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New wellness rules leave little time for compliance

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Your boss walks into your office and says: “I heard there are new rules for wellness programs. Are we in compliance?”

Can you smile and say: “Yes! Here is a summary of rules and how we comply”? If not, read on.

What are the new rules?

The newest rules come to us courtesy of the Equal Employment Opportunity Commission (EEOC). The EEOC enforces parts of the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). The new rules were issued May 17, 2016, and interpret the interaction of the ADA and GINA with wellness programs. The rules are final, and they contain several important changes from proposed rules that were issued last year. In previous articles, we provided an introduction to the issue and a follow-up on how the proposed GINA rules added another layer of complexity.

Your organization's wellness program must comply not only with the new ADA and GINA rules, but also with the Health Insurance Portability and Accountability Act (HIPAA), the Internal Revenue Code, and the Employee Retirement Income Security Act (ERISA) to the extent applicable. The design of your organization's wellness program will determine which laws it will be subject to (e.g., a wellness program that is a group health plan or part of one will be subject to more of these laws than a wellness program that is not). HIPAA in particular has wellness rules similar, but not identical to the ADA and GINA. Your wellness program may satisfy the HIPAA wellness rules, but that does not mean it also satisfies the ADA and GINA wellness rules. So, it is important to know which laws apply to your organization's wellness program and make sure that your program satisfies each of those laws.

This article refers to the new ADA and GINA rules as the “final rules,” but beware not to confuse these rules with other laws that apply to wellness programs, such as the Internal Revenue Code, HIPAA and ERISA. Each section of this article describes a specific requirement of the final rules. We recommend that you read through all of the requirements and talk to your benefits consultant before applying them to your wellness programs.

Act fast to determine whether or not your wellness program complies with the final rules.

Except for two parts of the final rules, the EEOC’s position is that the final rules are “clarifications” of existing law and are immediately **and retroactively** applicable. So, although you have a small cushion of time to prepare for the new notice and incentive requirements, you should determine as soon as possible that your company’s wellness program complies with all other aspects of the final rules since they are already applicable.

As noted, two parts of the final rules have a specific effective date that is the first day of the first plan year that begins on or after January 1, 2017. These two parts are:

1. The rule that employers must provide employees with the special notice described below in the "Voluntary designation" section.
2. The rules regarding wellness program incentives described below in the "Maximum 30% rule" section.

If your organization has already conducted or soon will conduct health risk assessments (HRAs) or biometric screenings during 2016 for incentives payable in 2017, you may be wondering if you must make changes to your 2017 incentives to satisfy the new rules, and whether you must provide the special notice now or if you can wait until 2017. We think that the new rules apply to incentives provided for the 2017 plan year, so your company will likely need to make sure that its 2017 incentives satisfy the new rules even if HRAs/biometric screenings for those 2017 incentives have already occurred.

And, although the final rules indicate that the special notice requirement will be effective for plan years beginning in 2017, the EEOC has informally indicated that the special notice should be provided during 2016 for HRAs/biometric screenings that affect incentives payable during 2017. So, out of an abundance of caution, employers may want to provide the special notice for HRAs/biometric screenings that have already been or will be conducted during 2016 for incentives payable during the 2017 plan year.

The "reasonably designed" requirement

Your wellness program must be reasonably designed to promote health or prevent disease. When the government uses the phrase “reasonably” in a law, there is no clear or “bright line” answer about whether or not a particular program satisfies the law. Instead, we have to reason our way to a conclusion based on all the facts and circumstances involved.

That said, the EEOC has provided some guidance to help employers determine whether a wellness program is reasonably designed to promote health or prevent disease. For example, if a wellness program collects health data through HRAs and/or biometric screenings and also provides results, follow-up information or advice designed to improve the health of participating employees, it likely meets this requirement.

Even if a wellness program does not communicate results to participants or provide follow-up information or advice, it may still meet this standard if the data is used to design a program that addresses at least “a subset” of the conditions identified in the data. The term “subset” isn’t defined, but it would seem to require that the program addresses at least two conditions identified in the data.

We think most wellness programs will meet this standard, but some questions arise because the reasonably designed requirement applies to all wellness programs, even those that do not involve questions about health status (or, in ADA parlance, “disability-related inquiries") or medical examinations. For example, when will a workplace exercise program, a “biggest loser” type of weight loss competition, or health education program be considered reasonably designed? The final rules do not directly answer that question.

The “voluntariness” requirement

Wellness programs that involve questions about health status such as HRAs, medical examinations or biometric screenings must comply with additional requirements, including the requirement to be “voluntary.” There are four things your organization must do so that the wellness program is “voluntary”:

1. Your organization can permit, but not require, employees to participate. This means you cannot discipline or terminate an employee based on the employee’s non-participation in your wellness program.

2. If your company has a group health plan, the plan cannot condition eligibility for the plan, any benefit package within the plan, or any benefit offered under the plan on participation in the wellness program, except as permitted by the 30% incentive rule described below. For example, a plan offering HMO and PPO options cannot condition PPO eligibility on participation in the wellness program. But if you have three different benefit packages that are identical other than the deductible amount, you may be able to restrict enrollment to only one package based on participation in the wellness program if you can demonstrate that the difference in cost sharing satisfies the 30% incentive limit (when added to any other incentives subject to the limit).

3. Your company must not take any adverse employment action or retaliate against, coerce, intimidate, or threaten employees for exercising their rights under the ADA or aiding or encouraging others to exercise their rights.

4. Your organization must provide employees with written notice that is understandable and describes the medical information that will be obtained by the wellness program and how it will be used. In addition, the notice must describe the restrictions on the disclosure of the employee's medical information, the individuals with whom the information will be shared and the methods the organization will use to ensure that medical information is not improperly disclosed. If your organization already has a notice that contains all of the required information, you will not need to adopt a new notice. **Note**: the EEOC plans to issue a model notice within a month or so.

The maximum 30% reward rule

If your wellness program involves a health risk assessment or biometric screening, the maximum wellness program reward is 30% of self-only coverage (employee's and employer's portions) under the employer's group health plan. Yes, you read that correctly: 30%. The reference plan (i.e., the plan used to calculate the 30% incentive) depends on how your organization structures its wellness program eligibility:

1. If the wellness program is limited to employees enrolled in a particular group health plan, the reference plan is that group health plan.

2. If the employer has a single group health plan and the wellness program is available to all employees regardless of plan enrollment, the reference plan is the group health plan.

3. If the employer has multiple group health plans and the wellness program is offered to all employees regardless of plan enrollment, the reference plan is the plan with the cheapest self-only coverage option (even if an employee actually enrolls in a more expensive option).

4. If the employer does not have a group health plan, the reference plan is the second cheapest Silver Plan for a 40-year-old non-smoker on the state or federal healthcare exchange in the location that the employer identifies as its principal place of business.

See below for the maximum incentive if the employee's spouse can participate in the wellness program. These maximum incentive rules apply only to wellness programs that involve questions about health status or medical examinations. They do not apply to programs that, for example, provide incentives for attending weight loss or nutrition programs or exercising a certain amount each week.

Keep in mind that any incentive may also have to comply with the HIPAA wellness plan rules. A current incentive that is legal under HIPAA may be higher than allowed under the ADA and may have to be reduced.

Interaction with ACA tobacco incentives

I know you're asking yourself, "But how does this interact with the Affordable Care Act's (ACA's) rules relating to tobacco non-use incentives?" The ACA rules permit wellness program incentives to be as much as 50% of the total cost of coverage if the incentive above 30% is related to a tobacco non-use incentive. The ADA rules, however, do not permit this unless the incentive relating to tobacco non-use does not involve a disability-related inquiry or biometric screening. This means that if you merely ask employees whether or not they use tobacco and an employee says yes, you can provide an incentive of 50% of the cost of coverage as long as the incentive also meets the ACA rules. But if you conduct a blood test for tobacco use, any incentive relating to tobacco non-use (when added to any other incentives subject to the limit) cannot exceed the 30% threshold.

Interaction with spousal Incentives

If your organization also offers incentives based on your employees' spouses in the wellness program, your organization can provide an additional incentive (i.e., on top of the employee's incentive) to incentivize the spouse to provide information about his or her medical condition (but not genetic information) as part of an HRA. The incentive must be no more than 30% of self-only coverage (employee's and employer's portions) under the employer's group health plan, and calculation of the spousal incentive must use the same reference plan as the incentive for the employee (see above). This limit will often be lower than the limit currently allowed under HIPAA, which means employers with spousal wellness incentives may need to reduce their total rewards.

Regarding children: The final rules prohibit providing incentives for participation by employees' children in a wellness program.

Heightened confidentiality requirements

Your wellness program must comply with heightened confidentiality requirements. The ADA already imposed confidentiality requirements on employee medical information or history. These requirements include collecting and maintaining the medical information on separate forms and in medical files that are treated as confidential medical records (subject to some limited exceptions), and not using the medical information for any reason inconsistent with the ADA.

The final rules contain two new ADA confidentiality requirements. First, employers may receive only aggregate and not individually identifiable data from the wellness program, unless the individually identifiable information is necessary for the employer to administer the plan (e.g., to determine whether an employee qualifies for a particular incentive). For wellness programs that are required to comply with HIPAA, the EEOC has said that compliance with HIPAA's privacy rules means "likely" compliance with this new ADA confidentiality requirement. However, if your organization's wellness program is not subject to HIPAA, it will need to comply with this new requirement.

Second, an employer cannot require an employee to agree to the sale, exchange, sharing, transfer or other disclosure of medical information (except as permitted by the ADA to carry out specific activities related to the wellness program). An employer also cannot waive any confidentiality protections as a condition for participation in a wellness program or for earning any related incentive. To make sure that your organization's wellness program meets this second requirement, you should review all paperwork relating to your wellness program, including the paperwork that your company's third party vendors use to conduct HRAs and biometric screening (e.g., authorizations, informed consents, etc.).

We can help

We offer several resources to clients to assist with wellness program compliance. These resources include a wellness plan compliance flowchart, an incentive calculator and a wellness program compliance guide, as well as consultations with our wellness consultants. We are updating these resources for the new rules described in this article, and they will be ready soon. Please contact your consultant or service team for more information.

For more information about the new wellness rules, contact us.