



LEGAL ADVICE FOR HEALTH PLANS

HEALTH LAW ALERT

April 20, 2015

EEOC Proposes New Requirements for Wellness Programs

Today, the Equal Employment Opportunity Commission (EEOC) proposed rules and issued guidance that would impose additional requirements on wellness programs, including programs that collect information about employees through Health Risk Assessments (HRAs). Under the EEOC's proposed interpretation of the Americans with Disabilities Act (ADA), employers administering HRAs would be required to provide written notices to affected employees and would not be permitted to receive HRA results unless (1) the results have been de-identified or (2) the information is necessary for administering wellness program provisions **and** the employer has amended its plan documents in compliance with the HIPAA Privacy Rule. The guidance also would resolve longstanding concerns about the common practice of providing incentives for employees to participate in Wellness Programs and the EEOC's interpretation of an ADA requirement that participation in such programs be "voluntary." The EEOC concludes that such incentives are permitted under the ADA's "voluntary" participation requirement, as long as the programs meet several conditions.

The EEOC's proposed Rule is published at 21659 (April 20, 2015) ([click here](#)). Guidance published by the EEOC is [available here](#). Additional guidance on Wellness programs published by the Department of Health and Human Services' Office for Civil Rights (which enforces the HIPAA Privacy Rule) and the Department of Labor are [available here](#) (HHS) [and here](#) (DOL).

Notice Requirement

Under the ADA, an employer may implement a wellness program that includes medical examinations of employees (such as biometric screenings or calculating Body Mass Indexes) or "disability-related inquiries" of employees only if participation in the program is "voluntary." The EEOC's proposed rule indicates that, in order for a wellness program* to be voluntary, the employer must, among other things, provide employees with a written notice in a reasonably-understandable form describing:

- The type of medical information the wellness program will collect;

- The specific purposes for collecting the medical information;
- The applicable restrictions on disclosure of the medical information;
- The employer representatives or other parties who will have access to the information; and
- The safeguards the employer will use to prevent improper disclosure of the information.

Employers that conduct biometric screenings and make disability-related inquiries through an HRA or other types of wellness programs (or the insurers or other vendors that administer such programs for employers) may therefore be required to prepare and distribute privacy notices.

* The notice requirement does not apply to a wellness program that is not part of a group health plan. But, a wellness program that conducts biometric screening or otherwise provides or pays for the cost of health care will generally qualify as a group health plan.

Employer Access to HRA Results

The EEOC's proposed rule would (with limited exceptions) prohibit employers from accessing results of HRAs except (1) as necessary to administer the health (wellness) plan or (2) in "aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of any employee." The EEOC's guidance reminds employers that wellness programs often qualify as group health plans, subject to the HIPAA Privacy Rule as covered entities and that wellness programs' disclosures of protected health information to employers is therefore strictly limited.

Wellness Program Incentives

The EEOC's previous guidance on wellness program incentives indicated that a wellness program was permissible under the ADA only if the employer "neither requires participation nor penalizes employees who do not participate." The agency believes that this interpretation of the ADA effectively prohibited the provision of incentives for participation in wellness programs, unless the incentives were "de minimus rewards or penalties." But, the EEOC acknowledges that this "reading . . . would make many wellness program incentives . . . expressly permitted by HIPAA [and the Affordable Care Act] impermissible under the ADA." The agency therefore "concludes that allowing certain incentives related to wellness programs . . . is the best way to effectuate the purposes of the wellness program provisions of both laws [*i.e.*, the ADA and the HIPAA wellness program provisions]."

A wellness program that otherwise complies with the HIPAA Wellness Program Rules also complies with the ADA, provided that the program is "voluntary." To qualify as

a “voluntary” wellness program under the EEOC’s proposed rule, the employer would have to ensure that the employer:

- Does not require employees to participate;
- Does not deny coverage under its group health plans (or other benefit packages) for an employee’s non-participation;
- Does not limit the extent of benefits (other than the permissible wellness program incentive) for employees who do not participate;
- Does not take any adverse employment action or retaliate against an employee for not participating; and
- Provides the privacy notice (described above) to employees.

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