EEOC Proposes New Limits on Wellness Program Incentives

New rules would restrict incentives for nongroup programs that track health data

By Stephen Miller, CEBS
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On Dec. 7, the U.S. Equal Employment Opportunity Commission (EEOC) released for public comment a set of proposed rules limiting the value of incentives employers may use to encourage employee participation in wellness programs that track employees' health data:

- Proposed rule on wellness programs under the Americans with Disabilities Act (ADA) (https://www.eeoc.gov/node/133647).
- Proposed rule on wellness programs under the Genetic Information Nondiscrimination Act (GINA) (https://www.eeoc.gov/node/133649).

If program incentives are too high, they would be considered to violate the ADA and GINA by coercing participation in these programs. A safe-harbor exception to the new limits is available for programs offered under a group health plan.

The EEOC is calling for public comments on the proposed rules for 60 days following their upcoming publication in the *Federal Register*.

Conflicting Statutes

A decade ago, the Affordable Care Act (ACA) amended the Health Insurance Portability and Accountability Act (HIPAA) to allow employers to encourage participation in certain types of wellness programs by offering incentives of up to 30 percent of the total cost of an employee's health insurance premiums for self-only coverage, rising to 50 percent of individual-coverage costs for employees who participate in programs that prevent or reduce tobacco use.

The ADA and GINA, however, require that employee participation in a wellness program that includes medical questions and exams be "voluntary," creating the issue of whether high-value incentives coerce employees into disclosing health information.

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Earlier Rules Vacated

In 2016, the EEOC issued regulations (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/eeoc-wellness-final-rules.aspx) that allowed employers to provide incentives for participating in a workplace wellness program that reflected the incentive caps under HIPAA, as amended by the ACA. However, AARP sued the EEOC over these rules, which AARP argued coerced employees to disclose ADA- and GINA-protected personal health information. In 2017, the district court for Washington, D.C., ordered the EEOC to replace its guidance with revised rules that comply with the ADA and GINA. When the EEOC failed to do so, the court subsequently vacated the EEOC's existing rules as of Jan. 1, 2019 (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-eeoc-wellness-regulations-vacated.aspx), leaving many incentive-based wellness programs in legal limbo (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wellness-programs-are-in-limbo-without-eeoc-regulations.aspx).

The New Rules' Incentive Limits

The EEOC is now proposing that employers can comply with ADA and GINA protections only if they offer no more than a minimal (or "de minimis") incentive to encourage participation in wellness programs outside of the group health plan, if those programs track employee health data.

The proposed ADA rule states that it "adopts the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty," and so nongroup wellness programs that include disability-related inquiries or medical exams "may offer no more than de minimis incentives to encourage employees to participate."

The EEOC's proposed GINA rule uses similar language.

Under the new proposed regulations, "de minimis is defined with examples such as a water bottle or gift card of modest value," said Ben Lupin, senior director in the health and benefits technical services unit at Willis Towers Watson.

According to consultants Katharine Marshall and Steve Schinderle of Mercer's law and policy team, the proposed guidance "suggests a health insurance premium differential of $50 per month or more, an annual gym membership, or airline tickets would *not* be de minimis."

The regulations also ask for comments about what other types of incentives should and should not be considered de minimis, and if additional examples would be helpful.

Exception for Group Health Plan Programs

Insurers frequently offer wellness programs in conjunction with a group health plan. The proposed rules create a regulatory "safe harbor" for employers regarding health-contingent wellness programs that are part of the employer's group health plan—or that qualify as a stand-alone group health plan—allowing them to provide incentives with greater than minimal value.

Under the proposed ADA safe harbor, for instance, health-contingent wellness programs that are part of, or qualify as, group health plans could still provide incentives of up to 30 percent of total cost of coverage of the plan in which an employee is enrolled, as long as they comply with HIPAA requirements for such plans, as amended by the ACA.

The proposed guidance lists four factors for determining when a wellness program is part of a group health plan for purposes of the ADA wellness rule:

- The program is offered only to employees enrolled in an employer-sponsored health plan.
- Any incentive offered is tied to cost-sharing or premium differentials under the group health plan.
- The program is offered by a vendor that has contracted with the group health plan or insurance issuer.
- The program has a term of coverage under the group health plan.

Tobacco-Cessation Incentives

According to Marshall and Schinderle, it appears that tobacco-cessation programs that are not part of the group health plan can provide more than minimal incentives to encourage participation under HIPAA/ACA rules, but "only if the program is strictly an incentive for tobacco-using employees to participate and does not ask any disability-related questions or require medical examinations, so it would not be subject to the proposed de minimis requirements."

What's Ahead

Health care specialists, pointing to the rules' complexity, expect public commenters to seek clarification on a number of issues—such as what qualifies as a de minimis incentive and how closely a wellness program must be linked to a group health plan to permit higher-than-minimal incentives.

If the rules are finalized along the lines of the proposal, one result might be that "participatory wellness programs such as health risk assessments or biometric screenings would be less likely to be completed by employees due to the lack of a better incentive to complete them," Lupin said.

Because "the de minimis limit would only apply to programs that require disclosure of health information," Lupin noted, employers with stand-alone wellness programs could decide to redesign them to avoid collecting health information, while offering incentives to encourage participation in wellness-promoting activities.

Steven Noeldner, senior consultant in Mercer's total health management practice, observed that lower participation rates in health-monitoring activities "could reduce the data available to employers in the aggregate, through their third-party vendors, to evaluate the impact of their programs on physical health. However, many employers in recent years have broadened the scope of their well-being initiatives beyond physical health to include other components of well-being," such as emotional, social and financial wellness, he noted, and "metrics to track these other components may still be available" to help determine the program's effectiveness.

In addition, the scope of the new limits could be limited, given that wellness programs offered through a group health plan that meet the existing HIPAA/ACA rules for health-contingent programs—and thus are not subject to the proposed de minimis incentive limit—"are likely to make up a large percentage of current employer wellness programs," Lupin said.

A Biden Revisit?

Another possibility is regulatory review by the incoming administration. "Republican appointees currently hold a 3-2 edge at the EEOC until at least July 2022 (https://www.fisherphillips.com/resources-alerts-eeoc-new-wellness-program-rules)," noted Mathew Parker, a partner in the Columbus, Ohio, office of Fisher Phillips. "It would not be terribly surprising for the Biden administration to put these new rules on hold until they can be re-evaluated with a majority of Democrats making up the EEOC."

Lupin believes it is unlikely that the Biden administration would want to take things back to square one, "but the new administration may change certain aspects of the final rule when issued, depending on the comments the EEOC receives."

Related SHRM Articles:

Employers Fine-Tune Wellness Incentives, Wait for EEOC Guidance (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-fine-tune-wellness-incentives-and-wait-for-eeoc-guidance.aspx), *SHRM Online*, October 2020

Wellness Programs Are in Limbo Without EEOC Regulations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wellness-programs-are-in-limbo-without-eeoc-regulations.aspx), *SHRM Online*, May 2019

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