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Employer Update

EEOC Final Rules on Employer Wellness Programs Become Effective January 1, 2017

By Olivia Z. Miller

In This Issue

Many employers offer health promotion and disease prevention strategies, often referred to as workplace wellness programs, not only to improve employee health and productivity, but also in an attempt to reign in health care insurance premiums. Employers seek to incentivize employees to participate in such programs, but cannot violate federal laws prohibiting discrimination based on health status, disability, and genetic information, or the dissemination of personal health information, to do so. To harmonize these competing interests, the U.S. Equal Employment Opportunity Commission (EEOC) recently issued final rules (the "Final Rules") on how employer-provided wellness programs can simultaneously comply with the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA).[1] The Final Rules become effective in January 2017 and apply to all workplace wellness programs. However, the Final Rules are not always consistent with the ACA and HIPAA, leaving employers to face overlapping and conflicting federal regulations. This article summarizes the Final Rules in the context of the ACA and HIPAA, and provides advice for employers seeking to implement or maintain corporate wellness programs.

"Voluntary" Programs

Under the Final Rules, employee wellness programs must be "voluntary," which means that an employer may not require participation; may not deny health care coverage or restrict access to specific health care plans to employees who do not participate; and may not take any adverse action against an employee who does not participate or fails to achieve certain health outcomes.[2] For programs that obtain medical information and/or medical examinations from employees, employers must also provide a notice explaining what medical information will be obtained, how it will be used, who will receive it, and restrictions on its disclosure.[3] Similarly, the ADA and GINA allow employers to seek employee health and genetic information in connection with corporate wellness plans, so long as participation in the medical screening (under the ADA) or the wellness plan itself (under the GINA) is voluntary.[4]

Program Must be "Reasonably Designed"

Under the Final Rules, employee wellness plans must be "reasonably designed to promote health or prevent disease," and cannot require an

overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating discrimination laws, or require employees to incur significant costs for medical examinations.[5] Examples of "reasonably designed" wellness programs include programs that ask employees to answer questions about their health or have a medical examination/screening to alert them to health risks (such as diabetes or high cholesterol), or the use of such information to design and offer programs aimed at specific conditions prevalent in the work place (such as hypertension).[6] A wellness plan under the Final Rules is not "reasonably designed" if it is used to predict the employer's future health costs, exists to shift costs from the employer to the employee based upon the health screening results, does not provide any feedback to the employee about the medical screening performed, or does not use aggregate information collected from employees to design programs to treat common employee health conditions.[7]

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Financial Incentives

The Final Rules depart from the ACA and HIPAA regarding the limitations on financial incentives offered under corporate wellness plans. Under the Final Rules, wellness programs that ask questions about employees' health or include medical examinations can offer a maximum financial incentive of up to 30 percent of the total cost of an individual's annual health premiums.[8] If the wellness program is only open to employees enrolled in a particular health plan, the maximum allowable incentive is 30 percent of the total cost for self-only coverage.[9] If the employer offers more than one group health plan and participation in the wellness program is open to all employees regardless of whether they are enrolled in a health care plan, the employer can only offer a maximum incentive of 30 percent of the lowest cost self-only major medical plan it offers.[10] If the employer does not offer health insurance but still wants to offer incentives to employees to participate in a wellness program, the employer can offer no more than 30 percent of the cost that a 40-year-old non-smoker would pay for self-only coverage under the second-lowest cost Silver Plan on the state or federal health care exchange in the location of the employer's principal place of business.[11]

In contrast, HIPAA, as amended by the ACA, allows employers to provide an incentive of 30 percent of the "cost of coverage," and authorizes the Secretaries of Treasury, Labor, and Health and Human Services to increase the incentive limit to 50 percent.[12] On June 3, 2013, the U.S. Departments of the Treasury, Labor, and Health and Human Services issued final regulations authorizing financial incentives under the ACA and HIPAA of 30 percent and up to 50 percent for plans encouraging smoking cessation.[13] These incentive financial limitations are calculated based on the cost of the health plan in which the employee is enrolled, which includes coverage for dependents, whereas the Final Rules allow for an incentive of 30 percent of self-only coverage.[14] Further, the ACA and HIPAA rules impose a 30 percent incentive limit only on health-contingent plans (which reward employees for achieving a specific health goal, such as lowering weight or cholesterol), but allow unlimited incentives for participatory wellness plans (which either provide no financial incentive or an incentive that is not contingent upon a health outcome), whereas the incentive limitations in the Final Rules apply to both participatory and health-contingent plans so long as the plans require a medical examination or inquiry.[15] Finally, although HIPAA, as amended by the ACA,

authorizes a 50 percent reduction in an individual's health insurance premium for undergoing smoking cessation screenings,[16] under the Final Rules, if an employer requires any nicotine/tobacco medical screening or testing, the maximum financial incentive offered is 30 percent of an individual's plan.[17]

The Final Rules were met with criticism by lawmakers and civil rights advocates. For instance, Senator Lamar Alexander (R-Tenn.), Chairman of the Senate Health and Labor Committee, stated:

> Wellness programs are the only part of Obamacare that everyone agreed on—everyone except the EEOC. Congress was clear in its support of workplace wellness programs in the health care law—just about the only provision in the law with bipartisan support—and the Departments of Health and Human Services, Labor, and Treasury were clear in their regulations implementing the law. It seems the EEOC is the only one missing the mark.[18]

Senator Alexander stated that he will push legislation, The Preserving Employee Wellness Programs Act, to reaffirm existing law, and is also considering introducing resolutions of disapproval under the Congressional Review Act to overturn the Final Rules by a majority vote in the Senate and House of Representatives.[19] It remains to be seen whether the Final Rules will be overturned, but until then, employers should operate under the belief that the Final Rules will become effective the first day of the plan year starting on or after January 1, 2017.

Reasonable Accommodation Requirements

Under the Final Rules, employers must provide "reasonable accommodations" for disabled employees to participate in any employer-sponsored wellness plan.[20] EEOC-provided examples include if an employer offers employees a financial incentive to attend a nutrition class regardless of whether the employees reach a healthy weight as a result of attendance, the employer would have to offer a sign language interpreter for a deaf employee (so long as providing the interpreter does not result in undue hardship to the employer), or, absent undue hardship, an employer would have to provide written materials that are part of a wellness program in an alternate format for an employee with a vision impairment.[21] In contrast, under the ACA, an employer must provide "reasonable alternative standards" for health-contingent wellness plans, but only under certain circumstances.[22]

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Confidentiality

The Final Rules do not change existing privacy laws under existing federal laws, but rather add two additional requirements: (1) an employer may only receive information collected by a wellness program in aggregate form that does not disclose and is not reasonably likely to disclose the identity of wellness program participants, and (2) an employer may not require an employee to agree to the sale, exchange, sharing, transfer, or disclosure of medical information as a condition for participating in a wellness program, except to the extent permitted by the ADA.[23] The EEOC stated that a wellness program that is part of a HIPAA-covered entity "likely" will be able to comply with the first requirement by complying with the HIPAA Privacy Rule.[24]

No Safe Harbor

The ADA's safe harbor provision allows insurers and plan sponsors to use medical information about risks posed by certain health conditions to make decisions about insurability.[25] Without the safe harbor, these practices could violate the ADA by treating individuals with disabilities less favorably than individuals without disabilities. However, many of these practices, such

as denying health coverage to individuals with pre-existing conditions or charging individuals with disabilities more money for group health insurance plans, are now unlawful under the ACA.

Under the Final Rules, the ADA's safe harbor provision does not apply to employee wellness programs.[26] The Final Rules are contrary to case law addressing this issue, in which both the Eleventh Circuit in *Seff v. Broward Cnty.,* and the Western District of Wisconsin in *EEOC v. Flambeau, Inc.,* held that corporate wellness programs were valid under the ADA's safe harbor provision.[27] The EEOC appealed Flambeau to the Seventh Circuit (where it is set for argument on September 15, 2016), and after publication of the Final Rules, filed a Notice of Supplemental Authority asserting that the Final Rules have "retroactive effect" and are "entitled to deference."[28] Currently pending in the Eastern District of Wisconsin is another case, *EEOC v. Orion Energy Sys.,* in which the EEOC alleges that an employer violated the ADA by administering involuntary medical examinations and disability-related inquiries as part of its wellness program.[29] On the day the Final Rules were published, the EEOC filed a Notice of Supplemental Authority in *Orion*, again asserting that the Final Rules were to be provided "deference" and retroactive applicability.[30] It remains to be seen whether courts will adhere to the Final Regulations and deny employers the right to utilize the ADA's safe harbor provision as part of corporate wellness programs.

Conclusion

Because the Final Rules are not entirely consistent with other federal regulations, mainly HIPAA and the ACA, employers are encouraged to consult with attorneys when administering corporate wellness programs to ensure such programs do not run afoul of the often-overlapping federal regulations. Pending action by Congress or the Courts to overturn the Final Rules, employers wishing to avoid litigation regarding the financial incentives offered under corporate wellness programs should abide by the more restrictive incentive limits found in the Final Rules.

1. *See* Federal Register, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. 31125 (May 17, 2016), available at https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act; Genetic Information Nondiscrimination Act, 80 Fed. Reg. 31143 (May 17, 2016), available at https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act.
2. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31128, 31133 (May 17, 2016).
3. A sample notice can be found on the EEOC's website, https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm.
4. 42 U.S.C. §§ 12112(d)(4)(B); 42 U.S.C. § 2000ff–1(b)(2).
5. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31132-33 (May 17, 2016).
6. EEOC, EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act, https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm.
7. *Id.*
8. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31134-35(May 17, 2016).
9. *Id.*
10. *Id.*
11. *Id.*
12. 42 U.S.C. § 300gg-4(j)(3)(A).
13. 45 C.F.R. § 146.121(f)(5).
14. *Compare* 42 U.S.C. 300gg-4(j)(3)(A) (ACA requirements), *and* 45 C.F.R. § 146.121(f)(3)(ii), (f)(4)(ii) (HIPAA requirements), *with* EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31139-40, (May 17, 2016).
15. 45 C.F.R. § 146.121(f)(2); EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,141-42 (May 17, 2016).
16. 45 C.F.R. § 146.121(f)(5).
17. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31141-42 (May 17, 2016).
18. Press Release, *Alexander: EEOC Workplace "Wellness" Rules Will Make it Harder for Employees to Choose Healthy Lifestyles and Save Money"* (May 16, 2016), http://www.help.senate.gov/chair/newsroom/press/alexander-eeoc-workplace-wellness-rules-will-make-it-harder-for-employees-to-choose-healthy-lifestyles-and-save-money.
19. *Id.*

20. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31141 (May 17, 2016).
21. *Id.*
22. 45 C.F.R. § 146.121(f)(2)-(f)(5).
23. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31142 (May 17, 2016).
24. *Id.*
25. 42 U.S.C. § 12201(c)(2).
26. EEOC, Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31143 (May 17, 2016).
27. *Seff v. Broward Cnty.,* 691 F.3d 1221 (11th Cir. 2012); *EEOC v. Flambeau, Inc.,* 131 F. Sup. 3d 849 (W.D. Wis. 2015).
28. *EEOC v. Flambeau, Inc.,* No. 16-1402, Dkt. No. 17 (7th Cir. May 17, 2016).
29. *See EEOC v. Orion Energy Sys. Inc.,* 145 F. Supp. 3d 841 (E.D. Wis. 2015).
30. *EEOC v. Orion Energy Sys. Inc.,* No. 1:14CV01019, Dkt. No. 47 (E.D. Wis. May 17, 2016).

Upcoming Changes in U.K. Employment Laws

By Iwor Gwilliams, Simon Gorham and Tas Voutourides

Introduction

There are a number of changes in U.K. employment law which employers will face in the next 18 months. In this article, we highlight two of the more significant changes: the new gender pay gap reporting obligations, and the changes to the taxation of termination payments. We also provide an update on the latest cases dealing with the increasing trend of individuals challenging their work status in the growing so-called "gig economy."

Gender Pay Gap Reporting Obligations

Mandatory gender pay gap reporting obligations for large employers in the U.K. (those with 250 or more employees in the private and voluntary sectors) are now due to come into force in April 2017. The current draft regulations require employers to publish:

- overall gender pay gap figures using both the mean and median gross average hourly pay;
- numbers of men and women in each of four pay bands, based on the employer's overall pay range;
- details of the proportion of men and women who receive bonus pay; and
- the percentage difference in mean bonus pay between men and women.

Employers subject to these reporting obligations will be required to analyse their gender pay gap each April, publish their gender pay gap report on their websites within 12 months (the first reporting date for publishing such information being no later than 4 April 2018 and annually thereafter), and keep the information there for three years. The information must also be uploaded to a government website. The draft regulations do not contain any civil or criminal penalties for non-compliance, although the U.K. government has stated that it will monitor non-compliance and publish employers' reported gender pay gaps, as well as possibly naming and shaming those employers who do not comply. Therefore, there may be significant consequences for employers who do not comply, in the form of adverse publicity and damage to their reputations both as employers for recruitment purposes and in their overall business dealings.

[T]here may be significant consequences for employers who do not comply [with gender pay gap reporting obligations] in the form of adverse publicity and damage to their reputations both as employers for recruitment purposes and in their overall business dealings.

At present, there is still a degree of uncertainty in certain areas of the regulations including which "employees" will be covered by the regulations. The current understanding is that it is the U.K. government's intention that a wider definition of employee will apply, which is likely to extend to workers which will include, for instance, fixed share LLP members and possibly some self-employed contractors. A further area of uncertainty is the definition of "pay." Currently, pay will include most remuneration paid through payroll including bonuses, shift premiums and other allowances. However, overtime will be excluded.

Practical Tips for Employers

UK employers likely to fall within scope of the regulations should start to take steps now in order to ensure that they are able to comply with these obligations. Ideas to consider include:

- Trialling the implementation of systems and procedures to gather, analyse and process pay data in order to prepare gender pay gap reports.
- Although any communications and analysis of the gender pay gap report with lawyers will be subject to legal privilege, employers should be aware that any preliminary or draft version of the report itself may be disclosable.

- Assemble and update employee records to ensure that all employees, such as casual workers, are within scope for the purposes of the gender pay gap report.
- Senior management should be involved as early as possible in the process, to provide input and oversight, as they will be required to sign off on the report.
- Senior management should also work closely with Human Resources to manage and address any internal employee concerns following publication of the gender pay gap report.
- It will be important to involve the company's marketing and public relation officers in preparing and managing external communications with the media addressing any disparities in pay revealed by the gender pay gap report.

Taxation of Termination Payments

In July 2015, the U.K. government published a consultation on the tax and National Insurance contributions (NICs) treatment of termination payments. The U.K. government has now published its response and draft legislation for further consultation, with the new rules due to apply from April 2018.

The changes proposed to come into force are as follows:

A. **Termination Payments:** Certain payments relating to the termination of employment will continue to have a £30,000 income tax and NICs exemption up to this threshold. There will also continue to be an unlimited employee NICs exemption on the entirety of the termination payment (i.e. even when the termination payment is over £30,000). However, in an effort to simplify the system and "prevent manipulation" by employers, the employer NICs exemption where the termination payment is over £30,000 will no longer apply. Therefore, this will increase costs for employers who agree to termination payments with employees in excess of £30,000, as they will be required to pay employer's NICs at 13.8% on any amounts above £30,000.

B. **Notice Periods:** Currently, a payment in lieu of notice (PILON) made to an employee pursuant to a clause in their employment contract that entitles an employer to make such a payment would be subject to tax and NICs in full, whilst similar payments made by an employer where there is no such PILON clause in the employment contract may be paid free of income tax up to the first £30,000, aggregated with other termination payments, and entirely free of NICs deductions. This distinction between a contractual and non-contractual PILON will be removed, which will mean that all such payments will be taxable and subject to NICs in full.

C. **Payments for Injury to Feelings.** Employment Tribunals can award successful claimants who bring discrimination claims and certain types of whistleblowing claims, compensation for "injury to feelings," as well as for financial loss. The intention is for the claimant to be compensated for the upset, hurt and distress the discrimination has caused them. In settlement negotiations, lawyers for claimants often attempt to apportion a specific sum of any settlement as compensation for injury to feelings in the belief that this sum will not be subject to tax due to an exemption for payments for disability or injury. However, as a result of conflicting case law, there is currently uncertainty as to whether payments for injury to feelings are subject to tax. Consequently, the U.K. government has decided to clarify the position to make it clear that the exemption does not apply in cases of injured feelings unless this relates to an injury or disability of a physical or psychiatric nature which is serious enough to prevent an employee from performing his or her job.

D. **Foreign Service Relief.** Currently, foreign service relief allows termination payments for qualifying U.K. resident employees to be exempt from U.K. tax if they relate to periods spent working outside the UK. This exemption will now be removed, save for seafarers.

Uber, Deliveroo, Hermes and City Sprint – Workers or Self-Employed?

The last few years has seen the emergence of the so-called "gig economy," which has seen a growing tendency for companies to use self-employed workers

instead of employees, particularly in low-skilled roles in service-based industries. The benefits for employers are significant, as they obtain the use of a large volume of workers on a flexible or part-time basis without the associated costs of permanent employees, e.g. sick pay, holiday pay, employer's NICs, etc. However, the backlash against this practice is gathering pace with companies such as Uber, Deliveroo, Hermes and City Sprint in the firing line. A number of high profile cases have been brought with individuals arguing that the terms and conditions of their work mean that they are not self-employed but rather are workers entitled to a range of benefits they currently do not receive, as well as greater statutory protection such as, for example, the right to the national minimum wage and benefits under the Working Time Regulations, such as minimum period rest breaks.

One of the most high profile cases is the case against the ride-hailing app, Uber, which has 30,000 drivers in London who are treated as classified as self-employed. Two test cases have been brought by drivers who are challenging their self-employed status claiming they are in fact workers. Lawyers for the drivers argue that Uber exerts significant control over its drivers, including control over drivers' routes and penalising drivers who refuse too many jobs over a period, and that this level of control is sufficient to extend worker status to such individuals. If successful, this will have an effect not only the thousands of Uber drivers, but may also have wider ramifications for workers in other industry sectors where the status of the workforce may have been misclassified. A decision is expected in October 2016.

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