New Wellness Rules Mean More Headaches for Plan Sponsors

By: John Kirk on February 9, 2021 on graydon.law

Recently, the EEOC finally released their proposed wellness regulations. These regulations replace regulations that were released in 2016 but were withdrawn by the EEOC in 2019 due to court challenges and confusion. These new proposed regulations address wellness programs under both the Americans with Disabilities Act ("***ADA***") and the Genetic Information Nondiscrimination Act of 2008 ("***GINA***"). While the regulations have been released, they, like most other new guidance, have been frozen while pending review by the Biden administration's newly appointed EEOC chair, Charlotte Burrows.

The newly proposed rules require that, if a wellness program includes disability-related inquiries or medical examinations, an employer may only offer a *de minimis* incentive for participation in wellness programs outside of a group health plan. Examples of a *de minimus* reward include items such as a water bottle, t-shirt, or gift card of modest value.

The EEOC stated that it "adopts the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty. . . " For this reason, non-group wellness programs that include disability-related inquiries or medical exams are limited to the *de minimis* incentives.

The good news for employers is that the new rules propose an exception or "safe harbor" to the *de minimis* standard for wellness programs that are part of, or qualify as, group health plans. Wellness plans that are part of group health plan may offer greater than minimal incentives.

Under the proposed rules, a health-contingent wellness program that is part of a group health plan could still offer a premium differential up to 30% of the total cost (meaning total of employee and employer contributions) of self-only coverage, as long as they comply with HIPAA requirements for such plans.

The new guidance provides that the following four factors will determine if a wellness plan is part of a group health plan for purposes of the proposed ADA rule: (1) The program is offered only to employees enrolled in an employer-sponsored health plan; (2) Any incentive offered is tied to cost-sharing or premium differentials under the group health plan; (3) The

program is offered by a vendor that has contracted with the group health plan or insurance issuer; and (4) The program is a term of coverage under the terms of the group health plan (*i.e.*, a requirement of the group health plan).

In addition to the safe harbor for programs that are part of a group health plan, tobacco cessation programs may still be able to offer more than *de minimis* incentives.

Based on the new guidance, tobacco-cessation programs, even if not part of a group health plan, could still use premium differentials up to 50% of the individual coverage costs if the program is HIPAA compliant and "strictly an incentive for tobacco-using employees to participate and does not ask any disability-related questions or require medical examinations."

As a reminder, health-contingent wellness incentives, such as tobacco-cessation, must comply with four HIPAA requirements: (1) Eligible individuals must be given an opportunity to qualify for a reward at least once per year; (2) A reasonable alternative standard to qualify for a reward must be provided; (3) The program must be reasonably designed to promote health or prevent disease and not be overly burdensome; and (4) The reasonable alternative must be disclosed in all wellness program materials and in any disclosure that an individual did not satisfy an initial outcome-based standard.

The guidance for the new GINA wellness rules points out that, while the ADA rules allow larger incentives under the safe harbor discussed above, GINA does not. Therefore, under the proposed GINA rule, employers may only offer a *de minimis* incentive for participation by family member's in a wellness program that requests family health information. However, the EEOC further stated that a larger incentive is still available to family members who participate in disease management and other programs. For employers, this means that if a family member provides genetic information, which is rewarded with a *de minimis* reward, and that genetic information shows the family member may be at risk for a health condition, the employer may provide a larger reward for participation in a program to manage or monitor that condition. The example given in the regulations is a $150 gift card for participation in a cholesterol or heart disease program.

While these new rules appear more stringent than the prior guidance, there should be limited impact on many common employer programs. Under the proposed rules, most employer wellness programs should be able to offer more than *de minimis* incentives to participants for completing a health risk assessment, receiving a physical, or providing information about family medical history. Employers with group health plans that meet the HIPAA requirements would be able to offer larger incentives as part of health-contingent

wellness plans much like they always have. It is when an employer starts a stand-alone wellness program or permits employees who are not enrolled in its health plan to participate that the new rules must be examined carefully to prevent any unintended violations.

Wellness programs have a lot of potential compliance issues. These new rules will make compliance even harder to manage. We are not suggesting that you make any changes to your program now as a result of these proposed rules, but wanted you to be aware of the things that may need to be considered if the regulations are finalized in a form similar to proposed. If you have any questions about your wellness plan or any compliance issue, please contact any of Graydon's employee benefits team.