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A Spoonful of Clarity Will Help Wellness Plans Thrive

Labor & Employment Working Group

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Executive Summary

On May 16, 2016, the Equal Employment Opportunity Commission (“EEOC”) finalized highly anticipated regulations that purport to define the extent to which the Americans with Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”) permit employer-sponsored wellness plans. The final regulations (“Final Rules”) were published in the *Federal Register* on May 17, 2016.¹

In developing these regulations, the EEOC has frequently stated that it intended to “harmonize” the ADA’s requirement that medical inquiries and examinations are “voluntary” and the Patient Protection and Affordable Care Act’s (“ACA”) “goal of allowing incentives to encourage participation in wellness plans.”² Whether the EEOC has accomplished this goal depends on the flexibility of the word “harmonize,” as the EEOC’s Final Rules are inconsistent with the ACA, the Health Insurance Portability and Accountability Act (“HIPAA”), and regulations issued by three cabinet departments in 2013 that purport to regulate wellness plans under those laws.³

Thus, employers who have or seek to implement wellness plans now face an additional layer of overlapping and sometimes inconsistent regulations. This lack of regulatory consistency is especially troubling for employers given the EEOC’s recent lawsuits against employers’ use of wellness plans, and its recent claim that courts should give retroactive effect to at least some aspects of its regulations and that courts should correspondingly impose retroactive liability on employers for establishing and administering wellness plans that comply with the ACA but are inconsistent with EEOC’s newly issued regulations.⁴

I. Background

Generally speaking, wellness plans seek to educate employees and their families about health-related issues, promote the maintenance of healthy lifestyles, and encourage participants to live healthier lives. Employers offer two primary types of wellness plans: participatory wellness plans are those that either provide no financial incentive for participation or provide an incentive that is not tied to satisfying a health-related standard. In contrast, health-contingent wellness programs require an employee to complete a health-related activity (“Activity-Only Plans”) or to achieve a health-related outcome (“Outcome-Based Plans”). Depending on the type of wellness plan, employers must ensure

¹ Regulations Under the American’s With Disabilities Act, 81 Fed. Reg. 31126 (May 17, 2016) (to be codified at 29 C.F.R. § 1630); Genetic Information Nondiscrimination Act, 80 Fed. Reg. 31143 (May 17, 2016) (to be codified at 29 C.F.R. § 1635).

² Statement of EEOC Chair Jenny R. Yang, April 16, 2015 (last visited May 18, 2016); Statement of EEOC Chair Jenny R. Yang, May 16, 2016 (last visited May 18, 2016).

³ Proposed Rules, 80 Fed. Reg. at 21,662-63 (“[C]ompliance with the standards in HIPAA is not determinative of compliance with the ADA....”).

⁴ *EEOC v. Orion Energy Sys., Inc.*, Case No. 14-1019 (E.D. Wis. filed Aug. 20, 2014); *EEOC v. Flambeau, Inc.*, Case No. 14-cv-638-bbc, 2015 WL 9593632 (W.D. Wis. Dec. 31, 2015); *EEOC v. Honeywell Int’l, Inc.*, Civil No. 14-4517, 2014 WL 5795481 (Nov. 6, 2014).

their plans comply with four different federal statutory regimes: the ADA, ACA, HIPAA, and GINA.

Congress passed the ADA in 1990 to prohibit discrimination in employment on the basis of disability. The ADA contains a “safe harbor” that exempts bona fide benefit plans from the ADA’s prohibitions when the terms of the plan “are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.”⁵ The ADA also authorizes employers to conduct medical examinations and to obtain employees’ medical histories in connection with wellness plans. However, participation in any medical examinations and medical histories must be voluntary.⁶

Like the ADA, GINA applies to wellness plans and contains an exception that permits employers to request health and genetic information in connection with voluntary wellness plans.⁷

In July 2000, the EEOC clarified that “a wellness program is ‘voluntary’” — and therefore lawful — “as long as an employer neither requires participation nor penalizes employees who do not participate.”⁸ The EEOC did not at that time define what it meant to “require” participation or to “penalize” employees who did not participate, nor did it purport to do so until it issued its regulations on May 16, 2016.

In 2010, Congress passed the ACA. Among other things, the ACA regulates wellness plans and allows employers to provide incentives for wellness plan participation that do not “exceed 30% of the cost of coverage” under a group health plan.⁹ Notably, the ACA’s incentive cap limits only health-contingent wellness plans, not participatory wellness plans, and the cap applies only to wellness plans offered in connection with a group health plan.¹⁰ The ACA also authorizes the Secretaries of Treasury, Labor, and Health and Human Services to increase the lawful incentive for health-contingent plans up to 50 percent.¹¹ On June 3, 2013, the U.S. Departments of the Treasury, Labor, and Health and Human Services issued final regulations under the ACA and HIPAA, permitting wellness plan incentives up to 30 percent of the total cost of coverage and up to 50 percent for plans designed to prevent or reduce tobacco use.¹²

⁵ 42 U.S.C. § 12201(c)(2).

⁶ 42 U.S.C. §§ 12112(d)(4)(B), 12201(c)(2).

⁷ 42 U.S.C. § 2000ff-1(b)(2).

⁸ Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employers Under the Americans with Disabilities Act (ADA), EEOC (July 27, 2000).

⁹ 42 U.S.C. § 300gg-4(j)(3)(A).

¹⁰ 45 C.F.R. § 146.121(f)(2)-(5).

¹¹ 42 U.S.C. § 300gg-4(j)(3)(A).

¹² 45 C.F.R. § 146.121(f)(5).

II. The EEOC's Final Rules

The EEOC's Final Rules require a wellness plan to be "reasonably designed to promote health or prevent disease."¹³ The Final Rules state that a wellness plan will satisfy this standard if there is "a reasonable chance of improving the health of, or preventing disease in, participating employees," and the plan is not "overly burdensome, is not a subterfuge for violating the ADA or other laws..., and is not highly suspect in the method chosen...."¹⁴ However, the EEOC does not define any of these terms, and the use of such ambiguous terms and vague phrases as "reasonably," "reasonable chance," "not ... overly burdensome," and "[not] a subterfuge," leaves employers to guess about what these rather amorphous terms and phrases actually mean.

The Final Rules do clarify that a wellness program is "voluntary" under the ADA if the employer: (i) does not require employee participation; (ii) does not deny or limit health coverage based on nonparticipation; (iii) does not take any adverse action against, retaliate against, or interfere with nonparticipating employees; and (iv) provides employees with adequate notice.¹⁵

The Final Rules also clarify that a wellness plan is "voluntary" if the financial reward for participation "does not exceed ... [t]hirty percent of the total cost of self-only coverage."¹⁶ Critically, in several ways, this limit on incentives differs from the permissible incentives that can be offered under the ACA and HIPAA.

First, ACA and HIPAA regulations permit unlimited incentives for participatory wellness plans and impose a 30 percent incentive limit only on health-contingent plans.¹⁷ In contrast, the incentive limit in the Final Rules restricts participatory and health-contingent programs if those plans include disability-related inquiries or medical examinations.¹⁸

Second, ACA and HIPAA regulations calculate the incentive amount based on the cost of coverage under the plan in which the employee is enrolled, including family coverage when spouses and dependents are eligible to participate in the wellness plan. In contrast, the EEOC's Final Rules under the ADA permit only incentives for employee participation up to 30 percent of self-only coverage.¹⁹ The EEOC's Final Rules under GINA permit an employer to incentivize spousal participation with rewards equal to an additional 30 percent of self-only coverage.²⁰

¹³ EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,139 (May 17, 2016) (to be codified at 29 C.F.R. § 1630.14(d)(1)).

¹⁴ *Id.*

¹⁵ *Id.* at 31,139-40 (to be codified in 29 C.F.R. § 1630.14(d)(2)(i)-(iv)).

¹⁶ *Id.* at 31,140 (to be codified in 29 C.F.R. § 1630.14(d)(3)).

¹⁷ 45 C.F.R. § 146.121(f)(2), (5).

¹⁸ EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,140-41 (May 17, 2016).

¹⁹ Compare 42 U.S.C. 300gg-4(j)(3)(A) (ACA), and 45 C.F.R. § 146.121(f)(3)(ii), (f)(4)(ii) (HIPAA), with EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,139-40 (May 17, 2016) (to be codified in 29 C.F.R. § 1630.14(d)(3)).

²⁰ 80 Fed. Reg. 31,143, at 31,158.

Third, the ACA and HIPAA permit the incentive to increase to 50 percent for tobacco-related programs, whereas the EEOC’s Final Rules permit no additional incentives for tobacco programs that include medical examinations or medical histories.²¹

The Final Rules also differ from ACA and HIPAA regulations by imposing additional reasonable accommodation requirements. Under the Final Rules, employers must provide reasonable accommodations for participatory and health-contingent plans.²² The ACA and HIPAA, however, require only “reasonable alternative standards” for health-contingent plans.²³ Even then, the ACA requires only reasonable alternative standards under certain circumstances based on whether the wellness plan is activity-only or outcome-based.

The following table illustrates these differences between the EEOC’s Final Rules about wellness plans and the regulations adopted to regulate wellness plans under the ACA and HIPAA:

	ACA and HIPAA	Final ADA Rules
Incentives: Limit	<p>Participatory Plans:</p> <ul style="list-style-type: none"> • Incentives are unlimited. <p>Health-Contingent Plans:</p> <ul style="list-style-type: none"> • Incentives are limited to 30% of the total cost of coverage. • Tobacco cessation programs can provide incentives up to 50%. 	<p>Participatory Plans:</p> <ul style="list-style-type: none"> • Incentives are limited to 30% of self-only coverage if the plan includes a disability-related inquiry or medical examination. <p>Health-Contingent Plans:</p> <ul style="list-style-type: none"> • Incentives are limited to 30% of self-only coverage if the plan includes a disability-related inquiry or medical examination. • Prohibits additional 20% incentive for tobacco cessation programs that include disability-related inquiries or medical examinations.
Incentives: Calculating Total Amount	Total reward for wellness plans are based upon “the total cost of coverage under the plan.”	Total reward for wellness plans are based upon “the total cost of self-only coverage under the plan.”
Reasonable Accommodations	<p>Required only for health-contingent plans.</p> <ul style="list-style-type: none"> • Activity-Only Plans: Must provide a reasonable alternative standard (or waiver) if an employee has an unreasonable difficulty achieving the standard due to a medical condition. • Outcome-Based: Must provide a reasonable alternative standard (or waiver) if an employee does not meet the initial standard based on a measurement, test, or screening. 	Must provide reasonable accommodations for participatory and health-contingent plans.

In addition, the Final Rules require that employers provide employees with written notice about any wellness plan, even if only “de minimis” incentives will be offered.²⁴ Notice must be provided in a way employees are “reasonably likely to understand,” describe the type of medical information and the use of the medical information to be obtained, and include the employer’s confidentiality

²¹ 45 C.F.R. § 146.121(f)(5); EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,141-42 (May 17, 2016).

²² *Id.* at 31,132-33.

²³ 45 C.F.R. § 146.121(f)(2)-(f)(5).

²⁴ *Id.* at 31,134.

obligations.²⁵ The Commission decided not to include any requirement of prior, written, and knowing authorization from participating employees under the ADA,²⁶ but EEOC's regulations under GINA require such prior authorization from employees and their spouses if they participate in a wellness program that collects genetic information (including family medical histories).²⁷ Moreover, because of concerns that employees might unwittingly “waive critical confidentiality protections of their health information,”²⁸ the Commission added a provision stating that “[a] covered entity shall not require an employee to . . . waive confidentiality protections [available under the ADA] as a condition for participating in a wellness program or for earning any incentive the covered entity offers in connection with such a program.”²⁹

Finally, the Final Rules add a confidentiality requirement, mandating that an employer may collect only the medical information or history of an individual in aggregate terms that are “not reasonably likely to disclose[] the identity of an employee.”³⁰

III. The ADA Safe Harbor, EEOC Litigation, and Retroactive Effect

To date, the only U.S. Court of Appeals decision to address the validity of a wellness plan under the ADA held the plan was valid under the ADA's safe harbor.³¹ Similarly, in *EEOC v. Flambeau, Inc.*, a federal district court affirmed that the ADA's safe harbor provision extends to wellness programs that are part of an employer's insurance benefit plan.³² In the Final Rules, however, the EEOC unequivocally rejected the application of the ADA's safe harbor to wellness programs.³³ The Commission explicitly stated its belief that *both* federal court decisions “were wrongly decided” and noted that because “neither court ruled that the language of the statute was unambiguous . . . the agency has the authority and responsibility to provide its own considered analysis of the statutory provision.”³⁴

The EEOC appealed the district court's decision in *Flambeau* to the U.S. Court of Appeals for the Seventh Circuit. On May 17, 2016, the same day that the EEOC published its new rules in the *Federal Register*, EEOC filed a notice of supplemental authority with the Seventh Circuit about its newly enacted Final Rules.³⁵ In its letter, the EEOC asserted that the Final Rules have “retroactive

²⁵ EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,139-40 (May 17, 2016) (to be codified in 29 C.F.R. § 1630.14(d)(2)(iv)).

²⁶ *Id.* at 31,134.

²⁷ Genetic Information Nondiscrimination Act, 80 Fed. Reg. 31143, 31158 (to be codified at 29 C.F.R. § 1635.8(b)(2)(iii)).

²⁸ *Id.*

²⁹ *Id.* at 31,137; *Id.* at 31,140 (to be codified in 29 C.F.R. § 1630.14(d)(4)(iv)).

³⁰ *Id.* at 31,140 (to be codified in 29 C.F.R. § 1630.14(d)(4)(iii)).

³¹ *Seff v. Broward Cnty.*, 691 F.3d 1221 (11th Cir. 2012).

³² *EEOC v. Flambeau, Inc.*, 14-cv-638-bbc, 2015 WL 9593632 (W.D. Wis. Dec. 31, 2015).

³³ EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,140 (May 17, 2016) (to be codified in 29 C.F.R. § 1630.14(d)(6)).

³⁴ *Id.* at 31,131.

³⁵ *EEOC v. Flambeau, Inc.*, No. 16-1402, Doc. No. 17 (7th Cir. May 17, 2016).

effect because [they] clarif[y] that the safe harbor provision does not apply to wellness programs.”³⁶ Ultimately in *Flambeau*, the Seventh Circuit panel affirmed the district court’s dismissal but avoided the statutory questions, unanimously finding that the relief sought by the EEOC was either moot or unavailable.³⁷

Also on May 17, 2016, the EEOC filed a similar letter in *EEOC v. Orion Energy Systems*, another federal district court case concerning the application of the ADA’s safe harbor provision to wellness programs.³⁸ In that letter, the EEOC echoed its assertion that the Final Rules apply retroactively.³⁹ It is unclear, however, how far into the past the EEOC purports to apply this retroactive effect. Notably, while these letters could be read more expansively, their assertions of retroactive effect are presumably limited to the Final Rules’ interpretation of the ADA safe harbor provision. Indeed, the Final Rules expressly state that the regulations relating to notice and incentives will apply only as of the first day of the plan year starting on or after January 1, 2017.⁴⁰

On September 29, 2016, the district court in *Orion* issued a decision that agreed with the EEOC on the ADA safe harbor question, as well as on the retroactivity of the Final Rules, which, the court clarified, apply retroactively to the safe harbor provision only.⁴¹ However, the court also partially granted Orion’s summary judgment motion on the lawfulness of the wellness program, concluding that participation in Orion’s program was voluntary, as applied pre-EEOC regulations. According to the court, employees were presented with a legal choice: “either elect to complete the [health risk assessment] as part of the health program or pay the full amount of the health premium.”

IV. Conclusion

While the EEOC’s Final Rules purport to “harmonize” wellness plan requirements under the ADA, GINA, HIPAA, and ACA, the EEOC has in fact added several additional regulatory burdens on employers that administer wellness plans. Specifically, the EEOC’s regulations impose limitations on wellness plans that are inconsistent with the ACA and existing regulations. Employers who operate or seek to implement wellness plans must carefully review their plans to ensure compliance with the established HIPAA and ACA regulations, as well as the EEOC’s overlapping regulations under the ADA and GINA, at least until the federal courts determine whether the EEOC’s regulations are lawful.

³⁶ *Id.* at 1.

³⁷ *EEOC v. Flambeau, Inc.*, 846 F.3d 941 (7th Cir. 2017).

³⁸ *EEOC v. Orion Energy Sys.*, No. 14-019, Doc. No. 47-1 (E.D. Wis. May 17, 2016).

³⁹ *Id.* at 2.

⁴⁰ EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,129.

⁴¹ *EEOC v. Orion Energy Sys.*, No. 14-1019, 2016 U.S. Dist. LEXIS 127292 (E.D. Wisc. Sept. 29, 2016).