THE WAGNER LAW GROUP

LAW ALERT
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EEOC Issues Proposed Regulations on Employer Wellness Programs

The Equal Employment Opportunity Commission ("EEOC") has issued two sets of proposed regulations that would change certain rules on how employer-sponsored wellness programs that require employees to answer disability-related questions or undergo medical examinations can comply with the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act of 2008 ("GINA").

Background. Currently, the term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment.

The ADA prohibits employers from discriminating against individuals on the basis of disability. While the ADA generally restricts employers from obtaining medical information from job applicants and employees, it allows for inquiries about employees' health and authorizes medical examinations that are part of a voluntary employee health program, including workplace wellness programs.

In general, GINA protects job applicants, and current and former employees from discrimination in employment matters on the basis of genetic information. Specifically, GINA restricts employers from requesting, requiring, or purchasing genetic information to use in making decisions on employment matters.

Both the ADA and GINA contain exceptions that allow employers to ask health-related questions and conduct certain medical examinations (e.g., biometric screenings) to determine risk factors as part of a voluntary wellness program that is reasonably designed to promote health or prevent disease. To meet this standard, a wellness program cannot require an overly-burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating laws prohibiting employment discrimination or require employees to incur significant costs for medical examinations.

Current regulations

Under current regulations, if a wellness program is open only to employees enrolled in a particular health plan, the maximum allowable incentive that an employer can offer is 30% of the total cost of the plan's self-only coverage, with a larger incentive permitted for smoking cessation programs.

Generally speaking, all wellness programs, including those that do not obtain medical information, must be made available to all employees. Accordingly, employers must provide reasonable accommodations to employees to enable them to earn whatever financial incentive is offered through the wellness program.

To comply with the ADA rules, employers must provide a notice to participating employees that describes the details of the wellness program, including: what information will be collected; how it will be used; who will receive it; restrictions on the disclosure of such information; and how the information will be kept confidential.

Employers are prohibited from denying access to health insurance or any package of benefits to, or retaliating against, any employee whose spouse refuses to provide information about his or her current or past health status to an employer wellness program.

Proposed Regulations

Similar to current rules, to be voluntary, a plan must: (i) not require employees to participate; (ii) not deny coverage under any group health plans or particular benefits packages within a group health plan; (iii) generally, not limit the extent of such coverage; (iv) not take any other adverse action against employees who decline to participate in an employee health program or fail to achieve certain health outcomes; and (v) not engage in retaliation or interference in violation of the ADA.

Under the ADA proposed regulations, most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than "de minimis" incentives to encourage participation. Under the proposal, gifts of water bottles or "modest" gift cards are considered de minimis. The proposed rule provides an exception for health-contingent wellness programs that are part of, or qualify as, group health plans: such programs could continue to offer the maximum incentives allowed under the current final regulations. In addition, it would no longer be necessary for employers to issue the ADA notice.

Under the new proposed GINA rules, obtaining genetic information through employer-provided health or genetic services will be considered lawful and voluntary if "prior, knowing, voluntary, and written authorization" is obtained, in compliance with GINA's regulatory requirements for satisfying that standard.

Again, the EEOC proposal would permit employers to offer only a de minimis incentive in exchange for employee's or family members' participation in a wellness program that contains inquiries about their manifestation of diseases or disorders, and similarly offers the examples of a water bottle or a gift card of modest value as clearly de minimis. However, unlike the ADA rules, there is no exception from the de minimis rule for health contingent wellness programs.

Takeaway for Employers

It is likely that the incoming Biden Administration will place a freeze on new regulations so these proposals may not be finalized in the near future.

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