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New EEOC Proposed Rules Require a Gut Check for Wellness Programs

Wellness program sponsors and vendors have long struggled with the application of the provision in the Americans with Disabilities Act (ADA) that generally prevents employers from making disability-related inquiries or requiring medical examinations unless the inquiry or exam is a *voluntary* part of an employee health program available to employees at that worksite. The Equal Employment Opportunity Commission (EEOC) has previously done little to clarify the application of this rule to wellness programs—in particular, incentive-based wellness programs.

On April 20, 2015, the EEOC issued long-awaited proposed regulations[1] that not only clarify the application of the ADA to wellness-based programs—in particular, when incentive-based programs are considered "voluntary"—but also address the intersection between HIPAA's nondiscrimination rules and the ADA.[2] Compliance with HIPAA's nondiscrimination rules does not ensure compliance with the ADA since the ADA and HIPAA strive to achieve different goals; however, the EEOC attempts in these proposed regulations to align the two sets of requirements as much as possible.

While the proposed regulations do not have an effective date, FAQs published by the EEOC suggest that employers may rely on the proposed regulations until the EEOC issues final regulations.[3]

Scope of Regulations

The ADA prohibits post-hire disability-related inquiries and/or medical exams that are not job-related or consistent with business necessity except for "voluntary" medical examinations or inquiries which are part of an employee health program available to employees. These regulations address only the requirements for employee health programs and whether such programs that provide incentives in connection with disability-related inquiries and/or medical exams are voluntary. There is, however, another exception from the ADA's limitations that is not addressed in these

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1 Amendments to Regulations Under the Americans With Disabilities Act, April 20, 2015, *available at* https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act.

2 For an in-depth discussion of the HIPAA wellness program rules, see Alston & Bird's prior advisory on the topic: http://www.alston.com/files/Publication/f88638f7-9114-4d35-b0ac-b8247b4a0da3/Presentation/PublicationAttachment/eff6f36f-eab1-40f0-a024-ca20ace1b11c/13-801%20ACA%20Update.pdf.

3 See "Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs," *available at* http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm ("While employers do not have to comply with the proposed rule, they may certainly do so. It is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the NPRM until a final rule is issued.")

regulations—the bona fide benefit plan safe harbor. The bona fide benefit plan safe harbor has been the primary issue in recent EEOC litigation (for example, *Seff v. Broward County*[4] and *EEOC v. Honeywell*[5]). The EEOC stated in Footnote 24 of the proposed regulations that it "does not believe" that the bona fide benefit plan safe harbor "is the proper basis for finding wellness program incentives permissible." Instead, the EEOC would have wellness plans comply with the requirements for "voluntary" medical examinations or inquiries that are part of an employee health program that are set forth in the proposed regulations.

Practice Pointer: With this shot across the bow, the EEOC has made it clear that it does not agree with courts—such as the court in *Seff*—that have applied the bona fide benefit plan safe harbor to incentive-based wellness programs. How a court would weigh this guidance, in view of contrary precedent in some federal circuits, remains to be seen. What is clear, however, is that the EEOC has not ceded the litigation position taken in *Seff* and *Honeywell*.

In addition to the ADA, the EEOC also administers Title II of the Genetic Information Nondiscrimination Act (GINA), which impacts wellness program design and administration. While these proposed regulations are limited to the ADA, the EEOC indicates that separate regulations on GINA are expected in the future.

Details of Regulations

While the proposed regulations are not necessarily complicated on their face, the interaction with the HIPAA wellness regulations can be complex, and not every potential situation will be addressed below. In addition, note that not all provisions will apply to *all* wellness programs. For example, some of the provisions discussed in the proposed regulations apply to all wellness programs; others only apply to wellness programs incorporating disability-related inquiries or medical examinations and/or wellness programs that are part of group health plans. Plan sponsors and wellness program vendors should pay careful attention to such distinctions and consult experienced counsel in case of any questions.

I. Wellness programs must be reasonably designed to promote health and prevent disease

In order to meet this standard, wellness programs, including disability-related inquiries and medical examinations that are part of such programs, must not be overly burdensome, a subterfuge for violating the ADA or other discrimination laws or highly suspect in the method chosen to promote health or prevent disease. The proposed regulations provide examples of what constitutes a reasonable design and what does not. For example:

Good	Conducting a health risk assessment or screening for the purpose of alerting participants to health risks
Good	Developing disease management programs based on assessments and screenings
Bad	Collecting information without providing any follow-up information, advice or tools
Bad	Requiring an overly burdensome amount of time to participate in a program as a condition to obtaining a reward
Bad	Requiring participants to go through intrusive procedures as a condition to obtaining a reward

4 691 F.3d 1221 (11th Cir. 2012).

5 2014 WL 5795481 (D. Minn. 2014).

This rule applies without regard to whether incentives are offered or whether the program is offered as part of an employer's group health plan.

Practice Pointer: HIPAA's nondiscrimination rules impose a similar requirement; however, HIPAA only imposes this requirement on wellness programs with health outcome or activity-based incentives. The EEOC imposes this requirement on all wellness programs, including participation-based programs.

II. Wellness programs must comply with the ADA's confidentiality provisions.

The proposed regulations clarify that employers may only receive aggregate, unidentified information unless identifiable information is necessary for health plan administration purposes.

Practice Pointer: If the program is part of a group health plan, HIPAA's privacy rules would apply and would impose similar restrictions.

III. Participation in a wellness program that includes disability-related inquiries or requires medical examinations must be "voluntary."

Whether a wellness program is "voluntary" has been one of the hottest debates surrounding the application of the ADA to wellness programs. The proposed regulations attempt to answer that question by identifying the following elements of a voluntary program:

- The employer doesn't require participation in the program;
- The employer doesn't deny employees who choose not to participate in the program access to health coverage under *any* of its group health plans or benefit package options;

Practice Pointer: It has been a common practice for employers to deny access to those who fail to complete a health risk assessment or to limit those employees to a less generous health plan option. This guidance clarifies that such practices are prohibited.

- The employer doesn't limit the coverage under the health plan for employees who choose not to participate (except to the extent the limitation is the result of forgoing an otherwise permissible financial incentive);
- The employer does not retaliate or take employment action against those who fail to participate; and
- If the wellness program is part of a group health plan, the employer must provide notice that clearly explains what information will be obtained, how the medical information will be used, who will receive it, restrictions on its disclosure and the methods used to prevent improper disclosure of the information.

Practice Pointer: The proposed regulations do not indicate the detail with which the employer must explain the steps it takes to prevent the improper disclosure of information.

IV. Any incentives offered as part of a wellness program that is part of a group health plan and that includes disability-related inquiries or requires a medical exam must be limited to 30 percent of the total cost of employee-only health coverage.

A. General rule

This incentive limitation is similar to the limitation imposed under HIPAA's nondiscrimination rules on incentive-based health outcome and activity-based wellness programs; however, this rule applies to *any* wellness program that is part of a group health plan and includes disability-related inquiries or requires a medical exam. Thus, if an employer sponsors an incentive-based participation-only program (e.g., a $25 premium reduction for completing a health risk assessment) and a health-contingent program (e.g., a $25 premium reduction for employees who meet three of five benchmarks in a biometric screening), the total incentive for both the participation-only and the health outcomes program cannot exceed 30 percent of the total cost of employee-only health coverage.

Practice Pointer: Under HIPAA's nondiscrimination rules, only health-contingent programs (other than tobacco cessation programs) are subject to the 30 percent limit; however, the proposed regulations would also include participatory programs. This may require employers to make adjustments to the collective incentives offered under their wellness programs.

Note that the 30 percent limit *only applies* if the wellness program is part of a group health plan and includes disability-related inquiries or requires a medical exam. For example, if the wellness program is part of a group health plan, but involves no disability-related inquiries or medical exams, it would be subject to the HIPAA wellness regulations, but *not* the EEOC's proposed rules.

Also, the EEOC's proposed 30 percent limitation appears limited to the total cost of employee-only coverage. Under HIPAA, a plan may provide a reward up to 30 percent of the total cost of family coverage if family members are permitted to participate. The proposed regulations do not indicate how an incentive-based wellness program that allows family members to participate in the program complies with the ADA's 30 percent limitation. However, this issue may be addressed in the EEOC's future GINA regulations, which may restrict the extent to which an employee can benefit from a family member's participation in a wellness program that conducts medical inquiries.

Practice Pointer: The EEOC has informally indicated that if a wellness program provides multiple methods of earning points to reach a reward, some of which are connected with disability-related inquiries and/or medical exams, and some of which are not, the program as a whole will *not* be subject to the 30 percent threshold as long as the employees can acquire the necessary points for the reward without answering questions related to a disability or taking a medical exam. Albeit informal, this position makes logical sense because employees can obtain the incentive without responding to disability-based inquiries.

Last, incentive-based wellness programs that include disability-related inquiries and/or medical exams must make reasonable accommodations where necessary. For example, if an employer offers financial incentives to attend a nutrition class, regardless of whether the employees reach a healthy weight, the employer would have to provide a sign language interpreter to deaf employees or provide written materials in large print format to visually impaired employees. Also, if a reward is provided for those who complete a biometric screening that includes a blood draw, the employer must provide an alternative test for those for whom a blood draw is medically dangerous.

Practice Pointer: This requirement applies even when HIPAA's nondiscrimination rules would not require a reasonable alternative standard, for example, participatory programs and activity-only health contingent programs that are not unreasonably difficult or medically inadvisable for a participant to complete.

B. Tobacco cessation

What about programs that offer incentives for compliance with a tobacco cessation program? Under HIPAA, programs that include tobacco cessation may impose a reward up to 50 percent of the total cost of employee-only coverage. Compliance with HIPAA's 50 percent limitation would run afoul of the ADA's 30 percent limitation (which does not carve out tobacco cessation). Fortunately, the regulations clarify that programs that merely ask whether an employee uses tobacco is not a disability-related inquiry; therefore, the incentive for compliance with tobacco cessation programs would *not* be subject to the ADA's 30 percent limitation.

Practice Pointer: Tobacco cessation programs that obtain tobacco use information through a blood test or other medical exam would be subject to the 30 percent limitation. In addition to modifications to the tobacco cessation reward, employers that previously incorporated a 50 percent tobacco reward into their affordability calculations for IRC § 4980H(b) purposes may need to adjust the premiums charged to employees.

Putting It All Together

The chart below illustrates the various "buckets" a reward-based wellness program could fall into and the combined impact of the Proposed Regulations and the HIPAA wellness rules on the allowable premium credits/rewards. Note that a program will only fit in one bucket.

Bucket	Program Design	Example	Permissible Reward/Penalty
Bucket 1	No medical information requests No medical exam or screening Not required to complete an "activity"*	Reward to any employee who attends a stress reduction class or nutrition counseling class regardless of health status	No caps on reward
Bucket 2	Reward is contingent on responding to a request for medical information or medical exam	Reward for completing a health risk assessment without regard to health status Reward for completing a screening without regard to outcome Reward for completing a health risk assessment and meeting certain benchmarks	Subject to cap of 30% of total cost of employee-only coverage
Bucket 3	Reward is based solely on "activity"**	Compliance with walking program, exercise program or diet/nutrition program	Subject to cap of 30% of the total cost of employee-only coverage OR family coverage if family members are allowed to participate
Bucket 4	Tobacco cessation based SOLELY on inquiry	Reward provided for those who certify their tobacco use status or, if they certify tobacco use, they complete a smoking cessation program	Up to 50%*** of total cost of employee-only coverage OR family coverage if family members are allowed to participate

* This is referring to an activity generally, not an activity-based health-contingent program under HIPAA's wellness rules.

** This is referring to an activity-based health-contingent program as defined by and subject to HIPAA's wellness rules.

*** Combined with any rewards for programs in Bucket 3 and health outcome-based programs in Bucket 2.

Summary & Request for Comments

The EEOC's wellness regulations under the ADA may appear straightforward, but the interaction with HIPAA's wellness plan regulations, in many cases, is not. Plan sponsors and wellness vendors should carefully review the distinctions made in the proposed regulations to determine how these changes, if implemented as currently drafted, would affect their wellness programs.

Along with the proposed regulations, the EEOC has requested comments on various aspects of the ADA's application to wellness programs. Entities interested in submitting comments should do so by **June 19, 2015**. Contact your Alston & Bird attorney if you would like assistance in filing, or joining, a comment letter.

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