Recent Wellness Program Regulations: ADA & GINA

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As plan sponsors prepare for open enrollment, attention should be given to the Equal Employment Opportunity Commission's (EEOC) new wellness regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). With final rules, released May 16, 2016, regarding notice and financial incentives becoming effective for plans beginning on or after January 1, 2017, plan sponsors should review their wellness programs and incentives to ensure compliance before the rules become effective. Moreover, the EEOC asserts that the other provisions in the final rules clarify *existing* obligations and are therefore already enforceable.

This article will provide a brief regulatory overview of the EEOC's new wellness program regulations and conclude with plan sponsor best practices. As the EEOC has a history of bringing legal action against plans that sponsor wellness programs that it deems to have failed to comply with the ADA and GINA, even in the absence of regulatory guidance, the risk of such suits may become a greater threat to plan sponsors in the wake of the EEOC's new regulations. The use of the terms "plan" and "employer" are generally interchangeable throughout this article as the EEOC applies its wellness regulations to both *"equally."*

The ADA, as enacted by Congress, includes the "bona fide benefit plan" safe harbor provision. The safe harbor "exempts certain insurance plans from the ADA's general prohibitions, including the prohibition on 'required' medical examinations and disability-related inquires." The relevant portion of the safe harbor provision states that an entity that administers the benefit plans is not prohibited from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on and not inconsistent with state law." The EEOC has taken the position that the ADA's safe harbor provision does not apply to a plan's decision to offer incentives or impose penalties in connection with wellness programs that include disability-related inquiries or medical examinations. Federal courts have come to the opposite conclusion. Last year, the court in *EEOC v. Flambeau* ruled that the ADA safe harbor applied to employer-sponsored wellness programs.

Regulatory Overview

ADA

Despite many organizations advocating that the EEOC mirror its wellness regulations after the Health Insurance Portability and Accountability Act's (HIPAA) wellness program regulations, as amended by the Affordable Care Act (ACA), the EEOC declined to accommodate such requests. Unlike the HIPAA rules, the ADA and GINA rules apply regardless of whether the program is considered a participatory or health-contingent program under the HIPAA standards. Thus, although HIPAA does not impose an incentive limit on programs that do not require the individual to satisfy a standard related to a health factor, the ADA and GINA rules will impose a limit on the incentive/penalty for these programs if the requirements of such programs fall within the regulatory jurisdiction of the ADA or GINA.

If a wellness program involves disability-related inquiries or medical examinations, new ADA rules provide limits on the incentives that plans may offer employees to encourage participation in such programs. Contrary to HIPAA wellness rules, the ADA's incentive limitations apply even when the program is not part of a group health plan. For example, if an employer that does not offer a group health plan sponsors a wellness program that provides a $20 gift card for participation in a step challenge, this program would not be subject to HIPAA's wellness rules, but it would be subject to the ADA and GINA.

As clarified in the new rules, the ADA requires all wellness programs that involve a disability-related inquiry or medical examination to be voluntary.

To meet this "voluntary" standard, the plan/employer:

> may not require employees to participate;

> may not deny coverage under any of its group health plans to employees for non-participation or limit the extent of benefits (except for incentives);

> may not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate; and

> must comply with certain enhanced notice requirements.

Notably, the final rules require plan sponsors to determine the value of any non-financial incentives provided to participants of the wellness program. For example, if an employer offers a relaxed dress code for participation in the wellness program, it will be responsible for determining the value of such incentive to ensure that the incentives do not exceed the stated limits.

Contrary to HIPAA's 50 percent incentive limit for programs with a tobacco cessation component, the ADA limits the incentive to 30 percent if the program uses a biometric screening or other medical procedure to test for the presence of nicotine or tobacco. However, plans that simply ask participants whether they use tobacco products are not subject to the ADA and such incentive limits would not apply.

GINA

The GINA final regulations provide much anticipated clarification regarding whether an employer may offer incentives to an employee in exchange for the spouse's completion of a health risk assessment (HRA). As GINA defines an employee's genetic information to include current medical information of relatives by affinity (e.g., spouse), any request for a spouse's medical information results in the generally unlawful request for genetic information as it relates to the employee. Under the final rule, incentives may be offered for spouses who provide medical information related to a wellness program with an HRA component assuming all of the requirements of the final regulations are met.

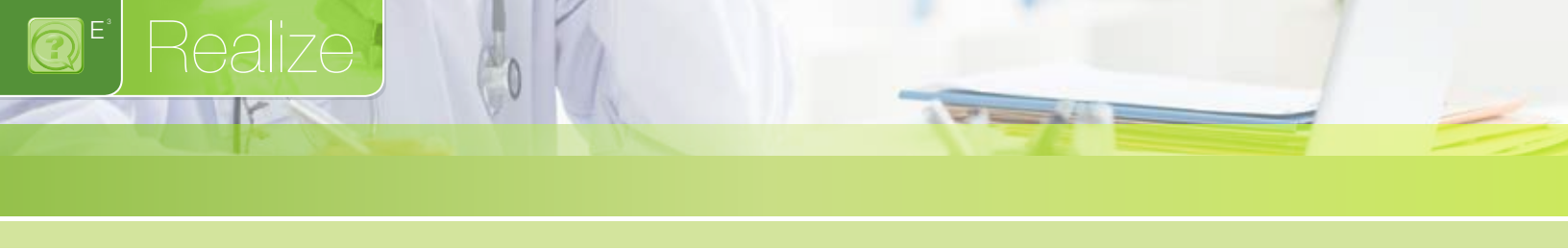
AS SOME PLANS OFFER A REDUCED PARTICIPANT PREMIUM CONTRIBUTION TO INCENTIVIZE PARTICIPATION IN THE PLAN'S WELLNESS PROGRAM, PLAN SPONSORS SHOULD CAREFULLY REVIEW THE INCENTIVE LIMITS SET BY THE NEW RULES TO ENSURE COMPLIANCE. THE FINAL RULES PRESENT THE FOLLOWING FOUR SITUATIONS AND THE INCENTIVE LIMIT THAT WILL APPLY UNDER EACH OF THE SCENARIOS:

> If participation in a wellness program is contingent upon enrollment in a particular group health plan, the employee may receive an incentive of up to 30 percent of the total cost of self-only coverage under that particular plan.

> If an employer offers only one group health plan, but participation in the wellness program is not contingent upon enrollment in the plan, the incentive is limited to 30 percent of the total cost for self-only coverage.

> Where an employer has multiple group health plans, but enrollment in any plan is not required for participation in the wellness program, the employer may offer an incentive of up to 30 percent of the total cost of the lowest cost self-only major medical plan.

> If an employer does not offer a group health plan, the incentive is limited to 30 percent of the total cost of the second-lowest cost Silver Plan for a 40-year-old non-smoker available through the state or federal exchange in the location that the employer identifies as its principle place of business.



Paralleling the ADA's incentive limitations, the final rule allows plans to offer an incentive of 30 percent of the cost of self-only coverage for a spouse's provision of medical information through an HRA. Thus, the total incentive that may be offered with such programs will be no more than 30 percent of the total cost for self-only coverage multiplied by two. The GINA rules mirror the ADA's method for determining which self-only plan will be used as the benchmark for determining the amount of the incentive discussed above.

The EEOC also provided clarification on whether incentives may be offered to employees' children who provide current or past health status information. It has taken the position that wellness programs that provide incentives for employees' children to provide current or past health status information violate GINA. This prohibition extends to both minor and adult children as well as biological or adopted children. Thus, no incentive may be offered to the children of employees.

Best Practices

Plan sponsors should review their wellness programs before open enrollment to ensure the program is complaint with the final regulations. Programs that were previously compliant under HIPAA's regulations, as amended by the ACA, may no longer be compliant in light of the EEOC's final rules. Appropriate legal counsel should be sought to confirm a wellness program's current and future compliance as certain aspects of the final rules are meant to clarify existing obligations rather than create new responsibilities.

With the new administrative/compliance burdens resulting from the final regulations, plan sponsors should evaluate the return on investment (ROI) for these programs. In light of the reduced ability to incentivize participation, plan sponsors may find a diminished value of such programs. Plan sponsors should consider offering different programs that may limit compliance responsibilities such as educational programs, financial wellness, healthy food offerings, Right Direction, etc. Ensuring that wellness programs are providing the minimum necessary ROI should be a priority before investing more time and resources into current wellness programs.

The EEOC's sample notice can be found at:
https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

Seff v. Broward County, 691 F.3d 1221, 2012 U.S. App. LEXIS 17501, 26 Am. Disabilities Cas. (BNA) 1153, 23 Fla. L. Weekly Fed. C 1432, 15 Accom. Disabilities Dec. (CCH) P15-092, 2012 WL 3552650 (11th Cir. Fla. 2012)

EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849, 2015 U.S. Dist. LEXIS 173482, 17 Accom. Disabilities Dec. (CCH) P17-002 (W.D. Wis. 2015)

Regulations under the Americans with Disabilities Act (Final Rule), 81 Fed. Reg. 31125 (May 17, 2016).

Genetic Information Nondiscrimination Act (Final Rule), 81 Fed. Reg. 31143 (May 17, 2016).

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