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Wellness Programs: Regulatory and Litigation Update

The EEOC continues to clarify its interpretation of wellness program rules. Rather than issuing additional formal guidance, the EEOC has opened the lines of communication with stakeholders through their website and responded more actively to questions about the nuances of their final ADA and GINA wellness program regulations — particularly on how these rules apply when an employer offers multiple health coverage options or a multi-faceted program. Additionally, several important legal developments, such as rulings in two pending cases questioning the validity of wellness programs and a new lawsuit brought by the AARP, demonstrate that case law in the wellness arena is still very much in flux and ultimately could impact wellness program design and strategy.

Background

Earlier this year, the EEOC issued final rules for wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The ADA generally prohibits employers from requiring a medical examination (e.g., biometric screening) or inquiring about either the existence of, or the nature or severity of, an employee's disability (e.g., a health risk assessment, or HRA) unless the requirement or inquiry is job-related or unless such exams or inquiries are part of either a "bona fide benefit plan" or a "voluntary employee health program." The EEOC's position is that the bona fide benefit plan safe harbor is not an appropriate basis for wellness programs that include medical examinations or disability-related inquiries. Rather, the voluntary employee health program exception may apply. (For information on these concepts and the final regulations, please see our June 17, 2016 *FYI In-Depth*.)

The regulations limit the maximum incentive that can be offered for wellness programs that involve a medical exam or disability-related inquiry and the limit varies. Specifically, the maximum permitted incentive is:

A **bona fide benefit plan** is an insured or self-insured health plan that is based on underwriting risks, classifying risks, or administering such risks, and is not subterfuge for discrimination. A **voluntary employee health program** is a program where the employer (i) does not require employees to participate, (ii) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten nonparticipating employees, and (iii) does not penalize employees for nonparticipation by denying coverage under any group health plan or particular benefit packages within a group health plan. Additionally, any medical records acquired must be kept confidential and separate from personnel records.

- 30% of the total cost of self-only coverage (employer plus employee contributions) of the group health plan in which the employee is enrolled where participation in the wellness program depends on enrollment in a particular group health plan
- 30% of the total cost of self-only coverage where the employer offers only one group health plan and employees may participate in the wellness program regardless of whether or not they are enrolled in the health plan
- 30% of the total cost of the lowest cost self-only coverage where the employer offers more than one health plan and employees may participate in the wellness program regardless of whether or not they are enrolled in a particular plan
- 30% of the cost to a 40-year-old non-smoker of the second lowest cost marketplace Silver Plan where the employer's principal place of business is located if the employer does not offer a group health plan

(Note that similar rules apply under GINA in certain situations where wellness incentives are offered to spouses. See our June 17, 2016 *FYI In-Depth*.)

The final regulations do not address the calculation of the 30% limit in the context of some common wellness program designs — for example, where an employer offers multiple coverage options under one group health plan and only employees enrolled in the health coverage are eligible for the wellness program, offers multiple or multi-faceted wellness programs, or offers different wellness programs for different groups (e.g., hourly versus salaried employees).

In addition to sidebar at right, for more information on employee benefits following the 2016 election, please see our November 14, 2016 *Legislate*.

EEOC Clarification

The EEOC's Office of Legal Counsel recently released two information letters, dated July 1, 2016 and August 31, 2016, interpreting how the ADA and GINA regulations apply to certain wellness program designs. While these letters are informal guidance rather than official EEOC opinions, they provide some important clarification for employers maintaining wellness programs.

Applying Limit in Cases of Multiple Group Health Plans or Benefit Options

In the July 1 letter, the EEOC clarified its interpretation of how the 30% maximum incentive limit applies to a group health plan with multiple coverage options.

Final Regulations under Trump Administration?

The EEOC issued the final ADA and GINA regulations on May 17, 2016 – putting them outside of a 60-day "pull back" period that could be used to withdraw them. Thus, to the extent it wishes to do so, the EEOC under President-elect Trump would have to go through a lengthy rulemaking process to rescind or revise these regulations. Congress has shown interest in this area and could take action by amending the ADA and GINA, but it remains to be seen if there is momentum for this in the new Congress. It's also not clear what approach the EEOC will take moving forward, but even if the EEOC does not pursue enforcement activity, employees could continue to file complaints with the EEOC and ultimately sue employers.

The regulations provide that the incentive limit is 30% of the lowest cost self-only coverage where an employer offers coverage under more than one group health plan and does not require employees to enroll in a particular plan to participate in the wellness program. The letter clarifies that, under the ADA and GINA, this principle applies both when an employer offers more than one group health plan and where an employer offers multiple benefit options under a single group health plan, regardless of the coverage in which the participant actually is enrolled.

Comment

In discussing the categories associated with the incentive limit in our June ***FYI In-Depth***, we noted the lack of clarity in the EEOC's regulations and suggested a conservative approach for 2017 – that employers limit the incentive amount to 30% of self-only coverage of the lowest cost plan where multiple coverage options are available. The July information letter confirms that approach.

Comment. While the ADA limits the incentive to 30% of the lowest cost self-only coverage, HIPAA permits wellness incentives of up to 30% of the cost of employee-only coverage in which the employee is actually enrolled. (Additionally, under HIPAA, if spouses and/or dependents may participate, the maximum incentive is based on the total cost of coverage in which employee is enrolled, e.g., family coverage). HIPAA also allows an additional 20% incentive for wellness programs aimed at preventing or reducing tobacco use. Thus, in some cases, the allowable incentive limit under the ADA (or GINA) might be more restrictive than what HIPAA permits. The EEOC acknowledges this distinction, noting that its rules attempt to promote consistency with HIPAA "while still ensuring that incentives are not so high as to be coercive."

Example. An employer sponsors a group health plan with three benefit options:

1. PPO with an annual cost (employee plus employer contributions) of $7,000 for self-only coverage and $16,000 for family coverage
2. High-deductible health plan and HSA with annual cost (employee plus employer contributions) of $6,000 for self-only coverage and $13,000 for family coverage
3. High-deductible health plan and HSA with annual cost (employee plus employer contributions) of $5,000 for self-only coverage and $12,000 for family coverage

Employees who are enrolled in any of the employer's three benefit options may participate in the employer's wellness program, which offers a premium reduction as an incentive to individuals who complete an HRA and submit to a biometric screening. It offers an additional incentive to those who achieve certain standards on the biometric screening and test negative for nicotine use.

Sam enrolls in self-only coverage in the PPO. He participates in the wellness program. He completes the HRA and submits to the biometric testing, meeting the required biometric standards and testing negative for nicotine use.

Under HIPAA, offering an incentive for meeting certain biometric standards and testing tobacco-free is an outcome-based, health contingent wellness program subject to the incentive limits. HIPAA permits a maximum incentive of 30% of the cost of self-only PPO coverage for meeting the biometric standards, as well as an additional 20% of the cost of self-only coverage for meeting the tobacco use requirement. Here, under HIPAA, the maximum permitted incentive is $2,100 (30% of $7,000) for meeting the biometric standards, plus $1,400 (20% of $7,000) for testing negative for nicotine use — totaling $3,500.

The ADA applies to wellness programs involving medical exams and questionnaires (like the HRA, biometric screening and test for nicotine use that are part of this program). In contrast to the HIPAA rules, under the ADA, the maximum incentive the employer can offer Sam is $1,500 — 30% of the lowest cost self-only coverage (30% x $5,000). This is true even though Sam is enrolled in the PPO self-only coverage (total cost of $7,000) and not self-only coverage in the lowest cost HDHP/HSA plan (total cost of $5,000). Note that the differential under HIPAA could be greater if family members are allowed to participate in the wellness program.

Comment. Given the complexity involved in complying with the various regulatory schemes, employers seeking to provide more significant incentives should speak with trusted advisors and counsel for plan design strategies.

Applying Limit Where Medical Exam or Disability-Related Inquiry not Required to Receive Incentive

In the August 31 letter, the EEOC responded to questions about the application of the ADA (and GINA, where applicable) rules to wellness programs that include disability-related inquiries and/or medical examinations but do not condition a reward or penalty on an employee answering those questions or taking a medical exam.

First, the letter provides an example of a wellness program with three separate components, each of which offers an incentive for completion. Two of the components involve a medical exam or disability-related inquiry. The third does not. According to the EEOC, ADA rules apply only to the programs (or components of programs) that offer an incentive for undergoing a medical exam or answering a disability-related inquiry — and not to a program (or component of a program) that simply requires an employee to engage in a particular activity to earn an incentive. Thus, the first two components of the example would be subject to the 30% incentive limit, but the third would not.

The letter then describes a wellness program with six components, two of which involve a medical exam and/or disability-related inquiry. Employees may complete any three of the six components to earn a financial incentive — and the amount of the incentive is the same regardless of which three components an employee chooses. The EEOC explains that because an employee may choose to provide medical information (by undergoing a medical exam or answering disability-related questions), but is not required to do so to earn an incentive, the limits would not apply. This is true even if the employee chooses components that involve disability-related inquiries and/or medical exams. In the event of a challenge to a wellness program, however, the EEOC will consider all facts and circumstances to determine whether the program is reasonably designed to promote health and prevent disease, including differences in the amount of the incentive, time required to complete components, and cost of completing components that do not include disability-related inquiries and/or medical exams versus those that do.

Incentive Available Only to Employees in Health Plan

Also in the August 31 information letter, the EEOC explained that where an employer offers only one health plan and all employees can participate in a wellness program, but only those who enroll in the health plan can receive an incentive, the incentive is limited to 30% of the cost of self-only coverage under that plan. On the other hand, where the employer offers more than one health plan (or health plan option) and offers an incentive only to individuals enrolled in any one of those plans (or options), the incentive is limited to 30% of the cost of the lowest cost self-only coverage (as discussed above).

Additional Questions

The EEOC anticipates issuing additional FAQs in the future. Individuals may email questions to the EEOC at FinalWellnessRules@eeoc.gov. EEOC staff has indicated that the questions submitted will be used to create additional guidance.

What's New with EEOC Litigation?

The EEOC has filed several lawsuits in the past few years alleging that an employer's wellness program violates the ADA and GINA requirements. (See our January 19, 2016 *For Your Information* and issues of *FYI Alert* from November 4, 2014 and October 30, 2014.) Recently, there have been important developments in two of these pending cases, and a new lawsuit filed against the EEOC.

Flambeau

Flambeau, Inc. offered its employees the opportunity to participate in a group health plan, but required them — as a condition of enrollment — to participate in a wellness program involving an HRA and a biometric screening. The EEOC sued Flambeau in 2014 following an employee's complaint that the company refused him coverage because he failed to complete the HRA and screenings due to being on medical leave — even though, in conciliation to the employee's EEOC complaint, the company agreed to reinstate his coverage retroactively after he completed the HRA and screenings.

On, December 30, 2015, the federal district court rejected the EEOC's position that the wellness program made disability-related inquiries and required medical examinations in violation of the ADA, ruling that the program meets the ADA's safe harbor for bona fide benefit plans.

> **Comment.** This conclusion conflicts with the EEOC's position that the bona fide benefit plan safe harbor is not the proper exception for wellness programs that include medical exams or disability-related inquiries. For more information on the bona fide benefit plan safe harbor, please see our *FYI In-Depth*.

The case is currently on appeal in the 7th Circuit. During oral argument on September 15, 2016, a three-judge panel questioned whether the employee actually suffered an economic loss, emotional distress or some other damage — given that the company subsequently restored his coverage. The court asked attorneys for the EEOC and Flambeau to prepare and submit briefs on the issue.

Orion

Orion Energy Systems, Inc. maintains a wellness program that includes an HRA and biometric screening. Employees who participate in the program receive a discount on their health insurance, whereas employees who do not participate pay 100% of the premium. In response to the EEOC's claims that the program violates the ADA, Orion argued that the wellness program was lawful under the ADA bona fide benefit plan safe harbor or, alternatively, was voluntary.

Ruling on motions for summary judgment, on September 19, 2016, the court rejected the holding of Flambeau and decided that the bona fide benefit plan safe harbor does not apply, accepting the EEOCs position in their regulations. The court explained that the safe harbor is a limited exception designed to protect the business operations of insurers by allowing basic underwriting and risk classification and, in this case, the wellness program was not used to underwrite, classify or administer risk.

The court did, however, agree with Orion that the wellness program was "voluntary" within the meaning of the ADA. The court stated that even though the employees' choice was a tough one, it was a choice nonetheless and, therefore, satisfied the statute.

> **Comment.** Notably, Orion's wellness program would not have met the incentive limits the EEOC set forth in the final regulations. This is not an issue in the litigation because the final regulations were issued after the case originated and the EEOC applies those requirements on a prospective basis only — so it remains an open question.

AARP

In October, the AARP filed suit against the EEOC on behalf of its members, alleging that the 30% incentive limit under the ADA and GINA regulations is "arbitrary, capricious, an abuse of discretion and contrary to the law." Among other things, the lawsuit states that the incentive limits are coercive because they impose heavy financial penalties on employees who do not participate in the wellness program, and arbitrary because they are not based on any facts in record, economic analysis or other legal requirement. The AARP contends that forcing employees to submit to medical examination or inquiries and reveal confidential medical and genetic information to employers controverts the statutory purpose of the ADA and GINA. The AARP is asking the federal district court for the District of Columbia to invalidate the regulations.

In Closing

While the EEOC's information letters and outreach efforts provide some welcome clarity around the application of incentive limits, questions remain. Further, given the lack of consistency in the recent court decisions, we can expect to see continued litigation. In the meantime, plan sponsors should continue to seek counsel of trusted advisors when planning and implementing their wellness programs.

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