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EMPLOYEE BENEFITS IN FOCUS: WELLNESS PLANS

May 2016

FINAL EEOC REGULATIONS: OVERVIEW

The EEOC is finally giving the green light to wellness plans that offer rewards for employee and spousal participation in health exams or health risk assessments. The EEOC's prior positions in enforcement actions under the Americans with Disabilities Act ("ADA") and the Genetic Information Non-discrimination Act ("GINA") left employers with uncertainty regarding how to design compliant wellness plans. The EEOC's 2015 proposals signaled its willingness to align many aspects of ADA and GINA requirements with existing Affordable Care Act ("ACA") rules. But newly finalized rules released on May 17, 2016 ultimately impose restrictions on permissible wellness plan incentives and add new confidentiality standards and notice requirements, which layer on top of the existing HIPAA/ACA rules. See "*EEOC Rules Remove Roadblocks but Narrow the Compliance Lanes Ahead*," page 2.

We think the majority of existing large employer wellness plan designs likely will comply (or substantially comply) with the newly released rules. Furthermore, the new EEOC rules are good news for employers seeking clear guidance for designing wellness plan modifications in 2017 and beyond. Still, employers should review their current wellness plan designs in light of the new standards. In particular, employers likely will want to revise participant communications to meet the new EEOC requirements and may want to establish a process that helps demonstrate the permissible purpose(s) of its wellness plans.

The new rules were issued by the EEOC using its authority to regulate health plans under the ADA and GINA. The requirements under these laws are in addition to rules issued by the Treasury, Labor, and Health and Human Services Departments in 2013 that interpret obligations under HIPAA (as modified by the ACA), not to mention other applicable laws that generally apply to employers operating a wellness plan. See "*Wellness Plans: Alphabet Soup of Applicable Rules*," page 2.

HIGHLIGHTS

In light of the final EEOC regulations, employers should review their wellness plan participant communications, vendor agreements, and overall designs with the following in mind:

- Rewards up to 30% of the cost of coverage likely will comply with the rules. However, the rules restrict incentive designs that were thought to be permissible (even under the EEOC's 2015 proposals), particularly for employers who offer multiple levels of health coverage or who do not offer group health coverage.
- The rule imposes a new annual notice explaining what medical information will be collected from wellness plan participants, and how it will be used and disclosed.
- Employees cannot be required to consent to the disclosure of any personalized medical information, other than to the extent necessary to carry out the wellness plan.
- The EEOC says that the new rules largely just clarify existing obligations **and therefore generally apply retroactively**. The notice and 30% incentive requirements generally apply January 1, 2017.

EEOC Rules Remove Roadblocks But Narrow the Compliance Lanes Ahead

Prior EEOC Roadblocks Removed

The new EEOC rules remove two roadblocks for wellness plans that the EEOC had previously erected:

First, under the ADA, the EEOC had taken the position that anything more than a *de minimis* incentive for an employee to complete an exam or answer an inquiry caused it to be "involuntary," and thus outside the ADA's statutory exception from general prohibitions on requiring medical examinations or making disability-related inquiries.

Second, GINA prohibits employers from asking for employees' "genetic information." Because genetic information includes the manifestation of a disease in a family member, and family member includes an employee's spouse and dependents, a health risk assessment of a spouse typically implicates GINA. Again, the EEOC had interpreted a statutory exception to these prohibitions narrowly, indicating any incentive to participate made it involuntary.

Key Components of New Rules

Existing ACA rules (and other applicable laws, see table below) have numerous requirements for wellness plans, depending in part on whether they are participatory or health-contingent. Now, if an employer's wellness plan includes a disability-related inquiry or medical exam of an employee, or if it requests or obtains genetic information of the employee, the wellness plan must also comply with the new EEOC rules. The following are the key components of the EEOC's rules (and how they compare to the existing ACA rules).

WELLNESS PLANS: ALPHABET SOUP OF APPLICABLE RULES

Law	Requirement
ADA (enforced by EEOC) 29 CFR § 1630.14(d)	Prohibits requiring medical exams or making disability-related inquiries of employees. Statutory exception for "voluntary" employee health programs. Requires offering employees with disabilities reasonable accommodations to access benefits.
GINA (enforced by EEOC) 29 CFR § 1635.8	Prohibits employers from asking for or disclosing "genetic information." Statutory exception for collection of information by a wellness plan for which the employee provides "prior, knowing, voluntary, and written authorization."
HIPAA / ACA (enforced by Treasury, DOL, & HHS) Treas. Reg. § 54.9802-1(f); 29 CFR § 2590.702(f), § 715-2705; 45 CFR § 146.121	"Participatory" wellness plans have no cap on rewards an employer may offer. "Health-contingent" programs are subject to a cap on rewards that is generally 30% of the cost of an employee's medical coverage (or for incentives for spousal/dependent participation, 30% of the cost of family coverage). The rewards cap increases to 50% for a program designed to prevent or reduce tobacco use, or in other situations the agencies determine appropriate.
ERISA (enforced by DOL)	ERISA disclosure obligations and claims procedure rules apply, assuming the wellness plan is part of an ERISA group health plan.
HIPAA Privacy (enforced by HHS Office of Civil Rights) 45 CFR part 164	Security and privacy standards for health plans (which may or may not include wellness plans, depending on their design and scope).

1. Designed to Promote Health

A wellness plan must be "reasonably designed to promote health or prevent disease." This standard is identical in both the new EEOC and existing ACA rules. A wellness plan typically meets this standard if it asks employees to complete a health risk assessment or exam in order to alert them to health risks, or if it uses aggregate information from the assessment or exam to design and offer programs targeted to specific health conditions.

The EEOC emphasizes the standard is determined based on all of the "facts and circumstances." Also, it identifies some designs that are not "reasonably designed" (new to the final rule and not in the ACA rules):

- The information collected in a test or questionnaire is not used to design a program that addresses "at least a subset" of the conditions identified, or
- The program exists "mainly" to shift costs to employees based on their health, or
- The program exists "simply" to give an employer information to estimate future costs.

The EEOC may more actively enforce this standard than do the agencies overseeing the ACA rules.

2. 30% Incentive Cap Now Applies in Many Cases Where it Would Not under the ACA Rules

Many participatory programs (e.g., blood tests or health risk assessments) that were not subject to a reward cap under ACA rules now are subject to a 30% cap because they involve exams, disability-related inquiries, and/or requests for genetic information.

(continued on page 3)

Narrowed Compliance Lanes Ahead *(continued from page 2)*

This means that the ACA's higher 50% incentive cap for programs targeting tobacco use will be available only if the incentive availability is based on self-reporting of tobacco use (rather than a test for nicotine, which would be an exam subject to the ADA rule).

3. 30% Incentive Cap is Calculated Differently from the ACA Rule

Under the ACA rules, rewards are capped at a percentage (generally 30%) of the total cost of self-only coverage, or if dependent incentives are involved, the total cost of the level of coverage the employee elects. The EEOC rules deviate:

- (New to the final rules) A reward for spousal participation cannot exceed 30% of the cost of self-only coverage.
- (New to the final rules) If the employer has more than one health plan option but the wellness plan is open to employees regardless of whether they enroll in a particular plan, the reward cannot exceed 30% of the lowest-cost self-only coverage option.
- (New to the final rules) If an employer does not offer health plan coverage, the wellness plan reward cannot exceed 30% of the cost of self-only coverage under the second-lowest cost Silver Plan for a 40-year-old non-smoker on the health insurance marketplace.

Otherwise (if the employer offers health coverage and the wellness plan is limited to those who enroll in that coverage), the reward cannot exceed 30% of the cost of self-only coverage under the plan.

4. Notice Requirement

In addition to disclosures required under ACA rules, participants must receive advance annual notice concerning the information collected by the wellness plan, how it will be used and shared, and how it will be kept confidential. Existing employer disclosures may not be sufficient. The EEOC plans to post an example notice on its website shortly.

5. Enhanced Confidentiality and Data Privacy Protections

The general approach of the final rule is to include data security recommendations that are not identical to — but largely appear redundant with — HIPAA privacy and security standards.

However, new to the final rules, an employer cannot require a wellness plan participant to agree to share or disclose personalized medical information, or waive confidentiality protections, as a condition for participation (except as necessary to carry out the program). It is not entirely clear whether this also restricts the sharing of de-identified (or aggregated) information. The example notice may clarify this point.

6. "Gateway Plans" Not Permitted

The EEOC rejected designs that allow wellness plan participants to enroll in a comprehensive health plan while limiting non-participants to a different plan with higher cost-sharing. Employers likely can achieve a similar result by providing cost-sharing incentives within the 30% limit, but these designs may be more confusing to explain to participants.

7. No Reward for Children

No incentive is permitted for participation by a non-spouse dependent (such as a child) in a wellness plan involving a request or test for the manifestation of disease in the child.

SUMMARY OF WELLNESS PLAN REWARD CAPS, AS MODIFIED BY 2016 EEOC RULES

Type of wellness plan	No exam, disability-related inquiry, or request for genetic information		Includes exam, disability-related inquiry, or request for genetic information	
	Employee	Dependent	Employee	Spouse
Participatory (e.g., educational programs, health risk assessment, diagnostic test)	No limit on reward, as long as made available to all similarly situated individuals.		Reward capped at 30% of lowest-cost self-only coverage.	Spouse reward capped at 30% of lowest-cost self-only coverage
Health-contingent • **activity-only** (e.g., walking, diet, or exercise programs), or • **outcome-based** (requires attainment of health outcome)	Reward capped at 30% (50% if targeted to tobacco use) of self-only coverage cost. Reward must be available at least once annually (including with reasonable alternative standards).	Total reward capped at 30% of coverage cost at applicable level of coverage (e.g., family or employee+child(ren)). Reward must be available at least once annually (including with reasonable alternative standards).	Reward capped at 30% of lowest-cost self-only coverage. Reward must be available at least once annually (including with reasonable alternative standards).	Spouse reward capped at 30% of lowest-cost self-only coverage. Reward must be available at least once annually (including with reasonable alternative standards).

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Steve Witmer and Ben Grosz teach ABA Employee Benefits Law CLE for business attorneys (April 28, 2016)

Kevin O'Brien named one of Top 20 ERISA lawyers in America by Lawdragon (April 2016)

Rosina Barker co-chairs ALI-CLE Conference and speaks on Employer Stock Funds (April 13-15, 2016)

Robin Solomon quoted in Investment News on DOL fiduciary rule enforcement (April 12, 2016)

Robin Solomon co-authors Mercer GRIST Alert on DOL Fiduciary Rules (April 6, 2016)

Jodi Epstein presents on Minimizing 401(k) Plan Litigation Risk at the Defined Contribution Institutional Investment Association ("DCIIA") public policy forum (April 5, 2016)

Robin Solomon and Ben Grosz interviewed in Fiduciary News on 401(k) fees (April 5, 2016)

Victor Chang authors article on the use of company charitable foundations in conjunction with corporate technology recruiting and retention efforts: The Tax Executive

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