EEOC Proposes Allowing Only ‘De Minimis’ Incentives for Many Wellness Programs

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The U.S. Equal Employment Opportunity Commission (EEOC) proposed a substantial revamp of its wellness program rules under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA), after its prior version of the rules was struck down in court.

In general, only “de minimis” incentives, such as water bottles or gift cards, would be allowed to encourage employees or their families to participate in a wellness program. However, in a nod to the ADA’s “safe harbor” for health insurance and the detailed regulations issued by other agencies for “health-contingent” wellness programs, a broad exemption would apply to health-contingent wellness incentives that are part of a group health plan.

The EEOC will accept comments on the proposed rules for 60 days after their publication in the *Federal Register*. The agency specifically requested input on certain topics, including the stringent new incentive limits.

Background

The ADA allows employers to “conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.” Such activities are exempt from ADA’s general prohibition on disability-related inquiries and medical examinations.

This left the question of what lengths an employer may go to encourage wellness program participation without rendering the program “involuntary” under the ADA. In 2016, the EEOC issued a final rule that specified the degree and type of financial incentives permitted by the exception for “voluntary” inquiries made as part of a wellness program.

Because GINA imposes its own restrictions on gathering family medical history, the EEOC issued a companion rule defining when an employer could seek information from an employee’s dependents for wellness purposes.

In general, the EEOC took the approach of allowing monetary incentives up to a set percentage of health insurance premiums for disclosures by an employee or spouse (but not children). The 2016 rules also included design, confidentiality, and notice requirements.

AARP challenged these ADA/GINA rules in court, arguing that if employers could impose penalties of up to 30 (or sometimes 50) percent of premiums, employees who could not afford to pay such an increase in premiums would effectively be forced to disclose their protected information when they otherwise would choose not to do so. A federal district court agreed with AARP, finding nothing in the record to explain the EEOC’s conclusion that these percentage

thresholds were the appropriate measure of voluntariness. The court ultimately vacated the incentive provisions of the rules.

ADA rule

In the newly proposed ADA rule, the EEOC replaced the percentage threshold with a strict *de minimis* standard for "participatory" wellness programs such as a health risk assessment or biometric screening.

If a wellness program involves a medical exam or inquiry, the employer may not offer more than "a *de minimis* incentive, such as a water bottle or gift card of modest value," in exchange for an employee's participation. Charging employees $50 more per month would not be *de minimis*, nor would an annual gym membership or airline tickets, according to interpretive guidance issued along with the proposed rule.

Unlike the 2016 version, the new rule would no longer require that a wellness program be "reasonably designed to promote health or prevent disease." That proviso is no longer needed, the EEOC explained in the preamble, because "the de minimis incentive standard will make it unlikely that an employee will choose to participate in a program that requires providing medical information unless the employee believes the program has some value in promoting health or preventing disease."

The proposed rule, like the prior version, includes other "voluntariness" provisions. An employer may not:

- Require employees to participate in a wellness program;
- Deny nonparticipating employees access to coverage under any of its health benefits packages;
- Limit group health coverage for such employees;
- Take any other adverse action against employees who choose not to answer disability-related inquiries or undergo medical examinations; *or*
- Retaliate against, interfere with, coerce, intimidate, or threaten employees regarding wellness program participation.

The proposed rule also retains all of the confidentiality protections from the 2016 rule, including the exceptions for disclosure, and states that medical information collected through a wellness program may be provided to an employer only in aggregate terms, except as needed to administer the health plan and for certain other purposes.

However, the EEOC would do away with the requirement for a separate notice describing what information will be collected as part of the program, who will receive it, how it will be used, and how it will be kept confidential. Wellness programs that are part of a health plan still must be addressed in the plan's Health Insurance Portability and Accountability Act (HIPAA) privacy notice.

Insurance Safe Harbor

While the proposed rule would tighten the incentive limit, it would also create a sizable exemption for health-contingent wellness programs as defined and regulated by the U.S. Departments of Labor, Health and Human Services, and the Treasury.

Health-contingent programs would be exempt from the *de minimis* requirement if they are part of a health plan and comply with the wellness rules issued by those agencies under HIPAA and the Affordable Care Act (see the national Healthcare Insurance analysis, "Wellness Programs").

The ADA includes a safe harbor for "establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks." In the 2016 rules, EEOC took the position that this did not apply to wellness programs, but a few courts have disagreed.

Under the new proposal, a wellness program that is a group health plan, or part of one, "will be considered to be 'classifying risks' and 'administering risks' when it offers incentives in exchange for employees to engage in certain activities and achieve goals aimed at reducing health risks provided that the program actually uses the aggregate data it obtains to help employees improve their health," according to the EEOC's preamble. However, this safe harbor might not apply to a wellness program that uses a health risk assessment based on self-reporting or requires a biometric screening without tracking the results or requiring achievement of health goals.

GINA rule

The GINA rule, like the ADA rule, replaces the percentage threshold with a *de minimis* standard. However, assuming an incentive is de minimis, it may be offered to any family member, not just a spouse, to disclose information on their own "manifestation of diseases or disorders" for purposes of a wellness program. The individual's "prior knowing, voluntary, and written authorization" would also be required.

Outside that narrow exception, the GINA prohibitions on incentives to disclose genetic information, and on employment-related use of that data, would still apply. However, if a family member disclosed health information related to compliance with a health-contingent wellness standard, the employer or wellness provider could use the data to determine whether the family member qualified for the incentive.

Like the ADA rule, the GINA rule would eliminate the "reasonably designed" requirement as unnecessary. Employers still would be prohibited from requiring family members to provide health information or from taking any adverse employment or health benefits action against an employee whose family member refused to do so.

Unlike the ADA, GINA does not include a safe harbor for insurance practices. Therefore, where family members' health disclosures are concerned, the proposed rules would not allow even a health-contingent wellness program associated with the group health plan to impose more than a *de minimis* incentive.

Implications

"The ADA proposed rules would create an entirely new compliance framework for employers that sponsor wellness programs," observed Ogletree Deakins attorneys in a blog post. "Although the proposed regulations appear to match up to existing HIPAA rules in certain cases,

they will require an extra layer of analysis for employers. If the proposed rules are finalized in their present form, existing wellness programs may need to be reconfigured to fit within the new parameters."

The GINA rules, likewise, "represent a major shift in policy," the attorneys added, since employers could no longer "offer significant rewards" to a spouse who completed a health risk assessment.

Even when a health-contingent wellness program is involved, "the incentives may still need to be restructured to relate solely to cost sharing or premiums under the employer's group health plan," according to an Ice Miller analysis. "Employer contributions to health savings accounts or health reimbursement arrangements, while very popular, are not specifically permitted under the ADA Proposed Rule. Clarification from the EEOC on this would be helpful."