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EEOC ISSUES PROPOSED RULE ON APPLICATION OF THE ADA TO EMPLOYER WELLNESS PROGRAMS

On April 16, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") announced the issuance of a proposed rule that would describe how Title I of the Americans with Disabilities Act ("ADA") applies to employer wellness programs that are part of group health plans. The proposed rule was officially published in the Federal Register on April 20, 2015. The EEOC has also published a fact sheet and a Q & A document regarding the new guidance.

The proposed rule would amend ADA regulations and interpretive guidance to provide clarity on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. In the process, it also addresses concerns regarding the application of the ADA to employer wellness programs that otherwise comply with guidance adopted by other federal agencies pursuant to the Patient Protection and Affordable Care Act of 2010 ("ACA").

BACKGROUND

The ACA included provisions revising the HIPAA nondiscrimination requirements applicable to wellness programs, which were meant to encourage employers to implement such programs as part of a group health plan. In June 2013, the IRS, DOL and HHS jointly issued final regulations to address these provisions ("HIPAA regulations"). Under the HIPAA regulations, wellness programs are categorized as either participatory wellness programs or health-contingent wellness programs, which are further subdivided into activity-based and outcome-based wellness programs. The HIPAA regulations include certain requirements for each type of wellness program to be considered nondiscriminatory under HIPAA, including limits on the financial incentives that can be offered under health-contingent wellness programs.

The ACA did not address the application of the ADA to wellness programs, and little guidance has been made available by the EEOC since the enactment of the ACA. Meanwhile, the EEOC has pursued enforcement actions against employers concerning the application of the ADA to employer sponsored wellness programs. In the enforcement actions, the EEOC has typically asserted that certain aspects of an employer's wellness program were not voluntary and consequently violated ADA restrictions on disability-related inquiries and/or medical examinations. Thus, the EEOC's approach to wellness programs has caused employers to be concerned that a wellness program that complies with the HIPAA regulations would nonetheless violate other laws, most notably the ADA.

IMPACT OF THE PROPOSED RULE

The proposed rule should eliminate uncertainty about the applicability of the ADA to wellness programs. Fortunately, the EEOC appears to have taken a more flexible approach when compared to past enforcement actions. However, the proposed rule is still more restrictive than the HIPAA regulations in several ways. In a snapshot, the proposed rule includes the following:

- A wellness program is "an employee health program" under the ADA when such program is designed to promote health or prevent disease.
- Wellness programs will be compliant with the ADA so long as they are "voluntary."
- In order to be "voluntary," an employer cannot require or coerce employees to participate, nor can they deny or limit access to health coverage for non-participation. Likewise, employers cannot retaliate against employees who do not participate or fail to achieve certain health outcomes.
- The maximum allowable financial incentive, whether in the form of a reward or penalty, an employer can offer employees for participation in a wellness program that includes disability related inquiries and/or medical examinations is 30 percent of the total cost of employee-only coverage. The proposed rule contains two significant deviations from the HIPAA regulations:
  - While the HIPAA regulations apply a 30 percent maximum for health-contingent wellness programs (50 percent for programs designed to prevent or reduce tobacco use), there is no limit for participatory wellness programs. The EEOC's proposed rule would extend the 30 percent maximum to participatory wellness programs that include disability related inquiries and/or medical examinations.

  - With respect to the 50 percent maximum for programs designed to prevent or reduce tobacco use, the proposed rule would not apply (and the 50 percent maximum could be used) so long as the program does not include disability-related inquiries or medical examinations (e.g., a program that merely asks employees whether or not they use tobacco or have quit upon completing a cessation program). However, a wellness program that includes a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination, and it would be subject to the 30 percent maximum.

- For wellness programs that do not include disability-related inquiries or medical examinations, the limits on financial incentives do not apply but employers must still abide by the ADA nondiscrimination requirement to provide reasonable accommodations that enable employees with disabilities to fully participate in employee health programs and earn any reward or avoid any penalty offered as part of those programs.
- Employers must be careful to only receive information collected by a wellness program in aggregate form so as to not disclose the identity of specific individuals except as is necessary to administer the plan.
- Employers must additionally keep in mind that they are still required to comply with other nondiscrimination laws (e.g., Title VII, the Equal Pay Act, the ADEA, etc.).

NEXT STEPS

Employers that have a wellness program, or are considering adding one, should evaluate the potential impact of the proposed rule in conjunction with the HIPAA regulations. Since there are differences between the proposed rule and the HIPAA regulations, employers may need to revise their wellness programs once the proposed rule is finalized.

Employers with concerns about the proposed rule have until June 19, 2015 to submit comments. Instructions on how to submit comments are available here. The EEOC will evaluate all of the comments it receives and may consider revisions in response to those comments before it finalizes the rule.

For questions on this topic, please contact Calvin Chambers at 317-977-1459 or cchambers@hallrender.com or your regular Hall Render attorney.

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