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BENEFITS BRIEF

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Senate and House Leaders Introduce Bill Supporting Employee Wellness Programs

On March 2, 2015, Senator Lamar Alexander (R-Tenn.) and Representative John Kline (R-Minn.), together with a number of Republican co-sponsors, introduced the *Preserving Employee Wellness Programs Act* (H.R. 1189, S. 620) ("Bill"). The Bill provides, among other things, for certain protections for employee wellness programs that comply with the Health Insurance Portability and Accountability Act of 1996's ("HIPAA") wellness program nondiscrimination regulations. The Bill was introduced, at least in part, to address the uncertainty surrounding HIPAA-compliant wellness programs in light of a recent motion for a temporary restraining order and preliminary injunction filed by the Equal Employment Opportunity Commission ("EEOC") involving Honeywell International Inc., which was denied by a district court. As a result, the Bill is likely to be a welcome signal to the plan sponsor community of congressional support for wellness programs.

This Benefits Brief first provides background regarding the various laws that may apply to employee wellness programs. Second, it addresses the substantive provisions of the Bill. Finally, it provides a roadmap for potential future congressional action with respect to the Bill.

Background

Application of HIPAA to Wellness Programs. Very generally, HIPAA prohibits a group health plan from discriminating among similarly situated individuals based on a health factor. However, HIPAA provides that the prohibition is not to be construed to prevent a group health plan from establishing premium discounts or rebates or modifying co-payments or deductibles for adherence to "programs of health promotion and disease prevention" – commonly referred to as wellness programs. Prior to passage of the Patient Protection and Affordable Care Act ("ACA"), the requirements applicable to wellness programs were set forth in regulations. As part of the ACA, Congress showed strong support for employee wellness programs by codifying the requirements, with some modifications.

Final HIPAA wellness program regulations implementing the ACA were published on June 3, 2013.[1] The regulations outline two main categories of wellness programs: (i) participatory programs; and (ii) health-contingent programs. Participatory programs are defined to be those that either do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor.

[1] *See* Groom Benefits Brief, Agencies Issue Final HIPAA Wellness Program Rules under ACA (Jun. 4, 2013), available at http://www.groom.com/resources-776.html.

Health-contingent programs generally require an individual to satisfy a standard related to a health factor to obtain a reward.[2]

The HIPAA wellness program regulations require that health-contingent programs satisfy a number of requirements, including limiting the maximum reward to 30% of the cost of coverage (up to 50% for tobacco cessation programs). Participatory programs are not subject to the regulations (including the limit on rewards) as long as any reward is available to all similarly situated individuals.

Application of the Americans with Disabilities Act ("ADA") to Wellness Programs. Wellness programs are subject to numerous other laws, including the ADA. Although the ACA signaled Congress' support for employee wellness programs, it did not address how an employer can ensure that its wellness program complies with the ADA or other laws.

The ADA generally prohibits an employer's ability to make disability-related inquiries or to require medical examinations. There are two statutory exceptions to this limitation. The first exception permits voluntary medical examinations and medical histories that are part of an employee health program available to employees at the work site. Informal guidance indicates that a program is "voluntary" if the employer neither requires participation nor penalizes employees who do not participate. It is unclear what level of reward, if any, would be permitted in connection with a voluntary wellness program.

The second exception is a safe harbor for "bona fide benefit plans," which, among other things, provides an exception from the prohibition on medical examinations and inquiries. Nothing in the ADA or related guidance addresses whether the safe harbor applies to employee wellness programs. However, in 2012, the Eleventh Circuit upheld a district court decision in *Seff v. Broward County*,[3] which ruled that a wellness program could utilize the safe harbor in certain circumstances.

Application of the Genetic Information Nondiscrimination Act ("GINA") to Wellness Programs. GINA may also apply to employee wellness programs. Title I of GINA applies to group health plans and issuers and is under the jurisdiction of the Departments of Health and Human Services, Labor, and the Treasury. It generally prohibits the collection of genetic information (including family medical history) for underwriting purposes. The Title I regulations provide that wellness programs that pay rewards for completing health risk assessments ("HRAs") that request genetic information, including family medical history, violate the prohibition against requesting genetic information for underwriting purposes.

Title II of GINA applies to employers and is under the jurisdiction of the EEOC. Title II generally prohibits employers from requesting, requiring, or purchasing genetic information of an employee. An employee's "genetic information" includes information relating to the manifestation of a disease or disorder in a spouse. Thus, a spouse's completion of an HRA that requests medical history may violate Title II. There is an exception for collecting genetic information as part of a voluntary wellness program. However, regulations provide that genetic information is not provided voluntarily if the individual is required to provide the information or penalized for not providing it.

[2] The regulations split health-contingent programs into two sub-categories: activity-only programs and outcome-based programs.
[3] 691 F.3d 1221 (11th Cir. 2012).

Recent EEOC Enforcement Activity. Last year, the EEOC brought court actions against three employers alleging that their wellness programs violated the ADA's prohibition against involuntary medical examinations.[4] One action asserted a violation of Title II of GINA, as well. The recent EEOC activity calls into question whether wellness programs that otherwise comply with the HIPAA regulations may nonetheless violate the ADA and Title II of GINA. The EEOC has also repeatedly called into question the conclusion reached in *Seff*, i.e., that an employee wellness program could utilize the ADA's safe harbor for bona fide benefit plans**.**

The Bill

Significant provisions of the Bill are described below:

- **No ADA or GINA Violations Merely for Offering Reward:** The Bill provides that an employee wellness program that complies with the HIPAA nondiscrimination requirements would not violate the ADA or GINA merely because it provides any amount or type of reward up to the limits specified by the HIPAA nondiscrimination regulations with respect to health-contingent wellness programs (i.e., 30%, and up to 50% for a tobacco cessation program). Providing such a reward would not constitute "penalizing" an individual in connection with a voluntary wellness program for purposes of the ADA and GINA. A wellness program would not be protected by this provision from any other potential ADA or GINA violations.

  Of note, a participatory program would only be eligible for this protection if it adheres to the reward limits described above, even though it is not required to adhere to such limits in order to satisfy HIPAA. The EEOC has expressed particular concern regarding participatory programs, because they are not closely regulated by HIPAA. It appears that the Bill is intended to allow for continued ADA enforcement of participatory programs, but only with respect to participatory program rewards that exceed the reward thresholds applicable to health-contingent programs under HIPAA.

  Additionally, the Bill does not specify that the HIPAA wellness program regulations as in effect at enactment will apply for purposes of this provision in the future. Thus, if the HIPAA wellness program regulations are modified at a future date, wellness programs would have to comply with those future regulations in order to retain protection under this provision.

- **Bona Fide Benefit Plan Safe Harbor:** A rule of construction in the Bill provides that nothing contained in the Bill is to be construed to limit or otherwise restrict application of the ADA's bona fide benefit plan safe harbor to wellness programs. This provision appears intended to preserve employer arguments that their wellness programs are excepted from ADA enforcement based upon the "bona fide benefit plan" exception referenced above.

- **Collection of Family Medical History:** The Bill provides that the collection of information about the manifested disease or disorder of a family member would not be considered "genetic information" with respect to another family member participating in an employee wellness program. This would facilitate offering rewards in connection with the completion of an HRA by an employee's spouse.

[4] *See* Complaint and Demand for Jury Trial, EEOC v. Orion Energy Systems, Inc., No. 1:14-cv-1019 (E.D. Wis. Aug. 20, 2014); Complaint and Demand for Jury Trial, EEOC v. Flambeau, Inc., No. 3:14-cv-00638 (W.D. Wis. Sept. 30, 2014); Motion for a Temporary Restraining Order and a Preliminary Injunction, EEOC v. Honeywell International Inc., No. 0:14-cv-04517 (D. Minn. Oct. 27, 2014).

- **Deadlines to Complete Program Requirements:** The Bill provides that employers may impose a deadline of up to 180 days for employees to request and complete a reasonable alternative standard as required in connection with health-contingent wellness programs.

What's Next?

The introduction of the Bill is the beginning of what could be a lengthy process that may include committee consideration, hearings, and future revisions to the text of the Bill at the subcommittee and committee levels. Although wellness programs have enjoyed bipartisan support, and the ACA substantially expanded the permitted rewards and incentives, the Bill has not yet been co-sponsored by any Democratic members. Still, the broad support for such programs by plan sponsors and the need for clarity in this area suggest that this could be an area where some political consensus is possible down the line.

The Bill has been referred to a number of committees in the House (including Ways and Means, Education and the Workforce, and Energy and Commerce, which are the committees responsible for the Internal Revenue Code, ERISA, and the Public Health Service Act, respectively) and the Health, Employment, Labor, and Pensions Committee in the Senate.

Outside of the legislative arena, the EEOC's regulatory agenda for 2015 indicates that regulations addressing wellness program compliance with the ADA and GINA were to be published in February 2015. Many employers have been waiting on the EEOC's regulations with the hope that they will provide a roadmap to compliance with the ADA and GINA. If the Bill becomes law, the expected EEOC regulations may need to be modified to reflect the provisions of the Bill.