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Wellness Program Compliance – Where Are We Now?

The EEOC recently removed portions of the final ADA and GINA regulations that permitted a 30 percent wellness incentive, following a federal court’s conclusion that those rules were arbitrary and capricious. Without clear standards, employers should assess current wellness program designs and determine their risk tolerance. They should also be mindful that the DOL has been actively enforcing the HIPAA wellness regulations, with a particular focus on plans that impose a premium surcharge on tobacco users.

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Background

Several statutes govern wellness programs maintained and implemented by employers. HIPAA, enforced by the Departments of Health & Human Services, Treasury and Labor (collectively, the departments) applies to group health plans and insurers. It generally prohibits a group health plan from discriminating against individual participants and beneficiaries with respect to eligibility, benefits or premiums based on a health factor — such as health status, medical condition, claims experience and medical history. Essentially codifying the 2006 HIPAA nondiscrimination and wellness regulations, the Affordable Care Act clarified that a wellness program providing an incentive that requires an individual to satisfy a health-related standard must offer a “reasonable alternative standard” for obtaining the incentive to anyone who fails the initial standard — regardless of the reason for that failure. (See our [December 9, 2015 For Your Information](#).)

The Americans with Disabilities Act (ADA), enforced by the Equal Employment Opportunity Commission (EEOC), generally prohibits employers from requiring employees to undergo a medical examination that could divulge information about a disability (e.g., biometric screenings) and from 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 part of a “bona fide benefit plan” or a “voluntary employee health program.” The Genetic Information Nondiscrimination Act (GINA), also enforced by the departments (Title I) and EEOC (Title II), prohibits group health plans, insurers and employers from discriminating on the basis of an individual’s “genetic information” — including prohibiting employers from requesting, requiring or purchasing information about the current or past health status of a spouse or other family member.

Information about the medical conditions of an employee's spouse is considered genetic information of the employee (even though the employee and spouse do not share genetic material). (See our [December 9, 2015 FYI In-Depth](#).)

Rise and fall of EEOC's permitted incentives

Both ADA and GINA provide exceptions for voluntary wellness programs, and, in 2016, the EEOC issued final rules for wellness programs under these statutes. The 2016 regulations set out requirements for voluntary programs that involve a medical exam and/or disability-related or genetic inquiry, generally limiting incentive amounts to 30 percent of the cost of self-only coverage. (See our [June 17, 2016 FYI In-Depth](#).)

Buck comment. While the 2016 EEOC regulations borrowed concepts from the HIPAA wellness regulations, there are differences. For example, the HIPAA regulations limit incentive amounts generally to 30 percent of the cost of the coverage option in which the employee is enrolled, while the EEOC regulations limited incentive amounts generally to 30 percent of the lowest cost plan.

In 2016, AARP sued the EEOC on behalf of its members, alleging that the 30 percent incentive permitted under the ADA and GINA regulations was “arbitrary, capricious, an abuse of discretion and contrary to the law.” Agreeing with AARP, the court found that the EEOC had not sufficiently justified its conclusion that the 30 percent incentive limit is a reasonable interpretation of voluntariness (as required by the statute) and instructed the EEOC to review and revise its regulations. In January 2018, the court ordered that, barring new proposed or final regulations, the incentive sections of the 2016 regulations would be vacated as of January 1, 2019. (See our [February 13, 2018 For Your Information](#)).

In December 2018, the EEOC issued [final rules](#) removing the incentive sections of the 2016 regulations. This means that there are now no EEOC regulations addressing permissible incentive levels under the ADA and GINA voluntary wellness program exceptions. All other parts of the 2016 regulations (such as the notice requirements) remain in effect.

Meanwhile, on the HIPAA front

As described below, the DOL has been actively enforcing the HIPAA wellness regulations — with a particular focus on plans that impose a premium surcharge on tobacco users.

- The DOL's wellness incentive-related [lawsuit](#) against Macy's, Inc., filed in August 2017, is still pending. This case involves allegations that the employer failed to offer a reasonable alternative an individual could use to avoid a tobacco surcharge. Additionally, DOL claimed that the employer breached its ERISA fiduciary duties by unlawfully imposing the surcharge —thereby reducing its obligations to fund the plan.
- In October 2018, DOL [settled](#) a lawsuit against ChemStation International Inc. after alleging that the employer offered lower premiums to participants who met certain health outcomes (including body mass index, blood pressure, cholesterol and glucose levels, non-use of tobacco products) but failed to provide a reasonable alternative standard for obtaining the discounts. The employer agreed to pay

\$59,189 to participants who did not receive the discounts either because they did not enroll in the wellness program or did not meet the required health outcomes.

- In a November 2018 settlement two days after DOL filed its complaint, Dorel Juvenile Group, Inc. agreed to pay a \$14,563.50 penalty and return \$145,635 in tobacco surcharges to plan participants. There, the DOL asserted that the employer failed to provide a reasonable alternative standard or waiver in connection with the tobacco use premium surcharge.

What's next?

The fate of the EEOC's regulation of wellness incentives is unclear. The EEOC might reissue the same regulations but provide more robust justification for why a 30 percent incentive is reasonable and voluntary. Or it might issue completely new regulations with different requirements for wellness incentives. In any event, guidance is not likely forthcoming — two EEOC commissioner slots, and the EEOC general counsel position, are currently vacant, with nominees stalled in a contentious Senate confirmation process.

With the EEOC's regulations on wellness program incentive limits now gone, employers should review their wellness program designs. With no clear rules regarding permissible incentive levels, some may want to reset and take a more conservative approach; others might stay the course, or even provide more aggressive incentives. In considering options, employers may want to think about their employee population and how changes to wellness-related incentives could affect morale.

Meanwhile, the DOL seems poised to continue its wellness program enforcement efforts targeted at plans that fail to offer reasonable alternative standards for participants and beneficiaries to avoid a tobacco use surcharge.

In closing

Employers should assess their wellness program designs in light of the EEOC's removal of its rules on permissible incentives. And in light of DOL's recent enforcement activity, group health plans should ensure compliance with the HIPAA wellness rules — specifically, the need to offer a reasonable alternative standard in connection with imposing a tobacco use premium surcharge.

EEOC Appointments

The EEOC is a bipartisan commission comprised of five members. No more than three commissioners can be from the same political party.

Commissioners are appointed by the president and confirmed by the Senate for five-year terms. If and when the stalled commissioner nominations are confirmed, the Republicans will hold a majority. The EEOC's general counsel supports the commission, among other things, providing direction, coordination, and supervision to the EEOC's litigation program.

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