Intersection of the Affordable Care Act and Employment Discrimination Law

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The Affordable Care Act (ACA) provides increased incentives for employer wellness programs. See 26 CFR Part 54; 29 CFR Part 2590; 45 CFR Parts 146 & 157. The ACA also created incentives to small businesses to begin wellness programs. First, the ACA has increased the maximum permissible reward under a health contingent wellness program offered in conjunction with a group health plan from twenty percent (20%) to thirty percent (30%) of the cost of coverage and would increase the maximum reward to fifty percent (50%) for wellness programs designed to prevent or reduce tobacco use. The rewards may be in the form of a premium discount, reduced cost sharing, the absence of a surcharge, or a benefit that would not otherwise be provided under the plan. Also, $200 million per year has been made available through 2015 for wellness grants for small businesses that employ fewer than one hundred (100) individuals who work twenty-five (25) hours or more per week. The grants will be available to businesses that did not have a wellness program in place when ACA was passed in March 2010.

The Departments of Health and Human Services (HHS), Labor and the Treasury have released joint proposed rules on wellness programs to reflect the changes made by the ACA, and these proposed rules will be effective for plan years starting on or after January 1, 2014.

The proposed rules support workplace wellness programs, including "participatory wellness programs" which generally are available without regard to an individual's health status. These include programs like reimbursement for the cost of membership in a fitness center; providing a reward to employees for attending a monthly no-cost health education seminar; or rewarding employees who complete a health risk assessment without requiring them to take any further action.

The rules also outline standards for non-discriminatory "health contingent wellness programs," which generally require individuals to meet specific standards to obtain a reward. Examples of these health contingent programs are rewards for the abstention or decrease of use of tobacco, programs providing rewards for achieving specified cholesterol or weight levels or those who fail to meet a biometric target but take certain additional affirmative required actions. The proposed rules try to protect consumers from unfair practices occurring in implementing health contingent wellness programs.

The rules are, unfortunately, vague and ambiguous, and it is unclear how the standards will be enforced. The rules are as follows: (1) The programs must be reasonably designed to promote health or prevent disease and to be considered such a program, the program must offer a different, reasonable means of qualifying for the reward to individuals who do not meet standards based on measurement, test or screening. (2) The individuals in the plan must be given notice of the opportunity to qualify for the same reward through other means. (3) The programs must have a reasonable chance of improving health or preventing disease and not be overly burdensome for the individual. "Overly burdensome" is not defined. (3) As well, the programs must be reasonably designed to be available to similarly situated individuals.

However, if employers are not careful, these wellness programs can run afoul of the Americans with Disabilities Act as Amended (ADAA) and the Genetic Information Non-Discrimination Act (GINA). For those of you not familiar with GINA, like the ADA and most other Title VII laws, it applies to employers with fifteen (15) or more employees and prohibits obtaining or using genetic information for employment decisions. GINA became effective November 21, 2009. The final GINA rules make clear that employers may not offer financial inducements for individuals to provide their genetic information as part of a wellness program. However, employers may use the genetic information voluntarily provided to guide that individual into an appropriate disease management program. GINA rules do allow offering financial incentives for entering disease management programs if the program is open to employees with current health conditions whose lifestyle choices put them at increase risk of developing a condition, not just those employees with a genetic predisposition to have a certain disease.

The EEOC has not offered any clear guidance regarding the ACA incentive provisions in relation to ADA and GINA. However, in 2000 and in 2011 the EEOC did issue some enforcement guidance regarding disability-related inquiries and medical examinations of employees. The 2000 guidance briefly addressed wellness programs. The EEOC stated that under the ADA employers can conduct **voluntary** medical examinations and **voluntary** activities including the taking of medical histories as part of an employee wellness health program without having to show that they are job-related and consistent with business necessity. A wellness program is deemed voluntary as long as the employer neither requires the participation nor penalizes the employees who choose not to participate. Additionally, the medical records acquired as part of the wellness program must be kept confidential and separate from general personnel records.

Further, in 2011, after passage of the ACA, the EEOC publicized an informal discussion letter regarding incentives to employees for wellness programs. In a traditional wellness program, employers

can offer employees incentives to participate in wellness programs. However, under ADA and GINA employers are prohibited from obtaining medical information to identify employees with problematic medical histories. The letter addressed the conflicts between the wellness programs, ADA, and GINA. The letter iterated that employers can conduct voluntary medical examinations and obtain information from voluntary medical histories as part of an employee wellness program. However, the EEOC did not take a position on whether offering financial incentives to employees to participate in wellness programs that include disability-related inquiries or medical examinations (such as blood pressure and cholesterol screening) is prohibited under the ADA or GINA.

As you can see, creation or improvement of wellness programs implicates several complex federal laws. If you are interested in the incentives, it is suggested that you contact not only your health insurer but also a labor attorney to analyze if your wellness program is compliant with the ACA and anti-discrimination laws.

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