

PUBLICATION

EEOC Proposed Rule to Shed Light on Wellness Programs under the ADA

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On April 20, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") published a proposed new rule that would amend the regulations for Title I of the Americans with Disabilities Act ("ADA") as they relate to employer wellness programs.

The proposed rule allows companies to offer up to 30 percent of the total cost of employee-only health insurance coverage as incentives for voluntary participation in wellness programs without violating the ADA. The rule requires that a wellness program be voluntary and any disability-related inquiries or medical examinations associated with the wellness program to be reasonably designed to promote health or prevent disease. An employer may not require an employee to participate, and it may not deny health coverage or discipline an employee who refuses to participate or who fails to achieve a particular health outcome.

In order to be voluntary, employers must notify employees of what information will be collected, how it will be used, with whom it will be shared, and how confidentially it will be maintained. The rule also requires medical information collected pursuant to a wellness program to be disclosed to employers only in aggregate form without revealing the employee's identity, and, of course, the information must be kept confidential under the ADA's requirements.

Importantly, employers must provide employees with disabilities reasonable accommodations to allow them to participate in wellness programs and earn whatever incentive an employer offers to nondisabled employees.

The EEOC will also issue interpretive guidance that will include an extensive discussion of legal requirements and best practices.

According to EEOC Chair Jenny R. Yang, "The EEOC worked closely with the Departments of Labor, Health and Human Services, and Treasury in developing the [Proposed Rule] to harmonize the ADA's requirement that medical inquiries and exams that are part of an employee health program must be voluntary, and HIPAA's goal of allowing incentives to encourage participation in wellness programs."

Prior to this proposed rule, employers have had no guidance regarding the intersection of the ADA and wellness programs. Many employers providing health insurance offer wellness programs intended to encourage healthier lifestyles and prevent diseases through medical screenings. Wellness programs have become increasingly popular given the many benefits, such as lower absenteeism, higher productivity, and lower healthcare costs.

Although the ADA limits circumstances when an employer may ask employees about their health or require medical examinations, it allows inquiries and exams if they are voluntary and part of a wellness program. Where employers have sometimes run afoul with respect to the ADA is in penalizing an employee who chooses not to participate in the form of termination, monetary penalties, or denying certain financial incentives to the employee.

The proposed rule arises in the wake of two lawsuits filed in 2014 by the EEOC challenging wellness programs that raised questions and concerns among employers regarding the legality of wellness programs. See *EEOC*

v. Orion Energy Systems, Inc., 1:14-cv-01019 (E.D.Wis.); *EEOC v. Flambeau Inc.*, 3:14-cv-00638 (W.D. Wis.). Given the increasing number of wellness programs with financial incentives and the EEOC lawsuits, the rule comes at a much-needed time.

Nevertheless, the rule raises questions that need resolving, such as: why the rule is only applicable to "employee only coverage"; how the Genetic Information Nondiscrimination Act and the collection of information from spouses interact with the ADA; and whether courts will follow the EEOC's new rule or the Eleventh Circuit's decision in *Seff v. Broward County, Fla.*, 691 F.3d 1221 (11th Cir. 2012), where the appellate court held that an employer's wellness program that imposed monetary penalties on employees who refused to participate in the program fell within the ADA's safe harbor for insurance plans.

The EEOC's published notice of the proposed rule triggers the beginning of a 60-day public comment period, after which the EEOC will issue a final rule.