LEGAL UPDATES

PUBLISHED: APRIL 22, 2015

EEOC Issues Proposed Regulations on ADA and Employer Wellness Programs

Services

Employee Benefits & Executive Compensation

Labor & Employment

Professionals

CRAIG A. KOVARIK
KANSAS CITY:
816.983.8249
CRAIG.KOVARIK@
HUSCHBLACKWELL.COM

JULIANNE P. STORY
KANSAS CITY:
816.983.8230
JULIANNE.STORY@
HUSCHBLACKWELL.COM

On April 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued its highly anticipated proposed regulations on the application of the Americans with Disabilities Act (ADA) to employer wellness programs. The proposed regulations provide reassurance that employers may continue to offer voluntary wellness programs that include financial incentives to encourage employee participation. However, the proposed regulations are not entirely aligned with the HIPAA wellness regulations in all respects, as discussed below.

The proposed regulations are open for public comment until June 19, 2015. The EEOC will consider the public comments and may incorporate comments into its final regulations.

The EEOC's Proposed Regulations and Guidance

With only limited exceptions, the ADA generally prohibits employers from either making disability-related inquiries or requiring medical examination of employees. The EEOC's proposed regulations clarify that if an employer collects employee medical information through a voluntary wellness program that is reasonably designed to promote health or prevent disease, then the collection of such information will not be considered a prohibited disability-related inquiry or medical examination under the ADA.

Consistent with HIPAA wellness regulations, the proposed EEOC regulations permit employers to offer financial incentives as a way to encourage employee participation in wellness programs that are part of a group health plan. These financial incentives may be up to 30 percent of the total cost of employee-only coverage under the group health plan.

Voluntary Requirement

Notably, the proposed regulations emphasize that participation in employer wellness programs must be completely "voluntary." For a program to be considered voluntary, an employer generally *cannot*:

mandate employee participation;

deny employee benefit coverage for non-participation; or

take adverse employment action against any employee who chooses not to participate in the wellness programs.

Notice / Privacy / Confidentiality

If an employer wellness program is a part of a group health plan, employers must provide employees with a specific notice stating: (1) what medical information will be obtained; (2) how it will be used; (3) who will receive the medical information; (4) the restrictions on its disclosure; and (5) the methods taken to prevent improper disclosure of employee medical information.

The EEOC's interpretive guidance also sheds light on how employers and wellness providers should receive and maintain medical records. In general, employers and wellness program providers can only receive medical information collected from a wellness program in an aggregate form that does not disclose the identity of individuals. The proposed regulations require employers and wellness program providers to take steps to preserve the confidentiality of information, such as training those who handle medical information; developing clear privacy policies and procedures related to the collection, storage and disclosure of medical information; and ensuring that electronic systems guard against unauthorized access. If the wellness program is part of a group health plan governed by HIPAA privacy rules, the program's compliance with HIPAA rules will likely comply with the proposed EEOC regulations.

Interaction with ACA and HIPAA

Under the Affordable Care Act (ACA) and HIPAA, employers are allowed to increase the wellness incentive from 30 percent to 50 percent with respect to tobacco cessation programs. The EEOC's proposed rules are not entirely aligned with the ACA and HIPAA in this regard. Specifically, the proposed regulations provide that if a smoking cessation program merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program), then such a program will not be viewed as one which includes disability-related inquires or medical examinations, and the wellness program may offer incentives up to 50 percent without violating the ADA. On the other hand, if a smoking cessation program requires a biometric screening or other medical examination that tests for the presence of nicotine or tobacco, then the test will be considered

a medical examination and the aggregate financial incentive may not exceed 30 percent, even though 50 percent may be allowed under the ACA and HIPAA.

What This Means to You

Now is the time for employers to review their current wellness programs and determine whether they are in compliance with the proposed regulations. Employers should also take a close look at the incentives offered to employees and their policies and procedures for maintaining the confidentiality of employees' medical information.

Consistent with the ADA, employers must provide reasonable accommodations to allow disabled employees to participate in wellness programs and obtain any incentives offered. However, compliance with the proposed regulations does not necessarily mean that a wellness program complies with all nondiscrimination laws, the ACA or HIPAA. Employers should evaluate their wellness programs with all of these laws in mind.

Contact Us

For more information on these proposed regulations or other issues affecting labor and employment, please contact your Husch Blackwell attorney or an attorney in our Labor & Employment or Employee Benefits & Executive Compensation practice groups.