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EEOC GUIDANCE: REDESIGNING WELLNESS PROGRAMS TO COMPLY WITH THE ADA

Although the Equal Employment Opportunity Commission (EEOC) has been actively taking legal action against employers over wellness programs that it considers coercive under the Americans with Disabilities Act (ADA), companies may avoid running afoul of the law by following guidance contained in a recent EEOC proposed rule.

At issue is a provision of the ADA that allows employers to conduct medical inquiries and examinations of employees only if they are job-related and consistent with business necessity or if those examinations are voluntary. The EEOC proposes to modify the commission's enforcement stance on wellness programs, especially in the following areas.

Design. A wellness program, including any disability-related inquiries or medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. A program cannot be overly burdensome or a subterfuge for violating the ADA or other laws prohibiting employment discrimination.

Below are examples of acceptable and unacceptable wellness programs:

Acceptable: Conducting a health risk assessment and/or a biometric screening of employees for the purpose of alerting them to health risks about which they may have been unaware.

Acceptable: An employer's use of aggregate information from employee health risk assessments to design programs aimed at specific conditions that are prevalent in the workplace.

Unacceptable: Collecting medical information on a health questionnaire or biometric screening without providing employees follow-up information or advice, such as feedback about risk factors.

Voluntariness. If the program includes disability-related inquiries or medical examinations (e.g. biometric screenings), the program will be considered voluntary if it does not require employees to participate; does not deny

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coverage under any group health plan or benefits package based on non-participation, or limit benefits for employees who did not participate; and does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees.

Notice. If the program is part of a group health plan, the employees must be provided with a notice written in an understandable manner. The notice must describe the types of medical information being obtained and the specific purposes for which it will be used as well as the restrictions on the disclosure of the information, the parties with whom the information will be shared, and the methods that will be used to safeguard the information under HIPAA's Privacy Standards.

Privacy. The medical information collected may not be shared with the employer except in aggregate form that is not reasonably likely to identify specific employees, except as needed to administer the health plan. Group health plans subject to HIPAA will satisfy this obligation as long they comply with HIPAA regulations.

Limitation on Incentives. The maximum allowable incentive for participation in a wellness program or for achieving certain health outcomes is 30 percent of the total cost of employee-only coverage. The EEOC's restrictions on incentives generally appear limited to those that are tied to disability-related inquiries as part of an HRA or biometric screening (which the EEOC regards as a "medical examination" for ADA purposes).

Nondiscrimination. Compliance with the proposed regulations does not eliminate an employer's obligation to comply with state and federal law prohibiting unlawful discrimination, including discrimination against employees with disabilities. Absent undue hardship, an employer must provide a reasonable accommodation that enable employees with disabilities to participate in wellness programs and earn any reward, or avoid any penalty offered as part of those programs.