



American Benefits Council

**Benefits Briefing:
EEOC Proposed Rules For Wellness
Programs**

May 12, 2015

Seth Perretta
Principal



Today's Discussion

- Quick overview of state of HIPAA rules
- Recent legislation was introduced to provide some protection for employers with respect to the ADA
- Overview of the proposed EEOC wellness regulations
- Implications for employer wellness programs
- Expected next steps and developments

Wellness Programs Generally

- Traditionally subject to regulation under HIPAA
- Congress reiterated strong support by codifying HIPAA regulations in ACA
 - Including increasing permitted reward limit from 20% to 30% (up to 50% for smoking cessation)
- Continued uncertainty re: interplay between HIPAA and other laws

Current Regulatory Landscape

HIPAA

- Prohibits discrimination with regard to eligibility, benefits, or premium discounts based on a health factor
 - Exception for adherence to certain programs of health promotion and disease prevention
- Three categories of wellness programs
 - Participatory, activity-only, outcome-based
- Financial incentives may be offered

Current Regulatory Landscape

ADA

- Limits employer's ability to make disability-related inquiries or require medical examinations with respect to an employee
- Two possible exceptions:
 - Voluntary wellness program
 - Enforcement guidelines and discussion letters
 - "neither requires participation nor penalizes employees who do not participate"
 - Bona fide benefit plan exception
 - *Seff v. Broward County*

Current Regulatory Landscape

GINA – Title I

- Applies to group health plans and issuers
- Generally prohibits collecting genetic information (including family medical history) for underwriting purposes
 - **Genetic information includes current medical information of family members by affinity (i.e., marriage)**
- Jurisdiction: DOL, HHS, Treasury

Current Regulatory Landscape

GINA – Title II

- Applies to employers
- Generally prohibits employers from requesting, requiring, or purchasing genetic information of an individual or family member
 - Exception for collecting genetic information as part of a voluntary wellness program
- Jurisdiction: EEOC
- Firewall exists between Title I and Title II

History of EEOC Activity

- **EEOC's historic position regarding wellness programs**
 - Famous Peggy Mastroianni letter from 2009
 - Certain OLC representatives suggested in public comments that financial incentives for spousal HRAs could violate GINA
 - Sporadic regional investigations; apparent reluctance to litigate directly
- **2013 hearing on wellness programs**
 - Statements made at the hearing suggested that Commissioners were sensitive to not having the ADA supplant HIPAA; rather, act as gap-filler
 - Continued concerns around privacy of health information
- **Announced rulemaking projects**
 - February 2015 according to semi-annual regulatory agenda
- **Fall Trilogy of cases**
 - *Orion, Flambeau and Honeywell*
- **Proposed Regulations Regarding the ADA on April 20, 2015**

EEOC v. Honeywell International, Inc.

“[G]reat uncertainty persists in regard to how the ACA, ADA and other federal statutes such as GINA are intended to interact....[r]ecent lawsuits filed by the EEOC ...signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs...”



Preserving Employee Wellness Programs Act

- Senate Bill 620; Introduced on March 3, 2015 by Senate and House Leaders
 - Provides that employer wellness programs will not violate the ADA or titles I or II of GINA solely because the program provides an incentive of a type or amount that otherwise complies with if the HIPAA wellness rules
 - BUT, if participatory-only program, must comply with HIPAA-limits to receive bill protections
 - Provides for GINA “fix” as well
 - Includes rule of construction regarding existing ADA bona fide benefit plan underwriting safe harbor
- Effective Date: If approved, the Act will take effect as if it was enacted on March 23, 2010 and shall apply to the ADA and GINA


Proposed EEOC Regulations

- Proposed Rule published April 20, 2015
- Comments due June 19, 2015
- Published a Fact Sheet for Small Business and Questions and Answers about EEOC's Notice of Proposed Rule Making
- Proposed rule amends the Americans with Disabilities Act regulations to provide guidance on wellness programs **that include disability-related inquiries and/or medical examinations** ... and a bit more too...
- Proposed rules do **not** address how Title II of GINA affects an employer's ability to condition incentives on family member's participation in a wellness program. This issue will be addressed in future EEOC rulemaking.


Proposed EEOC Regulations

- BE CAREFUL: Application varies depending on whether:
 - An employee health program that is NOT part of a group health plan and does NOT include a disability-related inquiry or medical examination
 - An employee health program that is NOT part of a group health plan BUT, INCLUDES a disability-related inquiry or medical examination
 - An employee health program that IS part of a group health plan AND, INCLUDES a disability-related inquiry or medical examination


SUMMARY OF NEW PROPOSED EEOC REQUIREMENTS WITH RESPECT TO WELLNESS PROGRAMS UNDER THE ADA

	Any Employee Health Program (“EHP”) that Is Not Part of a Group Health Plan and Does NOT have a Disability-Related Inquiry of Medical Examination	EHP That Is NOT Part of a Group Health Plan, But Has a Disability-Related Inquiry or Medical Examination	EHP that Is Part of a Group Health Plan and Has a Disability-Related Inquiry of Medical Examination
Must be reasonably designed:			
<ul style="list-style-type: none"> • Must have a reasonable chance of improving health/preventing disease • Must not be overly burdensome • Must not be a subterfuge for violating the ADA or other nondiscrimination rules • Must not use a “highly suspect” method to promote or prevent disease 	YES	YES	YES
Must provide reasonable accommodation:	YES	YES	YES
Must be “Voluntary”			
<ul style="list-style-type: none"> • Must not require participation 	NO	YES	YES
<ul style="list-style-type: none"> • Must not deny coverage under any group health plan or particular benefit package within a plan, or limit the extent of benefits (except as provided in (d)(3)) for nonparticipation 	NO	YES	YES
<ul style="list-style-type: none"> • Must not take any adverse employment action or retaliate against, interfere with, coerce, intimidate.... per ADA section 530 	NO	YES	YES
<ul style="list-style-type: none"> • Must provide special notice to employees that: <ul style="list-style-type: none"> ○ Is written so that the employee from whom medical information is sought is reasonably likely to understand it ○ Describes the type of medical information sought ○ Describes the specific purposes for which the medical information will be used ○ Describes restrictions on the disclosure of the employee’s medical information, with whom it will be shared, and methods to be used to ensure not improperly disclosed 	NO	NO	YES
Can provide incentives of a de minimis amount:	YES	YES	YES
Can provide incentives of up to 30% of the total cost of self-only coverage:	NO	Appears NO	YES
Can provide incentives up to 50% of the total cost of self-only coverage for qualified smoking tobacco cessation program:	N/A	Yes, but only if a question is asked; no medical examination is permitted	


Proposed EEOC Regulations

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Proposed EEOC Regulations


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Example: Attend a health fair and earn a pair of free movie tickets

Proposed EEOC Regulations


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Example: Employer's wellness program provides a cash incentive for a participant to complete a health risk assessment ("HRA")

Proposed EEOC Regulations

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Example: Employer's wellness program provides a premium rebate (or the absence of a premium surcharge) with respect to underlying major medical coverage if an individual completes a biometric screen or HRA

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Must provide reasonable accommodation:	YES	YES	YES

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Proposed EEOC Regulations

- Requires **reasonable accommodation** for a participatory wellness program even if it does not make a medical inquiry or require a medical examination
 - Employer that offers a nutrition class, regardless of whether a healthy weight is required, may be required to provide a sign language interpreter for a hearing impaired employee
 - Employer may be required to provide written materials in an alternative format, e.g., large print or computer disk
 - Employer may be required to provide reasonable accommodation to participate in a disability-related inquiry or medical examination, including a waiver of a generally applicable standard, for an individual with a disability (e.g., an alternative to a blood draw for a hemophiliac)

Proposed EEOC Regulations

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CHARTERED

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Must be "Voluntary"

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Proposed EEOC Regulations

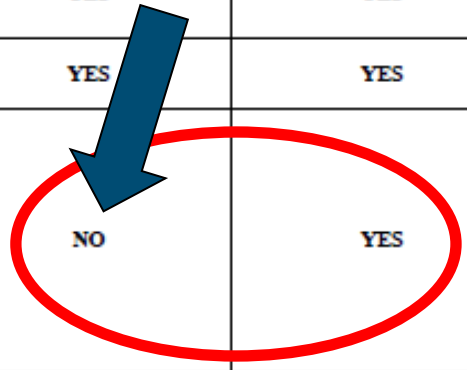
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Proposed EEOC Regulations

- **Example:** Employer offers two benefit packages – a low value option and high value option. To be eligible to enroll in the high value option, an employee must agree to take an HRA or undergo a biometric screening.
 - **Permissible under HIPAA?** YES
 - **Permissible under Proposed EEOC Regs?** APPEARS AT RISK

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Can provide incentives of a de minimis amount:	YES	YES	YES
Can provide incentives of up to 30% of the total cost of self-only coverage:	NO	appears NO	YES
Can provide incentives up to 50% of the total cost of self-only coverage for qualified smoking tobacco cessation program:	N/A	Yes, but only if a question is asked; no medical examination is permitted	

Proposed EEOC Regulations

- **What constitute de minimis incentives?**
 - No specified dollar amounts provided in the proposed regulations
 - Small dollar incentives are probably permissible
 - Example: The movie tickets for attending a health fair

Proposed EEOC Regulations

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Proposed EEOC Regulations

- **Maximum incentives:**
 - **HIPAA:** 30% of the total cost of coverage in which the individual is enrolled (except if only the employee is eligible to participate in the wellness program and he or she is enrolled in other than self-only coverage, the maximum incentive is 30% of the total cost of self-only coverage)
 - **Proposed EEOC Regs:** 30% of the total cost of self-only coverage regardless of whether the employee is enrolled in a different coverage tier and/or whether the employee's spouse or dependents are eligible to participate in the wellness program

Proposed EEOC Regulations

- **Maximum incentives:**
 - To the extent the EEOC regs are clarified as part of final rulemaking to make clear the maximum limit of 30% of self-only coverage applies only with respect to the employee, then the extent to which the ADA affects the wellness design will turn in large part on the differential in total cost between self-only and other coverage options and whether the employee and spouse both must complete the program for either to earn an incentive amount.

Proposed EEOC Regulations

Example: Employer offers medical coverage to its employees. Self-only coverage costs **\$7,000** per year and employee-plus-spouse coverage costs **\$14,000** per year. Employer also sponsors a wellness program. In accordance with HIPAA, Employer provides a premium incentive of 30% of the cost of coverage for employees and spouses who complete the wellness program. Under this program, employee Sue and her husband, Bob, who are enrolled in employee-plus-one coverage are eligible for a wellness incentive of **\$4,200**, but only if they both complete the program.

UNDER HIPAA: Complies because no more than 30% of the total cost of the coverage in which they are enrolled

UNDER the EEOC Regs: Appears at risk since the incentive that applies to Sue is \$4,200 in excess of \$2,100 (i.e., 30% of total cost of self-only coverage). But if unbundle, then works because Sue's incentive is equal to half of \$4,200 or \$2,100

Proposed EEOC Regulations

Example: Employer offers medical coverage to its employees. Self-only coverage costs **\$7,000** per year and employee-plus-spouse coverage costs **\$15,000** per year. Employer also sponsors a wellness program. In accordance with HIPAA, Employer provides a premium incentive of 30% of the cost of coverage for employees and spouses who complete the wellness program. Under this program, employee Sue and her husband, Bob, who are enrolled in employee-plus-one coverage are **each eligible for a wellness incentive of \$2,250, if they separately complete the program for a total incentive amount of \$4,500.**

UNDER HIPAA: Complies because no more than 30% of the total cost of the coverage in which they are enrolled

UNDER the EEOC Regs: Even if unbundle, Sue's incentive amount here (i.e., \$2,250) measured as a percentage of self-only coverage (\$7,000) exceeds the maximum 30% limit (i.e., \$2,100). Thus, Employer would need to reduce the extent of Sue's incentive. But what about Bob?

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Proposed EEOC Regulations

Enhanced confidentiality rules required

- **For wellness programs that are part of the group health plan:**
 - Compliance with HIPAA Privacy Rule's restrictions for the use and disclosure of PHI to a plan sponsor will satisfy the proposed regulation's confidentiality provisions
- **For wellness programs that are NOT part of the group health plan:**
 - May only disclose aggregate information to the employer and the information must be sufficiently aggregated so as not to be likely to disclose the identity of a specific individual
 - The employer must take steps to protect the confidentiality of employee medical information:
 - Training of individuals who have access to medical information
 - Adoption of privacy policies and procedures
 - On-line systems and other technologies to guard against unauthorized access
 - Individual who handles medical information should not be responsible for employment-related decisions

Proposed EEOC Regulations

- **EEOC has requested comments on numerous issues, including:**
 - Whether a wellness program should require prior, written and knowing confirmation that an individual's participation is voluntary
 - whether the incentive for a program that includes disability-related inquiries and/or medical examination must not render the program "unaffordable" under the Affordable Care Act

What Next?

- Legislation remains pending before Congress
- Comments with respect to the proposed EEOC regulations are due by June 19th
- Final regulations are expected by? Effective date?
- Corresponding GINA fix?
- EEOC enforcement actions possible, but how likely?
- What should I do as an employer?

Questions?

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