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Final Regulations Shed Light on Wellness Programs

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Background

The Americans with Disabilities Act (ADA) generally prohibits employers with at least 15 employees from making disability-related inquiries or requiring medical examinations unless job-related and consistent with business necessity. There is an exception where participation is voluntary, a term which was not defined.

The Genetic Information Nondiscrimination Act (GINA) Title II prohibits all employers with at least 15 employees from using genetic information (which includes the current and past health status of a spouse and children) in making decisions about employment. It restricts employers from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies. It also limits the disclosure of genetic information.

On April 20, 2015, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations providing the first guidance on how employers may use incentives in wellness programs and comply with the ADA. Similar guidance was subsequently released with respect to GINA.

On May 17, 2016, the EEOC announced final regulations under the ADA and GINA Title II regarding wellness programs. These regulations are similar to the proposed rules issued last year and more restrictive than the existing HIPAA rules. All three rules need to be carefully looked at when implementing incentive-based programs.

Bottom Line on Rewards

- Incentivized wellness programs with the reward at or below 30% of the total cost of self-only coverage generally are permissible under HIPAA, ADA, and GINA. Assuming compliance with the other requirements of these various laws, namely notice requirements, such rewards will not pose a risk.

- Employers intending to be more aggressive with their wellness program and offer incentives larger than the 30% self-only threshold require close review. While larger rewards are permissible in some cases, the specific features of the wellness program will determine whether the reward meets the applicable requirements under HIPAA, ADA, and GINA.

One caveat with rewards is if the employer is rewarding a spouse for completion of a risk assessment or tying the spouse's risk assessment to enrollment. GINA Title I prohibits a group health plan from collecting genetic information prior to or in connection with enrollment in health insurance coverage and for underwriting purposes. It is not clear whether a wellness program that provides rewards for a spouse's completion of a risk assessment (or ties the assessment to enrollment) violates GINA Title I as a spouse's medical history (which is collected in the spouse's risk assessment) is considered genetic information of the plan participant. More guidance on this issue is needed.

Highlights

Here are the highlights of the final regulations:

Applicability

The ADA rules on voluntary wellness programs apply to any employer wellness program that asks disability-related questions or requires medical examinations of employees. For example:

- Programs where employees must complete a health risk questionnaire, undergo an annual physical, or have other medical testing (e.g., biometric screenings) are subject to the ADA rules on voluntary wellness programs.
- Programs that require attendance in a nutrition class or a certain amount of exercise a week are not subject to the ADA voluntary rule. However, separate from these rules, the ADA requires employers to make reasonable accommodations to allow employees with disabilities to participate in any type of wellness program.

The final rules clarify that the safe harbor for insurance, that allows insurers and plan sponsors to use information, including actuarial data about risks posed by certain health conditions, to make decisions about insurability and the cost of health insurance coverage does not apply to wellness programs.

If the wellness program uses incentives to encourage a spouse to answer questions related to his/her current or past health status or complete a medical examination, GINA Title II applies. Such incentives are prohibited for children. The final rules clarify a "child" for this purpose includes an adult, minor, and adopted child. GINA also prohibits incentives tied to a spouse providing his or her own genetic information (e.g., results of a spouse's genetic tests).

Both the ADA and GINA apply to all wellness programs, regardless of whether the program is part of, or outside of, a group health plan.

Voluntary Wellness Programs

To qualify as a voluntary wellness program under the ADA, the employer:

- cannot require any employee to participate in the program;

- cannot deny any employee access to coverage under any group health plan for non-participation in the program or prohibit any non-participating employee from choosing a particular plan;

- cannot take any adverse action, retaliate against, or coerce employees who choose not to participate in the program; and

- must provide employees with a notice that clearly explains what medical information is obtained, who will receive it, how it will be used and the restrictions on disclosure (including whether the restrictions on disclosure comply with HIPAA Privacy Rule). The EEOC is expected to issue a model notice employers can use to meet this requirement.

The EEOC makes clear that certain tiered health benefit and cost-sharing structures that base eligibility for a particular health plan on completing the risk assessment or undergoing a medical exam will not meet this voluntary requirement. Two examples in the preamble help clarify this point:

- A program that allows employees who participate in the risk assessment to enroll in a comprehensive health plan, while non-participating employees are only eligible for a less comprehensive plan violates the ADA.

- However, such an arrangement would not violate the ADA if the non-participating employee could choose the more comprehensive program and pay more for the same comprehensive coverage than what a participating employee pays for the coverage (so long as the difference in cost does not exceed the permitted incentive limits).

Incentives

Unlike the proposed regulations, the final regulations adopt the same framework for establishing permissive incentive thresholds for purposes of the ADA and GINA Title II. Notably, these rules are more restrictive than what is permitted under the HIPAA rules.

The 30% Limit.

If a wellness program is available to the employee and includes medical examinations and/or health risk assessments, the maximum reward available is no more than 30% of the total cost of self-only coverage.

If the wellness program is available to the employee and spouse and includes medical examinations and/or health risk assessments, the maximum reward available is 30% of the total cost of self-only coverage for the employee PLUS 30% of the cost of self-only coverage for the spouse.

No incentive may be offered for a child to provide information about his or her current or past health status.

The ADA and GINA rules do not permit the employer to use family coverage when calculating the 30%.

The 30% threshold takes into account all incentives. This includes financial incentives (e.g., premium reductions or surcharge, cash, or gift cards) and in-kind incentives (e.g., t-shirts, water bottles, or fitness trackers).

How is the cost of coverage determined?

The cost of coverage is determined based on the total cost of self-only coverage (this includes employer and employee costs).

When participation in the wellness program is limited to employees (and spouses) who are enrolled in the health plan, the cost of coverage is based on the plan in which the employee is enrolled.

The final regulations provide a framework to determine the cost of coverage when the wellness program is available to all employees (and their spouses) regardless of enrollment in a health plan option:

- When the employer offers one health plan option and allows both enrolled and non-enrolled employees to participate in the wellness program, then the permissible incentive is determined using 30% of the cost of self-only in the sole health plan option.

- When the employer offers multiple health plans and allows both enrolled and non-enrolled employees to participate in the wellness program, then the permissible incentive is determined using 30% of the cost of self-only coverage in the lowest cost health plan option.

Tobacco use.

When an employer uses medical tests to detect nicotine (e.g., through a blood draw or mouth swab), then the ADA's 30% limit is triggered.

A wellness program that merely asks employees about their tobacco use is not a program that asks disability-related inquiries. It is not subject to the 30% threshold. However, to the extent the program is tied to a group health plan, the maximum reward is capped at 50% of the total cost of coverage and a reasonable alternative standard must be provided under HIPAA.

GINA does not apply to tobacco use.

Reasonable Design

Under both the ADA and GINA Title II, the wellness program must be reasonably designed to promote health and prevent disease.

This means the program cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be subterfuge for violating the ADA, GINA, or other employment discrimination laws, or require employees to incur significant costs for medical examination.

- A program that asks employees (and their spouses) to answer questions about health conditions or have a biometric screening or other medical examination for the purposes of alerting them to health risks (like elevated cholesterol) is reasonably designed.

- Asking employees (or their spouses) to complete a risk assessment without providing additional feedback or follow-up or advice about risk factors or using the aggregate information to design programs to treat specific conditions is NOT reasonably designed.

- A program that merely shifts costs to the employees based on their health or is used only to predict future costs is NOT reasonably designed.

Confidentiality

The two rules also make clear that the ADA and GINA provide important protections for safeguarding health information. The ADA and GINA rules state that information from wellness programs may be disclosed to employers only in aggregate terms except as necessary to administer a health plan.

The ADA rule requires that employers give participating employees a notice that describes what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure, and the way information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information to participate in a wellness program or to receive an incentive.

The guidance published along with the final ADA rule and the preamble to the GINA final rule identify some best practices for ensuring confidentiality, such as adopting and communicating clear policies, training employees who handle confidential information, encrypting health information, and providing prompt notification of employees and their family members if breaches occur. A wellness program that is part of a group health plan may satisfy its obligation by adhering to the HIPAA Privacy Rule.

Effective date

The ADA and GINA provisions are effective for plan years beginning on or after January 1, 2017 (except that ADA provisions related to denying a plan option or failing to make a reasonable accommodation are simply clarifying language and should be followed now).

Employer Action

- Employers with rewards at or under 30% of the total cost of self-only coverage generally will not need to alter their approach to incentives.
- Employers that extend wellness program incentives to employees who do not participate in the group health plan and/or have participatory wellness programs should review whether the incentives are set at the appropriate level in light of the new guidance.
- Employers looking to be more aggressive with incentives will need to carefully review the coordination of HIPAA, ADA, and GINA provisions to ensure compliance with the various applicable limits for plan years that begin on or after January 1, 2017.
- For plan years beginning on or after January 1, 2017, a new notice will be required if the employer's wellness program includes medical exams and disability-related inquiries.