update

Public Sector Benefits Compliance News

June 9, 2015

Equal Employment Opportunity Commission Proposes Standards for Wellness Programs

The Equal Employment Opportunity Commission (EEOC) has published a proposed rule governing wellness programs established by entities subject to the Americans with Disabilities Act (ADA).[1] The proposed rule would eliminate some of the prior uncertainties surrounding the legitimacy of wellness programs and provide boundaries for designing these programs. The new rules also set standards that in some respects are stricter than those set by the Departments of Labor, Treasury, and Health and Human Services (HHS) — collectively, the "Departments" — in their wellness program rules implementing the Health Insurance Portability and Accountability Act (HIPAA).[2] When the EEOC's final wellness rule is published, employers that offer covered wellness programs will need to comply with it in addition to the HIPAA rules.

The proposed rule would provide clear guidance on many wellness programs, including programs that are intended to encourage behavior to improve employee health in general, as well as wellness programs that impose penalties for nonparticipation in wellness programs. The EEOC is accepting comments on the proposed rule until June 19, 2015. This *Update* describes highlights of the EEOC proposal and recommends a course of action for employers and plan sponsors with wellness programs.

Health Compliance News:

- Covered Wellness Programs
- Proposed Rules for all Wellness Programs
- Proposed Rules for Certain Wellness Programs
- Implications for Employers and Plan Sponsors

Covered Wellness Programs

The EEOC proposed rules will affect employers and plan sponsors with a variety of health and wellness programs. Employers or plan sponsors that use any or all of the approaches noted in the text box at the top of the next page, as well as other similar health promotion programs, should review the existing HIPAA rules in addition to the EEOC's proposed rule to determine whether their health programs would be affected.

[1] The proposed rule was published in the April 20, 2015 *Federal Register*.

[2] See Segal's July 11, 2013 *Capital Checkup*, "New Rules for Wellness Programs."

Wellness Programs

Wellness programs vary considerably, and some offer financial or other incentives to encourage participation. Common designs include the following:

- Health Risk Assessment questionnaires;
- Medical screening for conditions such as high blood pressure, high cholesterol or high blood glucose;
- Classes to help individuals stop smoking or lose weight;
- Physical activities in which employees can engage, such as walking or exercising daily;
- Coaching to help employees meet health goals; and
- Data analytics to determine what type of health programs to design for a particular group of employees.

Proposed Rules for all Wellness Programs

Generally, the proposed rule would require wellness programs to be reasonably designed, provide a reasonable accommodation to individuals with a disability, and keep medical information confidential. Details about each of these requirements follow:

- ***Reasonable Design*** All wellness programs must be reasonably designed to promote health or prevent disease.[3] They also must not be overly burdensome to participants and must not be a subterfuge for violating the ADA or other laws. For example, a program that screens individuals and advises them as to what health risks they have would be considered a reasonably designed program.

- ***Reasonable Accommodation*** Under general ADA standards, programs must provide reasonable accommodations, absent undue hardship, to enable employees with disabilities to take advantage of any incentive offered to others. The proposed rule would require programs to provide a reasonable accommodation for wellness programs. For example, a nutrition class would need to provide a sign-language interpreter if a deaf person needs such assistance to understand the information communicated during the class. Written materials would also need to be available in alternate formats (*e.g.*, in large print or on a computer disk) for an employee with a vision impairment.

- ***Confidentiality*** In general, medical information obtained as part of a wellness program must be kept confidential. When programs are operated as part of a group health plan, the HIPAA privacy and security rules would need to be followed.[4]

Proposed Rules for Certain Wellness Programs

Under the EEOC proposal, any wellness program that includes disability-related inquiries or medical examinations, including questions or exams that are part of a health risk assessment, must be voluntary. This means that the employer or plan sponsor:

- May not require employees to participate;

- May not deny coverage under any of its group health plans or particular benefit packages within a group health plan for non-participation;

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[3] These same standards apply under the HIPAA wellness program rules, as the Departments noted in Answers to Frequently Asked Questions (FAQs) that were released on the same day as the EEOC proposal and available on the DOL website.

[4] Privacy issues were also emphasized in answers to FAQs issued by the HHS Office for Civil Rights, the agency responsible for enforcing the HIPAA privacy and security rules and available on the HHS website.

- May not limit the extent of benefits under the group health plan, unless it is a permitted incentive (generally the financial incentives/penalties must be limited to 30 percent of the total cost of employee-only coverage); and

- May not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who do not participate.

The proposed standards would appear to prohibit strategies that prevent employees/participants from enrolling in specific benefit packages if they do not participate in the wellness program (sometimes known as "gateway plans").

Implications for Employers and Plan Sponsors

Employers and plan sponsors may want to consider submitting comments to the EEOC on the proposed rule. Comments are due by June 19, 2015.

In information accompanying the proposed rule, the EEOC states that employers and other covered entities are not required to comply with the proposed rule, but may do so.[5] The statement points out that some of the provisions in the proposed rule already are required by existing ADA regulations. These include not requiring employees to participate in wellness programs and not denying health coverage or taking any adverse action against employees who do not participate. The EEOC has previously filed lawsuits against employers based on whether the program is "voluntary." Consequently, in light of the risk of litigation, employers may want to review with legal counsel whether to make any changes in their wellness program while this rulemaking is underway.

[5] This document, Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs, is available on the EEOC website.

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