EEOC Issues Important Proposed Rule Governing Employer Wellness Programs

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On April 16, 2015, the Equal Employment Opportunity Commission (EEOC) published a **proposed rule** further addressing increasingly popular employer "wellness programs." These programs generally incentivize employees to make healthier lifestyle choices by participating in nutrition and exercise classes, promoting weight-loss and smoking cessation programs, etc. The EEOC has attacked wellness plans that subjected non-participating employees to discipline, were not truly "voluntary" or otherwise violated the Americans with Disabilities Act of 1990 (ADA) or the Health Insurance Portability and Accountability Act of 1996 (HIPAA), by impermissibly probing into employees' medical histories. In cases that drew attention in 2014, the EEOC sued two employers for alleged ADA violations after accusing one of having "interfered, coerced and intimidated [plaintiff]" from exercising her right to "not be subject to unlawful disability-related inquiries and medical exams . . . . ." *See* ***EEOC v. Orion Energy Systems, Inc.*** *and* ***EEOC v. Flambeau, Inc.***

The ADA prohibits discrimination and promotes equal employment opportunity for persons with disabilities. The ADA limits an employer's ability to ask questions about an employee's medical, disability or injury history, or to require an employee to submit to medical evaluations, biometric testing or health-risk assessments. One relevant exception allows for voluntary medical examinations and questioning as part of a wellness program. The EEOC's most recent rule gives guidance on the extent to which the ADA's employment provisions allow employers to offer incentives to program participation and further explains the important requirement of "voluntary" participation. The rule addresses notice requirements to employees and clarifies the overlap between HIPAA and the ADA with respect to wellness programs.

The EEOC stated: "Although it is clear that compliance with the standards in HIPAA is not determinative of compliance with the ADA, the Commission believes that it has a responsibility to interpret the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and HIPAA's and the Affordable Care Act's provisions promoting wellness programs."

Under the new proposed rule, employers would not be allowed to discipline, threaten, retaliate against

or otherwise coerce workers to participate in wellness programs. Employers likewise cannot deny health coverage or access to benefits or make negative eligibility determinations based on an employee's failure to participate. Employers are, however, able to financially incentivize employees, including the use of *both* financial rewards and penalties. Employees must also be notified of how any protected health information obtained during their program participation may be used.

The rule requires explanation to employees of the programs' "voluntary" nature. The EEOC stated, "[t]he Commission's interpretation of the term 'voluntary' in the ADA's disability-related inquiries and medical examinations provision is central to the interaction between the ADA and HIPAA's wellness program provisions." The EEOC's rule indicates that the use of financial incentives, whether in the form of a reward *or* penalty, will not render a program "involuntary" if the maximum allowable incentive doesn't exceed 30 percent of the total cost of employee-only coverage under a group health plan.

The EEOC's new **proposed rule** has helped clarify lingering uncertainty surrounding the intersection of employee wellness programs, the ADA and HIPAA by more clearly defining the rules for employers and the rights of employees. However, unanswered questions remain.

The proposed rule's publication in the Federal Register on Monday, April 20, 2015 triggers a 60-day public comment period. Among the questions management-side attorneys expect to see addressed is whether the EEOC will update its position on the interplay between wellness programs and the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA generally prohibits requesting "genetic information" from job applicants or employees. The EEOC has indicated that genetic information includes family medical history and information about the genetic test of a family member. So, the question remains - How would wellness programs be viewed by the EEOC under GINA if they reward or penalize employee spouses?

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