive an incentive.

Employee Incentives

The final ADA rule provides that the incentive limit for any wellness program that is part of a GHP that includes disability-related inquiries or medical examinations (such as HRAs or biometric screenings) is 30% of the total cost (employer and employee) of self-only coverage. This limit applies to all incentives regardless of whether the incentives are (1) offered inside or outside a GHP, (2) for participation only or outcomes-based, or (3) in the form of rewards, penalties, cash, or prizes. The cost of financial as well as non-financial incentives is included, although employers have flexibility to assign a reasonable value to in-kind incentives.

- When the wellness program is available only to employees who are enrolled in a specific GHP, the incentive may not exceed 30% of the total cost for self-only coverage of the health plan in which the employee is enrolled.
- When an employer offers only one GHP, and does not require employees to be enrolled in the health plan in order to participate in the wellness program, the incentive may not exceed 30% of the total cost for self-only coverage under the health plan.
- When an employer offers more than one GHP, and does not require employees to be enrolled in a health plan in order to participate in the wellness program, the incentive may not exceed 30% of the total cost of the lowest cost self-only coverage under a major medical GHP offered by the employer.
- When an employer does not offer a GHP, and offers a wellness program that is open to employees, the incentive may not exceed 30% of the total cost to a 40-year-old nonsmoker purchasing self-only coverage under the second lowest cost Silver Plan available on the state or federal Exchange in the location that the employer identifies as its principal place of business. For information about the cost of insurance on the exchanges, see www.HealthCare.gov.

Spouse Incentive

The final GINA rule provides that a wellness program can offer an additional incentive of up to 30% of the total cost of self-only coverage for a spouse to provide information—through a HRA or biometric screening—about manifestations of disease or disorder. The program must obtain prior written authorization (which may be electronic) under prior GINA rules. However, a wellness program cannot offer incentives for a spouse to provide family medical history or results of genetic tests.

The GINA rule does not apply to inducements offered for spousal participation in wellness programs unless the program collects information on the spouse. It would not, for example, apply if the program simply rewarded a spouse for participating in a weight loss or nutrition program without collecting health information. The total inducements offered for the provision of health information of a spouse under GINA cannot exceed 30% of the total annual cost of self-only plan coverage. The maximum inducement that an employer can offer for an employee's provision of information on himself or herself, as noted above, is also 30% of the cost of sole-employee coverage. The maximum inducement that an employer can, therefore, offer for the provision of information by both an employee and spouse is twice the cost of 30% of self-only coverage. The inducement need not be paid directly to the spouse but can be used, for example, to reduce premiums or cost-sharing.

No Incentives for Children's Health or Genetic Information

The final GINA rules provide that a wellness program cannot offer incentives to provide information about an employee's child's (biological or non-biological) current or past health status or genetic information, even if the child is an adult.

Inducements may also not be offered in return for spouses providing genetic information other than information about manifestations of a disease or disorder, including the results of genetic tests and family genetic information. The GINA rules do not, however, prohibit employers from requesting genetic information, on a voluntary basis without inducements, from an employee's spouse or children in conjunction with providing medical treatment (including participation in wellness programs). The information must be provided pursuant to a knowingly signed written authorization that explains that individually identifiable information is only available to the person receiving the services and to treating healthcare and genetic professionals, and only disclosed to employers in aggregate, de-identified form.

Employers can also ask questions about genetic information in medical questionnaires, but must clearly state that questions about genetic information need not be answered in order to obtain an inducement. Employers cannot use genetic information as the basis for employment decisions and must keep genetic information in medical files that are separate from personnel files and treated as confidential information

Tobacco Cessation Programs

A question about tobacco use posed by a health plan is not subject to the EEOC rule since it is not a disability-related question under the ADA or genetic information under GINA. Therefore, if a wellness program offers an incentive for answering this question on a health assessment, the incentive amount can be up to 50% of the cost of coverage (under current HIPAA rules). However, a biometric screening for tobacco such as a cotinine test is a medical examination under the ADA. If a wellness program offers an incentive to take such a test, the above 30% limit applies.

Notice Requirement

The new rules confirm that a wellness program must provide written notice (in addition to any reasonable alternative standard notice) to employees of: (1) the type of medical information that will be collected as part of the wellness program, (2) the specific purposes for which that information will be used, (3) restrictions on the disclosure of the employee's medical information, (4) the employer representatives or other parties with whom the information will be shared, and (5) the methods the employer will use to ensure that medical information will be kept confidential and is not improperly disclosed. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members. The EEOC intends to provide model notices in the near future. The final rule does not, however, require written acknowledgment by program participants that participation is voluntary.

No Coercion or Gated Programs

The provisions of the final rules related to the incentive limits, the ADA notice requirement and the GINA spousal rules will apply as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement. According to the EEOC, other wellness program provisions (such as the reasonable design and confidentiality requirements) are clarifications of existing obligations and apply both before and after May 17, 2016. Thus, these rules require immediate attention.

Effective Date of Final Rules

For a wellness program to be deemed voluntary, an employer may not require an employee to participate in the program, deny coverage under its GHPs or particular GHP benefits, or take any adverse action against an employee who refuses to participate in a wellness program or fails to achieve certain outcomes under such a program. An employer may not retaliate against, interfere with, coerce, intimidate, or threaten an employee who does not participate in a wellness program. An employer may offer a less comprehensive or lower-tier health plan to employees who do not participate in the wellness program, but only if employees who refuse to participate can buy up to the higher-level plan without exceeding the 30% cost limit.

Employers are encouraged to review their wellness programs as soon as possible and coordinate with payroll and any wellness vendors to ensure compliance by the applicable date. Please contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 with any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online Resource Center.