EEOC addresses ADA implications on wellness plans

By Shari Herrle, Director of Compliance

A wellness program's compliance with standards imposed by HIPAA does not mean that program is compliant with Title 1 of the Americans with Disabilities Act (ADA).

On April 16, the EEOC released a proposed rule and guidance in its first real attempt to interpret the ADA in a manner that reflects its mission of limiting employer access to confidential medical information while at the same time promoting wellness programs permissible by HIPAA.

The proposed rule defines "employee health program" and "voluntary", identifies permissible incentives, and illustrates new notice requirements imposed on certain wellness plans.

It also addresses outstanding questions on the interplay between company wellness initiatives and the ADA. However, the proposal does not address the extent to which Title II of GINA impacts the ability for an employer to incent wellness participation for family members. Future rulemaking will address GINA.

Highlights of the proposed rule:

- Wellness program incentives may be in the form of a reward or penalty. Employers will need to cap their incentive at 30% of the self-only cost of coverage when offered through a health contingent program or a participation based program that requires employees to answer a health questionnaire with disability-related inquiries or take medical examinations, including biometric screenings. Employers providing incentives greater than 30% of single rate should be prepared to redesign their incentive formula if final regulations maintain this single-only incentive cap.
- Smoking cessation programs requiring an attestation can include incentives as high as 50%, but the same program testing for nicotine use in a bio-metric screening is capped at 30%.
- Disability-related inquiries or medical exams are permitted as long as participation in the program is voluntary.

Highlights of the proposed rule (cont.):

- The term "voluntary" means that a covered entity **does not**:
  - Require employees to participate
  - Deny coverage under any of its group health plans for non-participation or limit the extent of the coverage
  - Take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees as prohibited by the ADA
- To ensure that participation is truly voluntary, an employer must provide notice explaining what medical information will be obtained, who will receive it, how it will be used, restrictions on its disclosure, and the methods the covered entity will use to prevent improper disclosure. Disclosure is permitted only in aggregate form, except when information is needed in order to administer health plan. Employers who require a completed health risk questionnaire and/or biometric screenings must add an explanation on how the personal information will be protected from improper access or disclosure, in addition to the reason the information has been requested. This notice is not required if the employer's wellness program is completely independent from the employer's comprehensive health benefits, but it is noteworthy that very few wellness programs will be considered truly independent. HBI will provide model language for this new requirement once the regulations are finalized later this year.
- An employee health program must be reasonably designed to promote health or prevent disease and must have a reasonable chance of improving employees' health or preventing disease.
- Compliance with rules concerning voluntary wellness programs does not ensure compliance with other antidiscrimination laws. For example, a wellness program may not discriminate on the basis of age in violation of the Age Discrimination in Employment Act.
- Wellness programs that do not include disability-related inquiries or medical exams, such as health education programs, are not subject to the incentive rules. However, the ADA's non-discrimination requirements still apply (e.g., must provide reasonable accommodations that allow employees with disabilities to fully participate and earn rewards).

The EEOC has requested comment on several very specific issues related to the proposed rules, making it apparent what provisions it intends to focus on and where it needs considerable input.

Highlights on the requested comments:

1. Whether "voluntary" incentives to encourage employees to disclose medical information under the ADA must also offer similar incentives to persons who choose not to disclose such information, and instead provide certification from a medical professional stating that the employee is under the care of a physician and that medical risks identified by that physician are under active treatment.
2. Whether a "voluntary" incentives requesting that employees respond to disability related inquiries and/or undergo medical examinations may not be so large as to render coverage unaffordable under the ACA and therefore, in effect, coercive for an employee. Specifically, is it appropriate that incentives in participation-based programs requiring medical exams, biometric screenings, and/or completion of a health risk assessment could be deemed unaffordable in accordance with the ACA affordability standard?
3. What practices best ensure wellness programs are designed to promote health and do not operate to shift costs to employees with specific health impairments or conditions?
4. Should the ADA regulations limit incentives provided within wellness programs that are offered outside a group health plan?
5. What impact would the proposed 30% limit have on incentives offered under the tobacco cessation programs that include disability-related inquires and/or medical examinations? Under the proposed rule, a typical non-tobacco initiative involving completion of a health risk assessment and cotinine test would need to include a cap on the incentive equal to 30% of the single-only rate.

The 60-day comment period will end May 27, 2015. Refer to the Proposed Rule, the new Fact Sheet and a Q&A for additional information.