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EEOC Issues Final Rules on Employer Wellness Programs

The Equal Employment Opportunity Commission published final rules on May 17, amending the regulations under Title I of the Americans with Disabilities Act (ADA) and the regulations under Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs. These final rules are applicable to plan years beginning on or after January 1, 2017.

In general, the term "wellness program" refers to health promotion and disease prevention programs and activities offered to employees. Some wellness programs may be part of an employer-sponsored group health plan, while others are offered separately as a benefit of employment. Wellness programs that ask employees to answer disability-related inquiries, such as by completing a health risk assessment (HRA), and/or undergo medical examinations, including biometric screenings for risk factors (such as high blood pressure or cholesterol), are subject to the rule. Wellness programs subject to the rule may also be designed to provide educational health-related information or provide nutrition classes, weight loss and smoking cessation programs, on-site exercise facilities, and/or coaching to help employees meet health goals.

ADA Final Rule

Title I of the ADA generally restricts employers from obtaining medical information from applicants and employees but allows employers to make inquiries about employees' health or conduct medical examinations that are part of a *voluntary* employee health program, which includes many wellness programs.

Under the ADA final rule, an employee health program – including any disability-related inquiries or medical examinations that are part of such a program – must be "reasonably designed to promote health or prevent disease." To satisfy this standard, a program cannot:

- Require an overly burdensome amount of time for participation;
- Involve unreasonably intrusive procedures;
- Be a subterfuge for violating the ADA or other laws prohibiting employment discrimination; or
- Require employees to incur significant costs for medical examinations.

For instance, a wellness program that asks employees to answer questions about their health conditions or have a biometric screening or other medical examination for the purpose of alerting them to health risks (such as having high cholesterol or elevated blood pressure) is reasonably designed to promote health or prevent disease. Further, collecting and using aggregate information from employee HRAs to design and offer programs aimed at specific conditions prevalent in the workplace (such as diabetes or hypertension) also would meet this standard. Conversely, a wellness program is not reasonably designed to promote health or prevent disease if it exists merely to shift costs from the employer to employees based on their health or is used by the employer only to predict its future health costs.

Prior to issuance of the final rule, the scope of what constituted a voluntary employee health plan was unclear. The ADA final rule stipulated the requirements that must be met in order for an employee's participation in a wellness program that includes disability-related inquiries or medical examinations to be treated as voluntary. In particular, an employer:

- May not require any employee to participate;
- May not deny any employee who does not participate in a wellness program access to health coverage or prohibit any employee from choosing a particular plan; and

- May not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten any employee who chooses not to participate in a wellness program or fails to achieve certain health outcomes.

Additionally, in order to ensure that an employee's participation is voluntary, an employer must provide a notice that clearly explains what medical information will be obtained, how the medical information will be used, who will receive the medical information, and the restrictions on its disclosure.

Further, an employer must comply with the financial incentive limit. The final rule reaffirms the position in the proposed regulations that an employer may offer incentives up to a maximum of 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution), whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries and/or medical examinations as long as participation is voluntary. For example, if the total cost for self-only coverage for the plan in which the employee is enrolled is $6,000 annually, the employer can reward the employee up to $1,800 for participating in the wellness program and/or for achieving certain health outcomes (or penalize the employee up to the same amount for not participating and/or failing to meet health outcomes).

The 30 percent limit applies to all workplace wellness programs whether they are (1) offered only to employees enrolled in an employer-sponsored group health plan; (2) offered to all employees whether or not they are enrolled in such a plan; or (3) offered as a benefit of employment where an employer does not sponsor a group health plan or group health insurance coverage.

GINA Final Rule

GINA is a federal law that generally restricts the acquisition and disclosure of genetic information. Title II of GINA protects job applicants, current and former employees, labor union members, and apprentices and trainees from employment discrimination based on genetic information. Specifically, it prohibits employers and other covered entities from using genetic information in making employment decisions. The term "genetic information" includes, among other things, information about the "manifestation of a disease or disorder in family members of an individual." There is, however, an exception to GINA's general prohibition against acquiring genetic information for applicants or employees where an employer offers health or genetic services, including services offered as part of a voluntary wellness program, to employees or their family members provided certain requirements are met.

Employer-sponsored wellness programs generally cannot condition incentives to employees on the provision of genetic information, but may offer inducements for the completion of an HRA provided the participant is advised that the inducement will be made available regardless of whether questions regarding genetic information are answered. The GINA final rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse provides information about the spouse's manifestation of a disease or disorder as part of an HRA. Note that this exception does not extend to genetic information about diseases or disorders in, or genetic information about, the employee's children.

A wellness program, like any health or genetic service an employer offers that collects genetic information, must be reasonably designed to promote health or prevent disease. The criteria for satisfying "reasonably designed to promote health or prevent disease" are identical under GINA to the criteria employed under the ADA final rule.

The GINA final rule also conformed the level of inducements that could be offered to an employee under GINA to those set forth in the ADA final rule and applied the same rule to the employee's spouse. Thus, if an employee and the employee's spouse participate in a wellness program, the inducement to each cannot exceed 30 percent of the total cost of self-only coverage under the plan in which the employee is enrolled if enrollment in the plan is a condition of participation in the wellness program, or if enrollment in a particular plan is not a condition of participation in the wellness program, 30 percent of the lowest total cost of self-only coverage under the employer's group health plan. Thus, if the total cost for self-only coverage under the lowest-cost option was $6,000 and the employer provides the option of participation in a wellness program to the employee and spouse, the inducement to each could be $1,800. If the employer offers no group health plan, the inducement is tied to the second-lowest-cost Silver Plan available to a 40-year-old nonsmoker in the location that the employer identifies as its principal place of business.

The GINA final rule also prohibits an employer from requiring an employee or spouse to agree to the sale, exchange, transfer, or other distribution of health information in exchange for an inducement or as a condition for participating in a wellness program.

Both the ADA and GINA final rules are effective for plan years beginning on or after January 1, 2017. Employers should review the terms of their wellness programs to determine whether modifications need to be made to comply with the final rules.