CARLTON FIELDS

“Gating” Through Wellness Programs Under Proposed EEOC Regulation

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This article examines a recently proposed regulation that limits certain rewards provided through wellness programs. Equal Employment Opportunity Commission (“EEOC”) Proposed 29 CFR 1630.14(d), issued under the under the American’s with Disabilities Act (“ADA”), has been described as effectively eliminating the general practice of creating “gated levels” of a health plan. In examining those claims, this article omits wellness program restrictions imposed by the Affordable Care Act, the Health Insurance Portability and Accountability Act (“HIPAA”), other portions of the ADA, or other laws governing or affecting wellness programs, in general, even though an understanding of these restrictions is vital to creating an effective, compliant wellness program.

Employment Law, Employee Benefits, and the ADA

“Employment law” and “employee benefits” are areas of practice that often inter-relate, especially in the area of health benefits. The Family Medical Leave Act is a perfect example of this, in that whether an employee is entitled to the benefits of that law is generally considered an employment law issue, while an employer’s compliance necessitates its refining its health plan documentation and procedures, which is generally considered an employee benefits issue. The ADA has largely focused on employment law concerns of discrimination in the workplace, but this regulation focuses on discrimination within an employer’s group health plan. If the EEOC raises concerns under the ADA or an employee brings a claim on the basis that he or she was unfairly discriminated against, one would hope that an employer would immediately involve its employment law attorney, and in order for that employment law attorney to understand, properly advise, and defend a claim brought under this portion of the ADA, there needs to be a basic understanding of the employee benefit concepts at issue.

Terminology

Since this portion of the ADA relates to employee benefits, it involves some concepts with terminology that might not be familiar. Following is a brief explanation of several of these concepts.

- *Gated levels or gating*: This term describes the practice of using a single health plan that provides different levels of coverage, generally through different ratios of co-insurance and deductibles. While “tiers” often refer to who is covered (such as just the employee or the employee and his or her spouse), “gated levels” refers to the extent of coverage (such as whether a covered procedure is reimbursed by insurance at 100% or 80% of the cost, with the participant paying the remainder). When a wellness program is used to determine the available levels of coverage, this practice is “gating.”
- *Health plan*: This term describes an employer-sponsored employee benefit plan that provides healthcare. Common medical plans, dental plans, and vision plans are normally health plans. Dependent care assistance programs and policies that pay an insured a set amount upon an event (such as admission to a hospital or a cancer diagnosis) without regard to the medical procedures or costs incurred is generally not a medical plan.
- *Health Risk Assessment*: This term refers to the collection of data, often through questions concerning medical histories and the drawing of blood in order to assess and address potential medical risks.
- *Participant*: This term describes an employee who enrolls in a health plan or wellness program. In some employee benefit situations, this term includes individuals who are eligible, but choose not to participate in a program, but that is not how this term is used here.
- *Wellness program*: This term describes a program designed to encourage employees to make healthy lifestyle choices. In this article, the term is abbreviated as “Program.” A Program can be a “health plan” by providing medical care, such as screenings and vaccinations, but does not need to be. For example, a wellness program that rewards employees for exercising is not a health plan, but is a wellness program.

Scope of Regulation

EEOC Prop 29 CFR 1630.14(d), titled “Other acceptable examinations and inquiries,” states that “A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.” (emphasis added). The EEOC’s goal with this regulation is to ensure such examinations are truly voluntary. Subsection (d)(1) indicates that the regulation governs any wellness program that requires “disability-related inquiries” or “medical examinations,” and that such arrangements must be voluntary and have a reasonable chance to improve health. The Internal Revenue Service seems to give employers the benefit of the doubt on whether a Program will promote health, by providing guidance allowing the permissibility of less-scientific activities such as aromatherapy. It is not clear whether the EEOC will be as lenient.

Subsection (d)(2) of the regulation clarifies that medical histories and health risk assessments will make Programs subject to this regulation. Other aspects of a Program may not be subject to this regulation. For example, requiring participation in an anti-smoking program is probably not subject to this regulation because it is probably not a medical examination, but a requirement that a participant certifies that he or she is a non-smoker may be a part of someone’s medical history.

Voluntary

A primary purpose of the regulation is to explain when a Program will comply with the requirement that Programs be voluntary. A significant concern of the EEOC is the use of financial incentives to coerce employees to participate in a Program.

Participation in a Program will not be voluntary (and, thus, violate this regulation) if failure to participate in a Program results in complete ineligibility under any of an employer’s group health plans or benefits packages,[1] or if benefits were limited by more than a value equal to 30% of employee-only coverage.[2] The practice of gatekeeping does not automatically require a denial of health plan eligibility; rather, it can restrict or affect deductibles, copays, and other aspects of an individual health plan. In that instance, the restrictions should be permitted if the financial impact does not exceed the 30% limit.[3] Subsection (3) describes this limit and refers to the “total cost” of employee-only coverage, which generally means the “total premium,” regardless of whether that total premium is paid by the employer, the employee, or both. For commercially-insured health plans, the insurer sets a premium rate and the employer determines the portion that will be born by the employer and the employee, so knowing the total premium is relatively simple. With self-insured health plans, the employer must be prepared to pay claims, and must determine what employees must pay in terms of premiums, but the concept of a “total premium” does not necessarily apply. If the self-insured plan has properly established its COBRA premium rate,[4] that rate (less the administrative surcharge) should be used to determine the total cost of coverage.

Compliance and Cost-Sharing

This regulation’s restriction on financial incentives can be easily applied to Program rewards that are paid in cash, provided through a premium reduction (or increase), or any other method in which the dollar value of the reward is known at the onset, as an employer simply compares the known dollar value of the incentive to 30% of the total cost of the employee-only premium. However, when the value of a reward depends on the medical treatments and services obtained during the year, the application of this rule is unclear. For example, if a health plan provides for employees to pay 30% of covered expenses while the health plan pays 70% of those expenses, and a Program provides that successful completion will result in the health plan paying 80% of covered services, one cannot know the total dollar value of the benefit received from participation in the Program until the expenses are incurred. A participant with no medical expenses will have received no benefit from the Program while a participant who incurred significant expenses will have received significant benefits (or penalties) under the Program. If the EEOC ultimately enforces the regulation to mean that a Program offering rewards violates the ADA unless it precludes the mere possibility that the benefit could exceed the 30% threshold, then using a Program for gating purposes will probably no longer be practical.

Similarly, the regulation focuses on wellness program requirements, rewards, and penalties applicable to employees,[5] so its application to benefits that may be utilized by spouses and dependents (as is the case with rewards provided through deductibles, copays, and other cost-sharing mechanisms) is unclear. On October 30, 2015, the EEOC issued proposed amendments to 29 CFR 1635.8 and .11, affecting Wellness Programs under the Genetic Information Nondiscrimination Act (“GINA”), which generally protects employees from discrimination on their genetic information.[6] This proposed regulation focuses on wellness incentives offered for spousal information,[7] proposing to add to the pre-existing regulation, a statement

specifically allowing incentives for spousal genetic information, but limiting the incentive to 30% of the total premium of the coverage tier selected by the employee.[8] Since the "ADA limit" relates to employee-only coverage, which is normally the least expensive coverage tier, and the "GINA limit" relates to the tier of coverage actually selected by the employee, the 30% "GINA limit" may be viewed as more generous than the 30% "ADA limit." The focus on the total premium elected by the participant in assessing the GINA limit, combined with the focus on the employee-only premium and rewards for employee information when assessing the ADA limit indicates that benefits received by spouses and dependents are ignored under the ADA regulation.

The ability to ignore benefits relating to expenses incurred by anyone other than the employee will help a Program avoid exceeding the 30% ADA limit, but only if an employer increases the complexity of its Program. Currently, employers who gatekeep generally assign a level of coverage, triggering the application of a specific deductible and co-insurance amount. They do not actively investigate whether medical expenses born by the insured were due to treatments for the employee, the employee's spouse, or dependents (although such information should be available from the insurer). An employer who hopes to defend its gatekeeping incentive by focusing on incentives received by the employee may need to assess how to access this information from the insurer.

Conformance

The proposed regulation does not provide for an effective date. At this time, employers can rely on the regulation to demonstrate compliance with the ADA, but conformance with the regulation is optional. If an employer wanted to safely conform to the regulation while administering a Program that required medical treatments (like a physical) or medical histories, it might restructure it so that regardless of the level of coverage, the out-of-pocket expenses of a participant who chooses not to participate in the Program will never exceed a Program participant's expenses by more than 30% of the total cost of employee-only coverage. Since the penalty or reward is valued in comparison to what would have been paid had the Program requirements not been satisfied, a safe method would be to arrange for the benefit of each tier (or gate) to be capped at a value no greater than 30% of the value of employee-only coverage as compared to the prior tier, as that would ensure that Program benefits do exceed the ADA threshold. Following are two examples, each assuming that the total cost for employee-only coverage is $8,000, making the maximum Program benefit $2,400:

- Participant in health plan incurs $6,000 in out-of-pocket expenses for a year. Had Participant participated in the Program, he or she would have incurred $3,000 of expenses because of the lower deductible. Since the difference is more than $2,400, the Program might be viewed as violating the ADA proposed regulation in this instance by "penalizing" this participant in excess of the 30% threshold. It is unclear whether an employer could avoid a true "violation" by refunding $600 to the participant, or if the violation cannot be corrected once the participant incurs his $2,401 of expenses, or if the violation occurred at the outset when the employer established a Program that allowed for the possible excess expenses to be incurred.
- Participant in health plan incurs $4,000 in out-of-pocket expenses for a year. Had participant participated in the Program, he or she would have incurred $3,000 of expenses. Since the difference is less than $2,400, the Program does not appear to have violated the ADA proposed regulation, unless the mere fact that the participant could have incurred more than $2,400 of additional expenses is sufficient.

These examples might be further improved (but made more complicated) by focusing on employee expenses and ignoring spousal and dependent expenses, since the ADA regulation focuses on rewards and penalties provided or imposed on employees.

Because of the newness of these regulations and the lack of supplemental guidance, our comments on compliance should be viewed as suggestions that might show intended or "good faith" compliance with this proposed regulation, as opposed to guaranteed actual compliance.

Other Requirements

The above describes our main concerns with the proposed EEOC regulation and gatekeeping practices, but we point out that the regulation contains what should be considered "expected" prohibitions against punitive or retaliatory actions by an employer against an employee due to (non)participation in a Program. In addition, employees must receive specific Program information via a formal employee notice that is beyond the scope of this article, but is specifically addressed in the regulation.

Jurisdictional Issues

Whether the EEOC remained within its jurisdiction when issuing this regulation is not clear, but two aspects of this regulation

make us question the propriety of this regulation. First, the purpose of the portion of the ADA that includes this regulation is to protect employees from discrimination due to their disability or their relationship to someone with a disability. It is not clear how a Program that rewards participants who submit to tests, but does not adjust benefits on the results of those tests ("participation-only" requirements) could lead to prohibited discrimination if individual information is not provided to an employer. For example, a Program that provides a reward for the completion of an health risk assessment will violate the proposed regulation if the reward exceeds the 30% threshold, but if the reward is solely based on completion of the health risk assessment, with no additional award being provided based on the results of the health risk assessment, how does that discriminate against a disability? Second, the ADA contains an exclusion for medical inquiries and examinations used to help an employer manage underwriting risks of a group health plan. In general, that allowance has been used to support the use of health risk assessments. A federal court interpreted this portion of the ADA when it specifically approved Broward County, Florida's wellness program, consisting of a health risk assessment and a medical screening with a financial penalty imposed on those who enrolled in that county's group health plan without participating in its wellness program.[9] The Eleventh Circuit ruled that this wellness program was within the ADA safe harbor of allowable medical inquiries since it was part of the overall group health plan.[10] In issuing its regulation, the EEOC specifically rejects the *Seff* ruling.[11] The authority of a federal agency to ignore a federal court would seem to be a potential way to attack this regulation that should be investigated further if the EEOC attempts to enforce this regulation against a Program that would be permissible under *Seff*.

What is an Employment Lawyer to Do?

It is unlikely that the EEOC will investigate or bring claims against Programs before the regulation is finalized, so there is time for employment lawyers to help employers consider their options. At the same time, the issuance of the separately-proposed ADA and GINA regulations highlight the importance the EEOC places on this issue, so to simply ignore these regulations is unwise. Ultimately, a cautious, conscientious employment lawyer should consider taking the following actions:

1. Notify clients of potential new requirements and restrictions affecting Programs;
2. Advise clients with Programs that offer financial incentives to have those incentives assess in light of recent guidance;
3. If an employer's Program would violate the EEOC's proposed regulation, the employer has time to consider alternatives, including
   a. Reducing incentives;
   b. Restricting the portion of any incentive that relates to information governed by the ADA (or GINA); or,
   c. Restructuring a program to differentiate between expenses due to medical care for an employee and medical care due to an employee's spouse or dependents.

If changes are necessary to comply with this proposed regulation, identifying the changes with which the employer would be comfortable should be the goal. These changes would not need to be implemented until the regulation is finalized, although early reforms may protect the employer against a claim from an employee or former employee.

Ultimately, the proposed regulation puts employers and their attorneys "on notice" that too high of a Program incentive will be viewed as a violation of the ADA, and they should act accordingly.

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[1] Prop 29 CFR 1630.14(d)(2)(ii).
[2] *See* Prop 29 CFR 1630.14(d)(2)(ii), (iii), (d)(3).
[3] *See* Prop 29 CFR 1630.14(d)(3).
[4] COBRA requires self-insured plans to determine the applicable COBRA premium actuarially or based on the prior year's actual cost of coverage (assuming no significant coverage changes between the prior year and the current year). See IRC § 4980B(f)(4)(B); ERISA § 604(2); PHSA § 2204(2).
[5] *See* Prop 29 CFR 1630.14(d)(2) (focusing on how employees are treated).
[6] *See* 42 USC 2000ff, *et seq*.
[7] This proposed GINA regulation prohibits incentives for genetic information, including medical histories, of an employee's child. *See* Prop 29 CFR 1635.8(b)(2)(i)(A)(iii).
[8] *See* Prop 29 CFR 1635.8(b)(2)(i)(A)(iii).
[9] *Seff v. Broward County*, 691 F3d 1221 (11th Cir 2012).
[10] *Id*. at 1223-4.
[11] Prop 29 CFR 1630.14(d), note 24.