EEOC's Proposed Wellness Regulations Bring Some Clarity and Some Questions

DEBRA S. FRIEDMAN

The Equal Employment Opportunity Commission (EEOC) recently issued a notice of proposed rulemaking with respect to employer-sponsored wellness programs, focusing on the interplay between the Americans with Disabilities Act (ADA) and the Affordable Care Act (ACA). The proposed rule would amend the employment provisions of the ADA regulations, as well as EEOC interpretive guidance. There is a 60-day public comment period.

Wellness programs refer to programs and activities designed to help employees improve health and reduce health costs. There are three general types of wellness programs:

(1) participatory wellness programs,
(2) activity-only health contingent wellness programs, and
(3) outcome-based health contingent wellness programs.

Participatory wellness programs either do not offer a reward or do not include conditions for obtaining a reward that are contingent on an individual satisfying a condition related to a health status factor. Employer paid-for smoking cessation programs, nutrition classes, and gym memberships are examples of participatory wellness programs. Activity-only health contingent wellness programs require an individual to complete an activity related to a health factor in order to obtain an incentive. Outcome-based health contingent wellness programs require an individual to obtain a certain health outcome in order to obtain an incentive.

THE MUDDIED LEGAL LANDSCAPE PRIOR TO THE EEOC'S PROPOSED REGULATIONS

For years, employers have been offering financial incentives for employee participation in wellness programs offered in conjunction with group health plans. Indeed, the 2006 Health Insurance Portability and Accountability Act (HIPAA) regulations issued by the Departments of Treasury, Labor, and Health and Human Services (Departments) expressly permitted employers to offer rewards of up to 20 percent of the cost of health insurance coverage for participation in health-contingent wellness programs.

In 2010, the ACA was passed and it amended HIPAA's wellness program provisions to increase the maximum permissible financial rewards for health-contingent wellness programs. In 2013, the Departments issued final regulations implementing the ACA provisions, effective as of January 1, 2014. These regulations, among other things, increased the maximum permissible financial reward to 50 percent of the cost of health insurance coverage for health-contingent wellness programs designed to prevent or reduce tobacco use, and 30 percent of the cost of health insurance coverage for all other health-contingent wellness programs.

Over the years, the EEOC has flipflopped on its position as to the legality of offering financial rewards for participation in health-contingent wellness programs. In 2000, the EEOC stated that these wellness programs were voluntary employee health programs, and therefore lawful, if an employer "neither requires participation nor penalizes employees who do not participate." The EEOC never explained what constituted a penalty. By 2009, the EEOC began expressing reservations about the legality of health-contingent wellness programs under the ADA, questioning what level of financial reward, if any, was lawful. Yet the EEOC still did not provide employers with guidance on the issue.

In May 2013, the EEOC held a meeting with experts representing businesses, advocacy groups and providers to discuss wellness programs under federal law, with "an emphasis on understanding the ways" in which the ADA, the Genetic Information Nondiscrimination Act (GINA), and other statutes that the EEOC enforces may be implicated by such programs. No EEOC guidance followed.

The EEOC broke its silence with a bang. Over the course of three months from August through October 2014, the EEOC filed lawsuits against Orion Energy, Flambeau, Inc., and Honeywell, Inc. In the lawsuits, the EEOC alleged that the companies' health-contingent wellness programs

constituted involuntary medical examinations under the ADA that were not job-related, principally because employees suffered financial consequences for declining to participate in the wellness programs.

The EEOC sought a preliminary injunction to enjoin Honeywell from imposing financial surcharges on individuals who refused to undergo biometric testing in connection with participating in the employer's group health plan. Significantly, the EEOC refused to accept Honeywell's defenses that its wellness program was a *bona fide* benefit plan under the ADA and that its program complied with the ACA's express approval of surcharges used in conjunction with wellness programs. The EEOC also alleged that Honeywell violated GINA because the wellness program collected medical information from family members of employees. In November 2014, the federal district court in Minnesota refused to issue the injunction, in part based on its finding that there was "great uncertainty" regarding "how the ACA, ADA and other federal statutes such as GINA are intended to interact."

The Potential Future Legal Landscape, with EEOC Regulations

The EEOC's proposed rule represents an about-face from its recent stance in lawsuits. The proposed rule also is consistent in many respects with the 2013 ACA regulations.

The proposed rule applies to all wellness programs, whether offered as part of an insured or self-insured group health plan, or outside of a group health plan. The proposed regulations principally focus on:

- program design,
- voluntariness,
- permissible incentives,
- confidentiality, and
- access.

However, the provisions addressing notice and incentives apply only to group health plans.

The proposed rule provides that wellness programs must be reasonably designed to promote health or prevent disease. Employers can meet this requirement if their wellness programs provide feedback to employees about health risks or the employers use the collected, aggregate information from risk assessments to design and offer programs aimed at specific conditions prevalent in the employer's workplace.

Under the proposed rule, a wellness program that includes disability-related inquiries or medical examinations must be voluntary. This means that employees cannot be required to participate, may not be denied health insurance if they do not participate, and may not have health benefits reduced if they do not participate. Moreover, employers cannot take any adverse action against an employee for not participating in a wellness program, and cannot retaliate, interfere with, intimidate, coerce, or threaten employees regarding participation or achievement of certain outcomes.

Finally, when the wellness program is part of a group health plan, the employer must provide notice to employees as to what medical information will be collected, and must identify who will receive the medical information, how it will be used, and the procedures the employer has in place to prevent improper disclosure of medical information and restrictions on disclosure of medical information. The notice must be written so that employees are reasonably likely to understand it and the notice may be attached to any health-related assessment employees are asked to complete.

The proposed rule also addresses the use of incentives, although the rule only applies to wellness programs that require disability-related inquiries or medical examinations in connection with a group health plan. Incentives may be financial or in-kind (such as time-off, awards, and prizes). They may be framed as either rewards or penalties.

The EEOC has explained that it wants to ensure incentives for wellness programs that require disability-related inquiries or medical examinations are limited so as to prevent economic coercion that could render the provision of medical information involuntary. Significantly, the EEOC's proposed rule would permit employers to charge employees up to 30 percent of the total cost paid by the employee and the employer for employee-only health insurance coverage. This is the same limit found in the ACA/HIPAA regulations.

The EEOC also would extend the 30 percent limit to participatory wellness programs that ask an employee to respond to a disability-related inquiry or to undergo a medical examination. This requirement, which the EEOC states is necessary to ensure that the programs are not involuntary, goes beyond the ACA/HIPAA regulations. Indeed, there is no limit on incentives related to participatory wellness program in the ACA/HIPAA regulations.

Furthermore, under the proposed rule, employers may charge employees up to 50 percent of the total cost of employee-only health coverage for smoking cessation programs per the ACA/HIPAA regulations. The EEOC states that such programs would not be subject to the EEOC's 30 percent incentive limit under the ADA because participation is not based on disability inquiries or medical exams, but simply requires individuals to indicate whether they use tobacco or have ceased using tobacco. Significantly, however, if an employer's program is designed to limit or prevent tobacco use and it requires medical exams or involves disability-related inquiries, the program would be subject to a maximum charge of 30 percent of the total cost of employee-only health coverage, despite the allowable 50 percent charge under the ACA/HIPAA regulations.

The EEOC's proposed rule also addresses confidentiality. Employers generally only may receive information collected as part of a wellness program in aggregate form that does not disclose, and is not reasonably

likely to disclose, the identity of specific individuals, except as is necessary to administer the group health plan. Significantly, the EEOC recognizes that if the employer's wellness program is part of a group health plan, the employer already is subject to HIPAA's privacy, security, and breach notification rules. These rules require, among other things, that information provided to the employer must be de-identified. Accordingly, as the EEOC notes in its proposed rule, compliance with the HIPAA privacy rule likely will satisfy the employer's confidentiality obligations under the EEOC's proposed rule.

Lastly, reasonable accommodations must be provided for all wellness programs, absent undue hardship, to enable employees to participate and earn any incentive offered.

The EEOC and Employers Raise Questions About the Proposed Rule

Not only do the regulations offer answers, but they also pose questions. For instance, the EEOC is interested in whether employees who participate in wellness programs that make disability-related inquiries or involve medical exams should be required to provide prior, written, and knowing confirmation that their participation is indeed voluntary. The EEOC also is asking for comment on whether the notice requirement only should apply to wellness programs that offer more than *de minimis* rewards or penalties and, if so, how *de minimis* should be defined.

Other questions focus on incentives. The EEOC has inquired whether the incentive limits should apply to wellness programs outside of employee health plans. The EEOC further asks for comments on whether it should limit incentives so that they do not render the cost of health insurance unaffordable under the ACA, meaning that the portion an employee would have to pay for employee-only coverage would not exceed a specified percentage of household income (currently 9.5 percent).

The EEOC is not alone in raising questions about its proposed regulations. Employers have questions too. Significantly, the EEOC has not issued any guidance or proposed rule on the application of GINA to wellness programs, although the agency indicated in the proposed rule that it plans to do so in future EEOC rulemaking. In fact, the EEOC's proposed rule does not address participation of family members in wellness programs. Accordingly, employers continue to run the risk of violating GINA, particularly if the employer conditions incentives on a family member's participation in a wellness program that requires disability-related inquiries or medical examinations.

Employers also are questioning the EEOC's position on application of the ADA's safe harbor for insurance plans to wellness programs. Although the U.S. Court of Appeals for the Eleventh Circuit, in *Seff v. Broward County*,[1] found that the ADA's current safe harbor for insurance plans covers wellness programs that are part of a group health plan, the proposed rule provides that the ADA safe harbor provision is not the "proper basis for finding wellness program incentives permissible." The EEOC posits that the safe harbor for employers is found in the new voluntary provision of the proposed rule and that the insurance safe harbor is "superfluous" to the analysis. Therefore, employers should be cautious about relying upon the safe harbor provision to uphold the legality of their wellness programs under the ADA.

Employers Should Be Proactive in Examining Their Wellness Programs

The EEOC's regulations are not final, and the agency appears to be exploring how far to go in its regulations. Nevertheless, it is not too early for employers to take certain actions. As a first step, employers should ensure that their wellness programs are compliant with HIPAA and ACA wellness program regulations. Employers also should make sure that their wellness programs are designed to promote health or prevent disease.

Employers should consider evaluating whether their wellness programs will meet the voluntary requirements of the proposed regulations. Other than the notice requirement for wellness programs that are part of a group health plan, which is new and is not in effect yet, employers with ACA-compliant wellness programs most likely are meeting the remaining voluntary requirements under the ADA.

Now is the time to ensure proper confidentiality procedures are in place regarding the security, use, and disclosure of employee medical information. Employers may want to train individuals on how to handle medical information in compliance with HIPAA rules, the ADA, and any other applicable privacy laws.

Employers also should ensure that employees have access to all wellness programs, and that reasonable alternatives for access are provided where needed. Finally, employers must not take any adverse action against employees for not participating in a wellness program, nor may employers retaliate, interfere with, intimidate, coerce, or threaten employees regarding participation or achievement of certain outcomes. ✪

Note

1. 691 F.3d 1221 (11th Cir. 2012).

Debra S. Friedman is a member of the firm Cozen O'Connor, practicing in the Philadelphia office's Labor & Employment Practice Group. Ms. Friedman can be reached at *dfriedman@cozen.com.*