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EEOC Proposes Wellness Program Regulations

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The Equal Employment Opportunity Commission (EEOC) has proposed much-anticipated regulations regarding the use of employee health program under the Americans with Disabilities Act (ADA). The regulations are an attempt to close the gap between EEOC policy and those devised by other agencies to comply with the Affordable Care Act.

In June 2013, the Departments of Labor, Health and Human Services, and Treasury issued regulations that allow employers to reward employees for participation in wellness programs through both incentives and disincentives, in some cases allowing for incentives worth as much as 30 to 50 percent of the cost of health care coverage. Since then, the EEOC has filed three lawsuits alleging that various wellness programs created in full compliance with these regulations violated the ADA, arguing that the incentives effectively rendered the programs involuntary. After a more than a year of political and administrative wrangling in and around Capitol Hill, the EEOC has now proposed regulations that attempt to be compatible with other federal agencies by allowing employers to provide employee incentives for participating in wellness programs.

The proposed regulations confirm the EEOC's overall perspective that wellness programs and incentives created to induce employee participation in them are allowed if they do not economically coerce participation such that the disclosure of medical information becomes essentially involuntary. Pursuant to the proposed regulations, employee health programs will be compliant if they meet the following:

1. **Reasonably Designed to Promote Health or Prevent Disease**. A program must have a reasonable chance of improving health or preventing disease, without being overly burdensome, and must not be an attempt to circumvent the ADA or other anti-discrimination laws. For instance, assessing employees for unknown health risks is an acceptable practice, but simply collecting medical information without providing any follow-up information or advice not.
2. **Voluntary Participation**. According to the Commission, a program is voluntary only if participation is not required, benefits aren't denied to non-participating employees, no adverse employment action is taken against non-participating employees, and employee are notified of the medical information being obtained, how it will be used and how it will be secured.
3. **Incentives Offered**. An employer *may* offer incentives for participation without rendering the program involuntary, but the maximum allowable incentive must not exceed 30 percent of the total cost of employee-only coverage (meaning the total of *both* an employee's and employer's contributions). Also, if an employee needs a reasonable accommodation to participate in an incentive program, he must be given that accommodation. The Commission provides the example of a deaf employee attending a nutrition class—the employer would need to provide a sign language interpreter at the class unless doing so would present an undue hardship.
4. **Confidentiality**. Any medical information obtained must still be maintained on separate forms, in separate medical files and be treated as a confidential medical record. Supervisors and managers can still be informed regarding necessary restrictions on job duties and accommodations needed. Medical information may only be

used by the employer so long as it does not disclose, or is not reasonably likely to disclose, the identity of a particular employee.

5. **Compliance with Other Laws**. An employee health program must still comply with all other anti-discrimination laws and make no representations that following the aforementioned requirements will ensure compliance with those other laws.

The proposed regulations were released on March 20, 2015, in a notice to the Office of Management and Budget (OMB). Once cleared by OMB, these proposed regulations will be submitted for public comment.

Even though the EEOC regulations are not final, employers must be sure that their employee health programs comply with all federal regulations, not just those issued by an individual agency or department. For example, in conjunction with the EEOC's issuance of the proposed regulations, the Employee Benefit Security Administration (part of the DOL) issued an updated FAQ reminding employers that "the fact that a wellness program that complies with the Departments' wellness program regulations does not necessarily mean it complies with any other provision of the PHS Act, the Code, ERISA (including the COBRA continuation provisions), or any other State or Federal law, such as the Americans with Disabilities Act or the privacy and security obligations of the Health Insurance Portability and Accountability Act of 1996, where applicable."

Miller Canfield attorneys will be also be discussing these regulations and other issues arising under employee wellness programs at each of the HR Spring Training seminars in Kalamazoo, Troy and Chicago.

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