
EEOC to Issue Proposed Rule on the Impact of the ADA on Wellness Programs

By Kristi R. Gauthier / Apr 17, 2015

The Equal Employment Opportunity Commission ("EEOC") continues to scrutinize employer wellness programs and recently filed several lawsuits against employers claiming that certain wellness programs violate Title I of the Americans with Disabilities Act ("ADA"). To provide guidance to employers, the EEOC issued proposed rules addressing how the ADA applies to wellness programs that are part of employer sponsored group health plans. The EEOC's proposed rule will provide much needed guidance to both employers and employees about how wellness programs offered as part of an employer's group health plan can comply with the ADA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act ("HIPAA") as amended by the Affordable Care Act.

Some highlights of the EEOC's proposed rule include the following:

- Wellness programs are considered "employee health programs," and thus permissible under the ADA, when they are reasonably designed to promote health or prevent disease. The employer cannot make the program 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.
- Employee health inquiries and medical examinations are permitted under the ADA so long as the inquiry and/or exam is voluntary and part of an employee health program. This also includes the use of health risk assessments.
- Employers must provide a notice clearly explaining what medical information will be obtained, how it will be used, who will receive it and the restrictions on disclosure.
- Employers are prohibited from requiring employees to participate in employee health programs and are also prohibited from denying health coverage or otherwise disciplining employees who refuse to participate in such programs.
- Employers may not use employee health programs to discriminate based on disability.
- Employers may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with the program. (This limit is generally consistent with the limits HIPAA imposes on wellness programs.)
- The provider of the wellness program may disclose medical information collected as part of an employee health program to employers only in aggregate form that does not reveal the identity of employees and must be kept confidential in accordance with ADA requirements.
- Employers must provide individuals with disabilities with reasonable accommodations that allow them to participate in wellness programs and to earn whatever incentive an employer offers.

The proposed rule is intended to alert the public that the EEOC plans to change the ADA regulations and interpret previous guidance as it relates to employee health programs. After a comment period which runs until June 19th, the EEOC will then vote on a final rule. The EEOC has indicated that while employers do not have to comply with the proposed rule, they may certainly do so. The EEOC further stated that it is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the proposed rule until a final rule is issued.

You can obtain a copy of the EEOC's proposed rule and simultaneously issued Questions and Answers and fact sheet for small employers from the EEOC's website: <http://www.eeoc.gov/eeoc/newsroom/release/4-16-15.cfm>

Employers sponsoring wellness programs should work closely with their legal counsel to fully understand the compliance complexities surrounding these programs. If you have any questions about the subject matter of this e-alert please contact Ed Hammond at ehammond@clarkhill.com or (248) 988-1821; Kristi Gauthier at kgauthier@clarkhill.com or (480) 684-1300; Nancy Farnam at nfarnam@clarkhill.com or (248) 530-6333; or Doug Ellis at dellis@clarkhill.com or (412) 394-2367.