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BENEFITS BRIEF

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EEOC Releases Proposed Rule on Wellness Programs

On April 20, 2015, the Equal Employment Opportunity Commission ("EEOC") published a proposed rule ("Proposed Rule") in the *Federal Register* that would amend the regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act ("ADA") as they relate to employee wellness programs.[1] The Proposed Rule provides guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. Comments with respect to the Proposed Rule must be submitted by June 19, 2015.

The Proposed Rule follows in the wake of significant litigation and legislative activity. As discussed in more detail in a prior Benefits Brief,[2] the EEOC brought court actions against three employers last year, alleging that their wellness programs violated the ADA's prohibition against involuntary medical examinations.[3] In addition, 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 under the ADA for wellness programs that comply with the Health Insurance Portability and Accountability Act of 1996's ("HIPAA") wellness program nondiscrimination regulations.

The Proposed Rule only addresses how the ADA applies to wellness programs. It does not provide any guidance regarding how Title II of the Genetic Information Nondiscrimination Act ("GINA") applies to wellness programs. In a footnote in the Proposed Rule, the EEOC states that it will address the issue in future guidance. The Proposed Rule makes clear that compliance with the Proposed Rule does not relieve an employer from the obligation to comply with other nondiscrimination laws within the purview of the EEOC, including Title II of GINA.

The Proposed Rule reflects the EEOC's stated intent and efforts in interpreting the ADA in a manner that reflects both the ADA's goal of limiting employer access to medical information and HIPAA's provisions permitting nondiscriminatory wellness programs. However, as discussed in more detail below, the Proposed Rule differs in several important ways from the rules in effect under HIPAA.

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[1] Concurrently with the issuance of the Proposed Rule, the EEOC released "Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs." In addition, the Departments of Labor, Health and Human Services, and the Treasury released additional "FAQs about Affordable Care Act Implementation (Part XXV)," and the Centers for Medicare and Medicaid Services issued "Frequently Asked Questions on Health Insurance Market Reforms and Wellness Programs."

[2] *See* Groom Benefits Brief, Senate and House Leaders Introduce Bill Supporting Employee Wellness Programs (Mar. 9, 2015), available at http://www.groom.com/resources-953.html.

[3] *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).

This Benefits Brief first provides background regarding the ADA and HIPAA as they apply to wellness programs. It then addresses the substantive provisions of the Proposed Rule. Finally, it addresses what will happen now that the Proposed Rule has been issued.

Background

1. Application of the ADA to Wellness Programs.

The ADA generally prohibits an employer from making disability-related inquiries or requiring 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. This exception may be available to wellness programs. EEOC enforcement guidance issued in 2000 indicates that a program is "voluntary" if the employer neither requires participation nor penalizes employees who do not participate.[4] The Proposed Rule, discussed below, provides initial insight into what level of incentive may be permitted with respect to a voluntary medical examination or medical history.

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. ADA guidance provides that this "is a limited exemption that is only applicable to those who establish, sponsor, observe, or administer benefit plans, such as health and life insurance plans. . . . The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment."[5] The regulations go on to say that the "activities permitted by this provision do not violate [the ADA] even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part."[6]

Prior to the release of the Proposed Rule, nothing in the ADA or related guidance addressed how the "bona fide benefit plans" safe harbor applies to employee wellness programs.[7]

2. Application of HIPAA to Wellness Programs.

Wellness programs are subject to numerous other laws, including HIPAA. Very generally, HIPAA prohibits a group health plan from discriminating among similarly situated individuals based on a health factor. However, HIPAA contains an exception 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.

The ACA provides that the reward for programs that require satisfaction of a standard related to a health status factor could not exceed 30% of the cost of employee-only coverage under the plan (or, if dependents may participate in the wellness program, 30% of the cost of coverage in which the employee and dependents are enrolled). The statute provides that the Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward to up to 50% of the cost of coverage.

[4] EEOC Enforcement Guidance at Q&A-22 (July 27, 2000).
[5] Appendix to 29 C.F.R. § 1630.16(f).
[6] *Id*.
[7] In 2011, the Eleventh Circuit upheld a district court decision in *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), which ruled that a wellness program could utilize the safe harbor in certain circumstances.

Final HIPAA wellness program regulations implementing the ACA were published on June 3, 2013.[8] The regulations outline two main categories of wellness programs: (i) participatory programs; and (ii) health-contingent programs. Participatory programs are defined as 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. Health-contingent programs, which may be either activity-only or outcome-based, generally require an individual to satisfy a standard related to a health factor (or require an individual to undertake more than a similarly situated individual based on a health factor) to obtain a reward.

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 employee-only coverage (increased to 50% to the extent the excess percentage is for tobacco cessation programs). If dependents may participate in the wellness program, then the reward cannot exceed 30% of the cost of coverage in which an employee and dependents are enrolled (increased to 50% to the extent the excess percentage is 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.

The Proposed Rule

1. **"Employee Health Programs" Are Subject to the Proposed Rule.**

As noted above, while the ADA generally prohibits an employer's ability to make disability-related inquiries or to require medical examinations, it provides two exceptions – for voluntary medical examinations, including voluntary medical histories, which are part of an "employee health program" available to employees at the work site, and under the bona fide benefit plans safe harbor.

In a footnote to the preamble to the Proposed Rule, the EEOC states that it "does not believe that the ADA's 'safe harbor' provision . . . . is the proper basis for finding wellness program incentives permissible."[9] However, since the bona fide benefit plans safe harbor is in the statute and has been affirmed in the wellness context by a circuit court of appeals, it is not clear how much authority a preamble footnote would have without a corresponding statutory (or at least regulatory) change.

For purposes of the voluntary medical examinations exception, the Proposed Rule provides that the term "employee health program" includes wellness programs. In the Interpretive Guidance released with the Proposed Rule ("Interpretive Guidance"), the EEOC provides that employee health programs include wellness programs, which often incorporate services such as a health risk assessment ("HRA"), medical screening for high blood pressure, classes to help employees stop smoking or lose weight, coaching to help employees meet health goals, and/or the administration of prescription drugs such as insulin. It appears that a wellness program generally does not need to be part of a group health plan in order to be an employee health program.

2. **Employee Health Programs Must Be "Reasonably Designed to Promote Health or Prevent Disease."**

The Proposed Rule states that an employee health program, including any disability-related inquiries and medical examinations that are part of such a program, must be "reasonably designed to promote health or prevent disease." This requirement applies to wellness programs without regard to whether they are part of a group health plan (that

[8] *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.
[9] 75 Fed. Reg. 21,659, 21,662 (Apr. 20, 2015), n. 24.

is, even to programs sponsored by an employer that do not otherwise qualify as "group health plans"). Although the Proposed Rule is not entirely clear, this requirement may apply to all wellness programs and not just to those that include disability-related inquiries and/or medical examinations. It also appears to apply regardless of whether an incentive is offered in connection with the program.

The Proposed Rule provides that the reasonable design requirement is satisfied if a program:

- has a reasonable chance of improving the health of, or preventing disease in, participating employees;
- is not overly burdensome;
- is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination; and
- is not highly suspect in the method chosen to promote health or prevent disease.

This requirement is consistent with the reasonable design requirement applicable to health-contingent programs under HIPAA.[10] However, it would expand the requirement to participatory programs, which are not subject to the "reasonable design" requirement under HIPAA.[11]

The Interpretive Guidance provides that the Proposed Rule's reasonable design requirement would be satisfied where an employer concludes from aggregate information that a significant number of its employees have diabetes, and it designs a program to enable employees to treat the condition. However, the requirement would not be satisfied where an employer collects medical information without providing follow-up information or advice. The Interpretive Guidance also provides that a program does not satisfy the reasonable design requirement where, as a condition to obtaining a reward, it requires an overly burdensome amount of time for participation, it requires unreasonably intrusive procedures, or it places significant costs related to medical examinations on employees. A program is not reasonably designed if it exists mainly to shift costs from the employer to targeted employees based on their health.

3. Employee Health Programs Must Be "Voluntary."

As noted above, the ADA's exception to the prohibition on disability-related inquiries and medical examinations applies only if the medical examination is "voluntary." Except as provided below, the voluntary requirement applies regardless of whether a wellness program is part of a group health plan and regardless of whether it offers an incentive. However, to the extent that an employee health program does not involve a disability-related inquiry or a medical examination, the voluntary requirement does not appear to apply.

The Proposed Rule provides that a wellness program that includes disability-related inquiries and medical examinations will satisfy the voluntary standard as long as the employer:

- does not require employees to participate;

[10] The FAQs issued by the Departments of Labor, Health and Human Services, and the Treasury on April 16, 2015 provide additional insight regarding what the agencies would consider to be a reasonably designed health-contingent wellness program for purposes of the HIPAA regulations.

[11] This expansion appears to address the EEOC's concerns with participatory programs such as those that have been at issue in certain recent enforcement actions.

- does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits (except for wellness program incentives that are expressly allowed, as described below) for employees who do not participate;

- does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of section 503 of the ADA; and

- where the wellness program is part of a group health plan, provides employees with a notice that satisfies certain requirements (the "Notice").

The requirement to provide the Notice is new. The Notice must: (i) be written so that the employee from whom medical information is being obtained is reasonably likely to understand it; (ii) describe the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and (iii) describe the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with certain HIPAA privacy rules).

Comments Requested. The EEOC requests comments on whether employees should be required to provide prior, written, and knowing confirmation that participation in a wellness program is voluntary and, if so, details as to the form and requirements applicable to such a confirmation. The EEOC also requests comments on whether the Notice should only be required to be provided if a wellness program offers more than de minimis rewards for responding to disability-related inquiries and/or undergoing medical examinations, and, if so, how "de minimis" should be defined.

4. Employee Health Programs Must Limit Incentives to Be Voluntary.

As noted above, the Proposed Rule addresses the level of incentives that may be offered in a wellness program that includes disability-related inquiries and/or medical examinations. Per the express language of the Proposed Rule itself, this limit appears to only apply to programs that are part of a group health plan.

A wellness program that offers a reward for completing a disability-related inquiry and/or medical examination will not be rendered involuntary if the maximum incentive under the program, combined with the maximum incentive for other programs that include a disability-related inquiry and/or medical examination, does not exceed 30% of the total cost of employee-only coverage. The Interpretive Guidance clarifies that a wellness program that does not include disability-related inquiries or medical examinations, such as nutrition classes or smoking cessation classes, will not be subject to this incentive limit.

Is the EEOC Limit Tied to HIPAA? While the Proposed Rule places a limit on wellness incentives that is similar to the limit under HIPAA, it appears that the Proposed Rule's limit also differs in several ways from the limit on incentives that applies for purposes of HIPAA.

Perhaps most significantly, the Proposed Rule provides that the maximum incentive is determined based on the cost of employee-only coverage. This is different from the HIPAA regulations, which allow the maximum reward to be determined based on the total cost of coverage in which an employee and any dependents enroll in cases where dependents may participate in the wellness program. In the absence of clarification from the EEOC, there is concern that wellness programs seeking to comply with the ADA and HIPAA may not exceed the potentially lower ADA limit on incentives.

Additionally, despite the EEOC's stated intent to interpret the ADA consistent with HIPAA and the ACA, the Proposed Rule does not tie the incentive limit directly to the limit imposed by HIPAA. Rather, it imposes a flat 30% limit that will not increase if the regulators elect in the future to increase the HIPAA limit to a higher percentage as permitted by statute.

Finally, under HIPAA, participatory programs are not subject to a limitation on incentives; the HIPAA limit only applies to health-contingent programs. The Proposed Rule would impose a total 30% limit on participatory wellness programs that include disability-related inquiries and/or medical examinations, when combined with incentives under a health-contingent program under HIPAA.

Application to Tobacco Cessation Programs. Under HIPAA, incentives related to tobacco use may be up to 50% of the cost of coverage. The text of the Proposed Rule does not expressly address how the limit on incentives for EEOC purposes applies to tobacco cessation programs. However, the Interpretive Guidance provides some helpful clarification, stating that the limit on incentives only applies to employee health programs that include disability-related inquiries or medical examinations. The Interpretive Guidance states that a smoking cessation program that merely asks employees whether they use tobacco (or whether they ceased using tobacco upon completion of the program) is not an employee health program that includes disability-related inquiries or medical examinations. As such, the incentive limits described in the Proposed Rule would not apply to such a program, and such a program could utilize the higher HIPAA limit of 50%.

In contrast, the Interpretive Guidance states that a smoking cessation program that includes a disability-related inquiry or medical examination would be limited to a maximum incentive of 30% of the cost of employee-only coverage. Such a program would include a biometric screening or other medical examination that tests for the presence of nicotine or tobacco. These are common program designs, and employers should pay careful attention to this provision as the Proposed Rule proceeds toward finalization.

Comments Requested. Among other things, the EEOC requests comments as to whether final regulations should limit incentives such that they may not be so large as to render health insurance coverage unaffordable under the ACA and therefore in effect coercive for an employee. Generally, the cost of health insurance is affordable under the ACA if the portion an employee would have to pay for employee-only coverage would not exceed a specified percent of household income (9.56% in 2015). An affordability threshold would appear to be difficult to administer.

In addition, the EEOC requests comments regarding whether entities that offer incentives to encourage employees to disclose medical information must also offer incentives to individuals who choose to not disclose such information if they provide certain certifications from a medical professional.

5. Employee Health Programs Must Satisfy Certain Confidentiality Requirements.

The Proposed Rule would impose certain confidentiality rules that are arguably already applicable to employee health programs. The Proposed Rule specifically provides that medical records developed in the course of providing voluntary health services to employees, including wellness programs, must be maintained in a confidential manner and must not be used for any purpose in violation of the ADA.

The Proposed Rule provides that information obtained under the provisions relating to employee health programs regarding the medical information or history of any individual may only be provided to an ADA covered entity (i.e., the employer) in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of any employee. These new requirements would apply regardless of whether a wellness program is part of a group health plan and regardless of whether an incentive is available. The Interpretive Guidance makes clear that both employers

that sponsor employee health programs and the employee health programs themselves (if they are administered by the employer or qualify as the employer's agent) are responsible for ensuring compliance with this provision.

Where a program is part of a group health plan, the Proposed Rule provides that compliance with the HIPAA privacy rule will be considered compliance with the EEOC Proposed Rule. However, employers and health plans may need to review both sets of rules, as the Interpretive Guidance provides that certain disclosures that may otherwise be permitted under the ADA may not be permitted under the HIPAA privacy rule without the written authorization of the relevant individual. Moreover, if an employer offers a wellness program covered by the Proposed Rule that is not part of a group health plan (and thus is not already subject to the requirements of the HIPAA privacy rule), the Interpretive Guidance outlines a set of "best practices" that should be considered.

6. Employee Health Programs Must Satisfy the Reasonable Accommodation Requirement of the ADA.

The Interpretive Guidance notes that, regardless of whether a wellness program includes disability-related inquiries or medical examinations, the ADA's reasonable accommodation requirement applies to wellness programs (absent undue hardship).

The requirements for a reasonable alternative standard under HIPAA likely would fulfill this requirement for health-contingent programs. However, the employer would still have to provide a reasonable accommodation for a participatory program. The Interpretive Guidance provides an example whereby an employer that offers employees a financial incentive to attend a nutrition class, regardless of whether they reach a healthy weight as a result, would have to provide a sign language interpreter so that an employee who is deaf could earn the incentive, as long as providing the interpreter would not result in undue hardship to the employer.

What's Next?

The Proposed Rule is in proposed form and is not applicable until finalized. The Proposed Rule will not be finalized until after the EEOC has reviewed comments received with respect to the Proposed Rule, which are due June 19, 2015. The Q&As issued by the EEOC with regard to the Proposed Rule note that employers may choose to comply with the Proposed Rule, and that it is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the Proposed Rule until a final rule is issued. The Q&As note that many of the requirements are already requirements under the law. However, as discussed above, several provisions of the Proposed Rule appear to represent new requirements for wellness programs, and employers should certainly consider whether, and to what extent, to comply with the Proposed Rule.

Presumably, the EEOC's regional offices may feel compelled to pursue enforcement activity against employers with regard to their wellness programs. In evaluating programs for ADA compliance, it seems possible that the regional offices will refer to the Proposed Rule as part of any enforcement activity. In light of the foregoing, employers and wellness providers would benefit from a review of their wellness programs.