

April 29, 2015



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The EEOC's New Wellness Program Regulations: Notable or Needless?

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On April 20, 2015, [the EEOC issued](#) a proposed rule, or Notice of Proposed Rulemaking ("NPRM"), that would amend the agency's regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act ("ADA") as they relate to employer wellness programs. The proposed rule would amend the EEOC's regulations to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that are offered as part of a group health plan and include disability-related inquiries and/or medical examinations.

As discussed below, there is a sense in which the proposed amended regulations are not particularly consequential as a substantive matter - many of the restrictions/obligations imposed on employers are already in place under federal regulations implementing HIPAA, the Affordable Care Act, and ERISA. That said, many employers would agree that the proposed regulations warrant comment, including, but not limited to: Are these amendments really necessary? What purposes are served and/or what problems are rectified by the proposed amendments?

The principal, headline-item take away from the NPRM is that the amended regulations would expressly state that the use of incentives in connection with an employee wellness program that is offered as part of a group health plan will not render the program

involuntary, provided the maximum allowable incentive (whether as a reward for participation or as a consequence of non-participation) does not exceed 30 percent of the total cost of employee-only coverage.

Standing alone, governmental restrictions on the amount of expense employers are willing to shoulder in order to increase participation in employee wellness programs may seem a bit of a head scratcher. As the EEOC recognizes, employers that provide group health coverage commonly offer employee wellness programs as a means of attempting to improve employees' health and reduce health care costs. Given that objective - and in light of the fact that reducing health care costs is a national imperative - many employers will likely question the wisdom of placing caps on such incentives. As best as can be discerned from the NPRM, the EEOC's concern is that wellness programs that include disability-related inquiries and/or medical examinations (such as blood pressure or cholesterol measurements for purposes of determining whether an employee has met a health-risk reduction goal) could be used by employers to obtain medical information about employees that they would otherwise be prohibited from obtaining and then use that information for discriminatory purposes. Yet, the EEOC provides no justification for this expressed concern, and the NPRM provides no real-life illustrations of that actually occurring or otherwise being a problem.

Title I of the ADA prohibits discrimination against individuals on the basis of disability in regard to employment compensation and other terms, conditions, and privileges of employment, including fringe benefits, and requires employers to provide reasonable accommodations so that individuals with disabilities have equal access to fringe benefits. In addition, the ADA restricts the medical information employers may request and/or obtain from applicants and employees; notwithstanding those restrictions, the ADA expressly provides that "[a] covered entity may conduct voluntary medical examinations and inquiries, including voluntary medical histories, which are part of an employee health program available to employees at that work site." The central focus of the proposed rule is the meaning of the term "voluntary" as used in the foregoing statutory language.

The core substantive provisions provided for in the proposed rule (1) explain what it means for an employee health program to be "voluntary," (2) establish limitations on incentives employers may offer relating to voluntary employee wellness programs, and (3) set out requirements concerning notice and confidentiality of medical information obtained in connection with voluntary employee wellness programs. The proposed rule does not implicate disability-related inquiries or medical examinations outside the context of a voluntary wellness program.

In order for an employee wellness program to meet the EEOC's "voluntary" standard, it must:

- be reasonably designed to promote health or prevent disease;
- have a reasonable chance of improving the health of, or preventing disease in, participating employees; and,
- not be overly burdensome, a subterfuge for violating the ADA, or highly suspect in the method chosen to promote health or prevent disease.

Furthermore, for a program to be considered voluntary, a covered entity may not:

- require an employee to participate in such a program;
- retaliate against, interfere with, coerce, intimidate, or threaten employees (e.g., by coercing an employee to participate in an employee health program or threatening to discipline an employee who does not participate);
- deny coverage under any of its group health plans or particular benefits packages within a group health plan generally;
- limit the extent of such coverage; or,
- take any other adverse action against employees who refuse to participate in an employee health program or fail to achieve certain health outcomes.

Finally, as previously noted, incentives (whether in the form of a reward for participation or a penalty for non-participation) may not exceed a maximum of 30 percent of the total cost of employee-only coverage.

The proposed rule also imposes a number of obligations on the notice that employers must give employees if a wellness program is part of a group health plan. In general, the notices must be written in an understandable manner, describe the medical information to be obtained and the specific purposes for which the information will be used, and provide information on disclosure of the information and protections against improper disclosure.

With respect to confidentiality, the proposed rule would add new provisions concerning the confidentiality and use of medical information gathered in connection with an employee's participation in an employee health program. Specifically, the amendments provide that such medical information may only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan and except as otherwise permitted under the current regulations.

The foregoing is not an exhaustive presentation of all of the nuances and/or exceptions in the proposed regulations, and employers should independently review the NPRM. Employers who wish to submit comments on the proposed rule must do so by June 19, 2015.

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