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Voluntary Is In the Eye of the Beholder: EEOC Proposes Rules for Wellness Program Incentives

After many years of regulatory silence, the Equal Employment Opportunity Commission (EEOC) has issued proposed regulations defining when workplace wellness programs are considered voluntary so that they do not violate the Americans with Disabilities Act (ADA).

Ideally, the EEOC’s proposed regulations would have dovetailed nicely with the existing, fairly rigorous regulations on wellness program incentives (we call these the HIPAA/ACA rules). Unfortunately, the EEOC’s proposed regulations are inconsistent with the HIPAA/ACA rules in several respects and, if the rules are finalized as written, employers whose wellness programs are entirely compliant with the HIPAA/ACA rules could find that they must make significant changes to avoid ADA violations.

Lockton comment: For a detailed explanation of the HIPAA/ACA rules, see our overview of those rules and our Alert on the topic.

The biggest differences between the HIPAA/ACA rules and the EEOC’s proposed rules would affect:

- The size of the incentives that are permitted under a group health plan’s wellness program.
- An employer’s ability to condition availability of richer health benefit options on completion of a health risk assessment or biometric screening.
- The notice that employers are required to provide regarding wellness program incentives.

Lockton Comment: Along with its proposed regulations, the EEOC issued a Q&A document, a press release and a fact sheet for small businesses. In addition:

- The three federal agencies charged with implementation of existing rules on wellness program incentives also issued a set of FAQs.
The Office for Civil Rights at the Department of Health and Human Services issued its own FAQs explaining in general terms how wellness programs fit into HIPAA privacy and security compliance.

The Department of Labor posted a research report regarding wellness programs.

We are addressing in this Alert only the EEOC’s proposed regulations, and explaining the portions that are most likely to disrupt employers’ wellness programs. Between the ancillary guidance noted above and subtleties in the EEOC’s proposed regulations, there may be a number of issues employers should consider in connection with their wellness programs. To address those issues we will present a webcast on May 13, at 2 p.m. Central time, regarding the April 16 guidance. A separate invitation to that webcast will follow, or you may register now.

**Background: Wellness Program Incentives Allowed Under the HIPAA/ACA Rules**

The HIPAA/ACA rules permit a wide variety of wellness-related activities and incentives. Most importantly for purposes of this discussion, the HIPAA/ACA rules divide wellness programs into two types: participation-based and health-contingent. Participation-based programs provide a reward based solely on participation in an activity that anyone can do regardless of health status. Completing a health risk assessment or biometric screening is generally considered such an activity. The HIPAA/ACA rules do not apply any limits to the incentives awarded under participation-based programs.

The HIPAA/ACA rules do cap incentives available under health-contingent aspects of a wellness program (health-contingent is generally anything that isn’t considered participation-based). The cap is 30 percent of the total cost of the individual’s coverage (or 50 percent where the program addresses tobacco use). Most wellness programs satisfy the HIPAA/ACA rules.

*But the HIPAA/ACA rules leave employers with a nagging question.*

Those rules include a statement that meeting their requirements does not assure compliance with the ADA, among other laws. That is significant because, subject to exceptions, the ADA prohibits employers from asking disability-related questions and requiring medical examinations of employees. And wellness programs almost always involve a health risk assessment (which generally is a disability-related inquiry), a biometric screening (which usually is a medical examination) or both.

As noted above, one of the ADA exceptions to the “don’t ask/don’t examine” rule allows “voluntary” wellness programs but the EEOC long ago issued guidance saying that a wellness program is not voluntary if there is a penalty for not participating. The EEOC left open the question of whether wellness program incentives are penalties that make participation involuntary. A long and convoluted history followed the EEOC’s pronouncement regarding penalties. (Although fascinating, we will skip that history here; for details, see our Alert, our blog post and this article by Compliance Services attorneys.)

Suffice it to say that the meaning of “voluntary” in the context of wellness program incentives has remained unresolved, and the EEOC’s new proposed rules are the first regulatory step
toward defining voluntary for ADA purposes. In short, as far as the EEOC is concerned, everything in the workplace wellness world turns on what “voluntary” means.

**Lockton Comment:**

“You keep using that word. I do not think it means what you think it means.”

-- Inigo Montoya in *The Princess Bride*

**The EEOC’s Definition of “Voluntary”**

Ideally, the EEOC would have said that a wellness program is considered “voluntary” under the ADA if it’s compliant with the HIPAA/ACA rules. It’s clear that the EEOC was working in that direction and, in large part, succeeded. Unfortunately, there are some significant differences between the HIPAA/ACA rules and the EEOC’s proposed rules that, if finalized, would force changes in many employers’ wellness programs.

According to the EEOC’s proposed regulations, a wellness program is “voluntary” if:

- Employees are not required to participate.
- Non-participation does not result in denial of coverage under an employer’s group health plan, denial of coverage under any benefits package within the plan, or limitation of coverage (except an allowed incentive).
- Neither non-participation nor any outcome of participation results in any adverse employment action, retaliation against, interference with, coercion, intimidation or threats.
- A group health plan’s incentive (whether a reward or penalty) does not exceed 30 percent of the total (employer plus employee) cost of *employee-only* coverage under the plan. Fifty percent may be used if the additional incentive is related to tobacco use and there is no biometric screening used to identify tobacco use.
- A group health plan’s wellness program must provide a notice that (1) the participant is reasonably likely to understand, (2) describes the medical information to be obtained by the wellness program and the purposes for which that information will be used, and (3) describes the restrictions on disclosure of the participant’s information by the recipient, the parties with whom the recipient will share the information, and the methods that will be used to prevent improper disclosure.

**Comparison to Incentives Allowed Under Existing HIPAA/ACA Rules**

The most obvious difference between the EEOC’s proposed rules and the existing HIPAA/ACA rules is the size of permitted incentives. Although the EEOC’s proposed rules use the same 30 percent and 50 percent thresholds described in the HIPAA/ACA rules, they apply them to different amounts and set additional conditions for applying them.

- **Thirty or 50 percent of what amount?** The HIPAA/ACA rules allow an incentive that is 30 or 50 percent of the total cost of the coverage tier in which an employee is actually enrolled, if one or more of the employee’s dependents may participate in the wellness program. The EEOC’s proposed rules apply these percentages solely to the *employee-only* total premium.
**Example:** Z Company has a wellness program that provides rewards in the form of contribution discounts for completing a minimum number of wellness activities. To earn any rewards under the program by completing the activities, however, both the employee and his or her enrolled spouse must complete a biometric screening.

Once the screening occurs and the requisite number of activities is completed, the employee receives a reward of 30 percent of the total premium for the coverage unit elected (e.g., employee + one or family). This is a permitted incentive under the HIPAA/ACA rules (assuming the various other conditions under those rules are met) but would violate the EEOC’s proposed rules because it takes into account the higher premium for coverage units other than employee-only.

- **Application of the tobacco-related reward.** In addition to applying the relevant percentage to the employee-only rate, the EEOC’s proposed rules disallow the additional 20 percent incentive related to tobacco use if the employee must complete a biometric screening in order to establish that he or she is not a tobacco user. The HIPAA/ACA rules do not differentiate based on how tobacco use is identified. Under the EEOC’s proposed rules, the 20 percent add-on applies only if the tobacco use or non-use is established by an employee statement.

  **Example:** Y Company’s wellness program is just like Z Company’s, except that Y Company also charges a 20 percent surcharge if an employee is a tobacco user. Tobacco use is determined as part of the biometric screening, through a test that detects tobacco use. If the employee is tobacco-free or completes a reasonable alternative standard, no surcharge is applied. If the employee is a tobacco user and does not complete the reasonable alternative standard, a surcharge is imposed equal to 20 percent of the total premium for employee-only coverage.

  This is a permitted incentive under the HIPAA/ACA rules (assuming the various other conditions of those rules are met) but would violate the EEOC’s proposed rules because the 20 percent additional incentive is imposed based on a biometric screening.

- **Limit applies to all wellness program incentives.** As noted earlier, the HIPAA/ACA rules impose their 30 percent/50 percent limits on health-contingent wellness programs, but not participation-based programs (programs that provide a reward based solely on participation in an activity that anyone can do regardless of health status). Completing a health risk assessment or biometric screening is generally considered such an activity.

  **Lockton Comment:** Therefore, under the HIPAA/ACA rules, a health plan-related wellness program could apply the full 30 or 50 percent permissible incentive to health-contingent aspects of the program (pretty much anything that isn’t considered participation-based) and stack atop that incentive an additional reward for completion of a health risk assessment or biometric screening. Moreover, as further explained below, the incentive related to the health risk assessment or biometric screening would be essentially unlimited under the HIPAA/ACA rules.

  The EEOC’s proposed rules bring participation-based programs that involve disability-related inquiries or medical examinations under the HIPAA/ACA rules’ 30 or 50 percent
regime. Further, they specify that the incentives applied to disability-related inquiries or medical examinations must be *aggregated* with all other wellness program incentives to determine compliance. The effect of this is to make all wellness incentives subject to the conditions noted in the two previous bullets.

**Example:** X Company’s group health plan wellness program applies a modest incentive – 10 percent of total employee-only premium – to the completion of a health risk assessment. In addition, however, its wellness program has a tobacco-related health-contingent component under which participants may obtain rewards up to an additional 50 percent of the total premium for the employee-only coverage.

This is a permitted incentive arrangement under the HIPAA/ACA rules (assuming the various other conditions are met) but it would violate the EEOC’s proposed rules because the aggregate incentive, including the incentive applied to the health risk assessment, exceeds 50 percent of the total employee-only premium.

**Plan Eligibility as an Incentive**

For employers whose plans include a less-expensive, lower-benefit program and a more-expensive, richer-benefit program, the EEOC’s proposed rules may be particularly troubling. Some employers that have this plan structure condition availability of the richer, more expensive program on completion of a health risk assessment or biometric screening. The EEOC’s proposed rules would make that impermissible. The same would apply to an employer that conditions eligibility for any health coverage on completion of a health risk assessment or biometric screening.

**Lockton Comment:** As noted above, under the HIPAA/ACA rules, the 30 and 50 percent incentive limits don’t apply to purely participation-based programs and allow essentially unlimited incentives for such programs. Therefore, a wellness program that conditions employer contributions or eligibility for a richer plan option on completing a health risk assessment or a biometric screening would not violate the HIPAA/ACA rules. It would, however, violate the EEOC’s proposed rules.

**Another Notice Requirement**

The HIPAA/ACA rules require materials describing a wellness program to include a notice regarding reasonable alternative standards when incentives are offered in connection with a health-contingent wellness program. (A wellness program is generally health-contingent unless it is purely participation-based, as described above.) That notice requirement does not apply to participation-based wellness programs. The EEOC’s proposed rules would require virtually all group health plan wellness programs to provide a notice regarding collection, use and disclosure of health risk assessment or biometric screening information, as generally described above.

**Lockton Comment:** In connection with the requirement that the notice disclose the purposes for which the information will be used, note that the EEOC’s proposed rules require that a wellness program have a “reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.”
Conclusion

Despite our concerns with the EEOC’s proposed regulations, it is heartening to see the agency responding to requests that it state the standards it is applying to determine whether wellness programs are considered voluntary, under the ADA. In addition, the proposed regulations are constructed with reference to the existing HIPAA/ACA rules, and can be easily modified to make them more congruent. We hope they will be. We also hope that some of the issues with the EEOC’s proposed rules that we have identified are inadvertent and are not a back-door attempt by the EEOC to modify the HIPAA/ACA standards.

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