EEOC Final Rules Impact Wellness Programs

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) issued its final rules to amend the regulations and interpretive guidance surrounding Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008. After nearly a decade of uncertainty and debate surrounding wellness program compliance, these regulations provide significant clarity for employers.

What's in the ADA ruling?

The final ruling under the ADA provides guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations (e.g. health risk assessments (HRA) and/or health screenings). The ADA ruling **does not apply** to those wellness programs that **do not contain** disability-related inquiries or medical examinations. Also, an employer must provide "reasonable accommodations" within a wellness program for an employee with disabilities and the program must be made available to all employees. For example, if a nutrition class is part of a wellness program, an employer must provide a sign language interpreter to enable an employee who is deaf to participate in the class. The following list summarizes the key components of the new ruling and its application to wellness programs. This ruling:

- Prohibits retaliation, adverse action or "gating" against employees who do not wish to participate or do not meet certain health standards.
- Applies rules to wellness programs that are participatory **and** health-contingent.
- Requires written notification that informs employees about how their health information will be used and how Personal Health Information (PHI-EEOC) – such as health screening data or answers from an HRA – would be handled. *(The EEOC intends to provide model notices that employers can use in the near future.)*
- Requires the provision of an alternative standard.
- Requires wellness programs to be reasonably designed to promote health and prevent disease, and to provide reasonable accommodations for persons with disabilities.
- Limits employee incentives to up to 30% of the total cost for self-only coverage. This limit applies to all incentives, financial and/or non-financial.
- Limits tobacco incentives to up to 50% of the total cost of self-only coverage. If a screening for tobacco use is conducted, the 30% limit applies.

What's in the GINA ruling that pertains to wellness programs?

The final ruling under GINA clarifies the extent to which an employer may offer an incentive to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. The following list summarizes the key components of the new ruling and its application to wellness programs. This ruling:

- Clarifies that tobacco use is not genetic information and can be included as a question in health risk assessments or biometric testing.

- Clarifies that employers can use the same HRA for employees and their spouses.

- Caps the overall level of incentives at 30% of the total cost of the plan in which the employee and any dependents are enrolled. This limit applies to all incentives, financial and/or non-financial.

- Requires that any health or genetic services related to genetic information requested by an employer be “reasonably designed” to promote health or prevent disease.

Focus on What Matters – Definition & Direction

Wellness compliance typically isn’t an exercise associated with much excitement or fanfare. However, the EEOC’s efforts to finally define what it considers incentives to be and to provide regulatory direction of compliance should create less frustration, anxiety and ambiguity with employer wellness programs. In conjunction with a well-planned wellness program strategy, these new guidelines should help you focus on the goals of your program, rather than be consumed by compliance uncertainties.

Noteworthy Deadlines

The final rules will be effective on the first day of the first plan year that begins on or after **January 1, 2017.**

The content above provides a summary of the major areas of the new EEOC rulings that will impact employers who sponsor wellness programs of a certain type, including current and future compliance deadlines. It is important to note that compliance with one regulation does not mean compliance with another. Therefore, compliance with the ADA and GINA does not necessarily mean compliance with ACA-HIPAA or other benefit and labor legislation.

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