PARKER | SMITH | FEEK

EEOC issues regulations addressing ADA requirements for employer wellness programs

Issue Date: April 29, 2015

The Equal Employment Opportunity Commission (EEOC) has issued long awaited proposed regulations on how employers can structure their wellness programs in relation to the American with Disabilities Act (ADA). The guidance also addresses the interaction between the new EEOC rules and the existing ACA and HIPAA wellness rules.

Background

In general, the Americans with Disabilities Act (ADA), prohibits employment discrimination based on disability. The ADA directly impacts employer wellness programs in a number of ways. For example, the ADA restricts when an employer may make disability-related inquiries or require medical examinations. Wellness programs often include elements of both. For example, a health risk assessment (HRA) may include disability related questions, and biometric screening programs are considered a medical examination.

Until now, the EEOC had provided very little guidance on how it would determine the voluntary nature of a program, leaving employers in the dark regarding how to design a wellness program that would be in compliance with the ADA rules. Importantly, the ADA includes exceptions for certain types of health plan and wellness programs. Specifically, an employer may make disability-related inquiries or conduct medical examinations if the program is "voluntary".

Proposed Regulations

In some ways, the new EEOC guidance tracks closely with the existing ACA and HIPAA wellness rules. However, the proposed regulations address changing the following items:

1. Incentive amounts allowed in wellness programs that are part of group health plans
2. Notification surrounding confidentiality of medical information
3. Definition of "voluntary" participation.

The proposed rules will not be effective until after publication of the final rules.

CHANGES TO INCENTIVE LIMITS

Under the EEOC rules, if the wellness program includes disability-related inquiries and/or medical examinations, employers can offer incentives up to 30% of the total cost of employee-only coverage and the program will still be considered voluntary. This limitation applies to all wellness programs, regardless of whether it is participatory, health-contingent or a combination. This is an area in which the EEOC rules differ significantly from existing HIPAA wellness rules. The current HIPAA restrictions on incentives do not apply to participatory programs, so this EEOC rule effectively imposes a new maximum on many types of wellness related incentives. Prior to this rule, employers could have designed participatory programs with incentives exceeding 30% of the premium. Now, if that incentive involves a program that includes disability-related inquiries and/or medical examinations, the maximum incentive possible will be 30%, even if it a participatory program. Employers will need to be conscious that incentive totals do not exceed 30% of the employee only rate.

The proposed regulations include special rules for smoking cessation programs. A smoking cessation program that only asks employees whether they use tobacco would not be considered a disability-related inquiry or medical examination, and would not be subject to the EEOC rules. In this case, HIPAA rules would still allow an incentive of up to 50% of the premium. However, a wellness program requiring employees to submit to medical testing to determine whether they use nicotine or tobacco is a medical examination and the rules would apply, thereby limiting even tobacco-related incentives to 30%.

Issue Date: April 29, 2015

NOTIFICATION TO EMPLOYEE:

The employer must also provide employees with a notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential.

VOLUNTARY WELLNESS PROGRAM:

In defining a voluntary program, the EEOC takes the position that wellness incentives can be offered to employees as long as participation is not required, and nonparticipating employees are neither denied coverage under any employer group health plan nor subject to any adverse employment action. Employees with disabilities must be provided a reasonable alternative that will allow them to participate and earn the incentive. This directly addresses a strategy that some employers have begun to adopt where participation in the employer's health plan is contingent on the employee completing an HRA. Under these new rules, this strategy would violate the ADA.

REMINDER

Wellness programs must be reasonably designed, with the intent to improve health or prevent disease in participating employees.

Summary

The proposed regulations address many employer questions, but some issues still need clarification. For example, the proposed rules do not provide details on affordability of care and federal subsidy eligibility. The EEOC is taking comments on the proposed rules and may make revisions before final regulations are issued. Additional issues may be address in those final rules.

Comments will be taken until **June 19, 2015.**

To submit comments go to:

http://www.regulations.gov/#!home

Use RIN number 3046–AB01

As always, should you have any questions, please contact your Parker, Smith & Feek Benefits Team.