PALEY ROTHMAN
ATTORNEYS AT LAW

EEOC Proposes Rules on Wellness Programs

By Jessica Summers

On April 16, 2015, the EEOC issued its long awaited, and much anticipated, proposed rules on wellness programs as they relate to the requirements and restrictions of the Americans with Disabilities Act (ADA). Once finalized, these rules will be the critical guide for employers on how they can sponsor a wellness program without running the risk of liability for violating the ADA.

In 2009, the Patient Protection and Affordable Care Act (ACA), among many other things, amended and expanded the wellness provisions of the Health Insurance Portability and Accountability Act (HIPAA). The primary purpose of these changes was to make it easier for employers to support and promote healthy behavior among their employees in order to help cut health costs.

As we previously reported, in 2013, the U.S. Departments of Health and Human Services, Labor and Treasury issued joint final rules on employment-based wellness programs, which amended the preexisting HIPAA regulations. The 2013 joint rules set clear standards for how different types of wellness programs must be structured to comply with the HIPAA non-discrimination rules, which prohibit such programs from discriminating amongst individuals on the basis of health factors. However, prior to the release of the EEOC's proposed rules, open questions remained as to how to structure wellness programs, so as to comply with the ADA.

The key issue with wellness programs and the ADA, is the fact that the ADA places tight restrictions on an employer's ability to make disability-related inquiries of its employees or to require employees to submit to medical examinations. The ADA does however, provide an exception to these restrictions, allowing employers to make such inquiries or conduct such exams when these actions are taken as part of a voluntary employer health program.

Like the joint HIPAA rules, the EEOC rules emphasize that any employer sponsored health program must be reasonably designed to promote health and prevent disease. However, the biggest issue in the EEOC's proposed regulations is to how an employer can offer an incentive based wellness program that is still deemed to be voluntary for the purposes of the ADA exception allowing for the medical inquires or exams.

The proposed regulations provide that, in order to be considered voluntary, a wellness program must meet the following requirements:

- Employees cannot be required to participate in the program;
- Employees cannot be denied health coverage or specific benefits, nor can the extent of their benefits be limited, for declining to participate in the program;
- Employees cannot be subject to adverse actions or retaliation for declining to participate in the program or failing to meet the program's outcome requirements; and
- Where the wellness program is part of a group health plan, the employer must provide employees with a written notice which the employee is reasonably expected to be able to understand and which identifies (i) the type of medical information that the will be obtained through the program, (ii) how the information will be used, (iii) with whom the information will be shared, (iv) what restrictions will be placed on the disclosure of the information, and (v) what actions will be taken to prevent improper disclosures of the information.

The proposed regulations make it clear that providing employees with an incentive for participating in a wellness program that is part of a group health plan will not impact the programs voluntary status so long as total incentives under the program do not exceed 30% of the cost of employee-only health coverage, or 50% in the case of smoking cessation programs. These are the same maximum benefit thresholds as set by the joint HIPAA regulations.

In addition to the key provisions on voluntariness, the proposed regulations also include news confidentiality provisions which specify the terms under which, and extent to which, a health program can share health information collected as a part of a wellness program.

Interested parties will now have sixty (60) days to submit comments to the proposed rules.

Bottom Line for Employers: While these rules are not final, employers should treat these proposed rules as an advanced warning of the types of changes that they may need to make to the administration and/or structure of their wellness plans once the rules are finalized in order to ensure ADA compliance.

 | 4800 Hampden Lane, 6th Floor, Bethesda, MD 20814-2930 | 301-656-7603 | 301-654-7354 fax **www.paleyrothman.com**