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Practice Update

Wellness Programs May Need a Check-Up Following Recent EEOC Guidance

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Many employers offer some type of "wellness program" to their employees as a way to improve employee health and reduce healthcare spending. Wellness programs can be called many different things, including "weight loss challenges" or "healthy employee programs." Recently, there were new rules issued regarding the way these programs can be structured, and the types of incentives or rewards they may provide. These new rules are discussed in more detail below, and are relevant for all employers that either currently offer or are considering offering these types of programs in the future. They will become effective for the first full plan year beginning on or after January 1, 2017.

On May 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued two Final Rules addressing the application of Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) to employer wellness programs.

These regulations clarify prior inconsistencies between the EEOC's April 2015 proposed regulations and the existing wellness program guidance issued under the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA), specifically with regards to notice

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requirements, wellness program eligibility restrictions, and maximum incentive limits.

Given the differences and distinctions between the EEOC and the ACA/HIPAA regulations, and the EEOC's recent litigation efforts against employer-sponsored wellness programs, employers should be sure to confirm that their current or future wellness programs comply with all necessary guidance.

What is a "Wellness Program?"

A wellness program can take many forms (and may go by many different names). Generally, the term wellness program means programs or activities intended to improve employee health and reduce overall healthcare costs.

Some wellness programs either do not provide a reward, or do not require an individual to satisfy a standard related to a health factor to achieve the reward ("participatory wellness programs"), while other wellness programs require an individual to achieve a standard related to a health factor to receive an award ("health-contingent wellness programs").

Wellness programs may be offered only to employees that participate in a group health plan, or they may be offered to all employees, regardless of group health plan participation.

History of Wellness Program Regulations

As a general rule, HIPAA prohibits employers from discriminating against employees under a group health plan based on a health-status related factor. Although on its face, this general rule seems to prohibit employers from providing premium discounts or other rewards to employees that participate in wellness programs, regulations issued in 2013 confirmed that HIPAA does provide an exception from its general nondiscrimination rules for wellness programs as long as such programs

comply with a set of regulations issued in connection with the ACA.

These 2013 ACA/HIPAA regulations provided that "participatory" wellness programs are generally permissible as long as they are made available to all similarly situated individuals. However, for health-contingent wellness programs, the 2013 regulations provided the following conditions that must be satisfied:

1. *Timing*: individuals must generally be given the opportunity to qualify for a reward at least once per year;

1. *Maximum Incentive*: rewards under the wellness program may generally not exceed 30% of the total cost of coverage (or 50% to the extent that the wellness program is designed to prevent or reduce tobacco use);

1. *Reasonable Alternative Standard*: the employer must provide a reasonable alternative standard to qualify for the full reward, and must disclose the availability of this reasonable alternative standard to employees; and

1. *Reasonable Design*: the wellness program must be reasonably designed to promote health/prevent disease, and may not be overly burdensome.

The ADA Final Rule

Title I of the ADA prohibits employers from discriminating against individuals on the basis of disability, and generally restricts employers from obtaining medical information from applicants and employees. However, Title I permits employers to make inquiries about employees' health or do medical examinations that are part of a voluntary employee health program.

With the ADA Final Rule, the EEOC has described the requirements that must be satisfied for a wellness program to satisfy the voluntary employee health program exceptions.

1. *Wellness Programs Subject to the ADA Final Rule*: The Final Rule has clarified that Title I of the ADA applies to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. As a practical matter, this may necessarily include wellness programs that would otherwise be classified by the ACA/HIPAA regulations as participatory, and not subject to additional compliance requirements. For instance, a wellness program that requires individuals to complete a health risk assessment to qualify for a reward that would generally be permissible under the ACA/HIPAA regulations without satisfying any additional compliance requirements will now be required to comply with the ADA Final Rule.The ADA Final Rule also cautions that all wellness programs, including those that do not include disability-related inquiries or medical examinations, must still be made available to all employees and must provide reasonable accommodations to employees with disabilities pursuant to other sections of the ADA.
2. *Maximum Incentive:* Like the ACA/HIPAA regulations, the ADA Final Rule limits incentives that may be offered as part of a wellness program at 30% of the cost of self-only coverage (both the employer and employee's portion). However, unlike the ACA/HIPAA regulations, the ADA Final Rule does not provide an increased incentive limit for wellness programs designed to reduce tobacco use. Therefore, as a practical matter, a wellness program subject to the ADA Final Rule (i.e. it requires employees to answer a disability-related question or undergo a medical examination), will not be permitted to avail itself of the increased incentive limit under the ACA/HIPAA regulations. However, perhaps in an effort to avoid too much

inconsistency with the ACA/HIPAA regulations, the EEOC clarified in the ADA Final Rule that a wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program) is not a wellness program that asks disability-related questions. Therefore, such wellness programs will not be subject to the ADA Final Rule and may take advantage of the increased incentive limit under the ACA/HIPAA regulations.

3. *Notice*: The ADA Final Rule requires employers sponsoring wellness programs subject to the ADA Final Rule to provide participating employees with a notice that clearly explains what medical information will be obtained from the employee, and how the medical information will be used and disclosed by the employer. The EEOC will post a sample notice on its website within 30 days.

The GINA Final Rule

GINA is a federal law that prohibits discrimination in insurance and employment on the basis of genetic information. The EEOC enforces Title II of GINA, which generally prohibits employers from, among other things, acquiring genetic information about employees or their family members. However, Title II of GINA provides a limited exception against this prohibition for employers who offer voluntary health or genetic services to employees or their family members.

The GINA Final Rule provided a number of requirements that must be satisfied if an employer wishes to offer an incentive in connection with a wellness program that asks for genetic information about an employee or employee's family members.

1. *Wellness Programs Subject to the GINA Final Rule*: The GINA Final Rule only applies to wellness programs that offer an inducement to an employee or employee's family member to

answer questions about the individual's current or past health status, or to take a medical examination. Therefore, wellness programs that might otherwise be classified as health-contingent and subject to additional requirements under the ACA/HIPAA rules may be exempt from the GINA Final Rule.

1. *Eligibility for Wellness Programs Subject to the GINA Final Rule*: The GINA Final Rule provided that an employee's spouse may participate in, and earn an incentive up to 30% of the cost of employee-only coverage, however it bars children from participating, or earning incentives through, a wellness program that would otherwise be subject to the GINA Final Rule.

1. *Wellness Programs Subject to the GINA Final Rule Must Be Reasonably Designed:* Like the ACA/HIPAA regulations, the GINA Final Rule requires wellness programs to be reasonably designed to promote health. However, the GINA Final Rule appears to provide more stringent criteria than the ACA/HIPAA regulations for determining whether this requirement is satisfied. The GINA Final Rule explains that wellness programs which consist of a measurement, test, screening, or collection of health-related information that do not use such information either to provide results, follow-up information, or advice to individual participants is not reasonably designed to promote health or prevent disease. Similarly, the Final Rule explains that a wellness program that is used by an employer only to predict its future health costs will also not satisfy the GINA Final Rule.

Next Steps for Employers

The ADA and GINA Final Rules will both become effective for the first full plan year beginning on or after January 1, 2017. Employers that currently sponsor wellness programs, including those that

have been deemed to comply with the existing ACA/HIPAA regulations should take this time to consider whether their wellness programs are subject to the ADA or GINA Final Rules, and if so, whether any modifications to the wellness program are necessary.
