Population Health Alliance Working Group on Employee Wellness Programs

EEOC Recommendations

Background: On April 16, 2015, the Equal Employment Opportunity Commission (EEOC) released a proposed rule and supplemental guidance ("Proposed Rules") addressing the use of financial incentives to encourage participation in employee wellness programs with respect to the Americans with Disabilities Act (ADA). For several years, conflicting agency positions on the use of such incentives have made the implementation of employee wellness programs difficult despite Section 2705 of the Affordable Care Act that sets forth the parameters issued by the Departments of Health and Human Services (HHS), Treasury and Labor (Tri-Agency) in 2013 (current ACA/Tri-Agency Framework). We believe Members of Congress, regulators at HHS, Treasury, and Department of Labor and federal courts, were mindful of the ADA and the Genetic Information Nondiscrimination Act of 2008 (GINA) when they enacted this provision and helped spur interest in employee wellness programs throughout the country. Most of these concerns arose from the lack of official guidance from the EEOC coupled with EEOC lawsuits filed in 2014, alleging that certain wellness program designs violated the ADA and GINA. During the drafting of the ACA, Congress recognized how employer wellness programs could use incentives to both help employees improve their health and reduce health care costs and these developments undermined that intention.

Proposed Rule: We appreciate the EEOC taking the first step with the proposed rules to bring greater clarity on the use of financial incentives in employee wellness programs. We are encouraged to see the EEOC supports the use of financial incentives in its proposed rule and find many of its proposed guidelines for the "use of information, privacy and confidentiality" helpful in explaining to employees how wellness programs work. We also understand the important role the EEOC plays in ensuring that employers do not engage in discriminatory practices. We also recognize the difficult job the EEOC has to ensure the ADA and GINA are consistent with the current legal framework for employee wellness programs. While we believe the proposed rules make progress, there are still areas of the rule that need further clarification and others that could disrupt successful wellness designs permitted under the ACA. We appreciate the opportunity to offer our recommendations to ensure further clarity and consistency with the current ACA/Tri-Agency Framework.

1. **EEOC proposes to count "participatory programs" towards incentive caps** - The EEOC proposes to count participatory wellness program[1] towards a proposed 30 percent incentive cap (and the 50 percent cap applicable to smoking cessation). Under the current ACA/Tri-Agency Framework, participatory program rewards are NOT counted against the incentive cap – only "health-contingent programs" (e.g., reduce BMI). Previously, if an employer contributed $60 to the employee's health coverage and the employee contributed $40, the total cost would be $100 of which up to $30, or

[1] "Participatory wellness programs" are where the rewards are not based on a health factor such as a sponsorship of fitness center membership or smoking cessation program regardless of whether you quit smoking. A "health-contingent" program is one based on an individual satisfying a standard related to a health status factor (i.e. a premium surcharge based on tobacco use).

in the case of smoking $50,[2] could be used for a reward for a health–contingent standard. Under the Proposed Rules, the employer's use of incentives for basic programs, such as completion of a health risk assessment or contribution to a gym membership, would count towards the EEOC's incentive cap and de-value further incentives that could be offered to employees to help them engage in health and wellness.

Recommendation: This proposal is in direct conflict with the current ACA/Tri-Agency Framework. Participatory program incentives should not be counted towards the incentive cap and only "health – contingent" program incentives should be counted as provided for in the current ACA/Tri-Agency Framework. This will add an additional administrative burden and possibly discourage the use of incentives designed to improve the health of employees and ultimately reduce health care costs.

2. **EEOC proposes limiting the calculation of "cost of coverage" to employee-only** – Currently, the "cost of coverage" used for calculating the incentive limits is the total of both employee and spouse/dependent cost of coverage. A recent Employer-Sponsored Health & Well-being Survey found that 54 percent of employers offer incentives to spouses/domestic partners in 2015.[3] Limiting the cost of coverage calculation to the employee would only effectively cut the amount of allowable incentives in half. For example, if the total cost of employee plus spouse coverage was $10,000 each or a total of $20,000, an incentive value of 30% could differ between $6,000 (current ACA/Tri-Agency Framework) or $3,000 (under the Proposed Rules).

   Recommendation: The Proposed Rules should reflect prior authorization in the current ACA/Tri-Agency Framework to include both employee and family member coverage and not further disrupt wellness program designs that have been abiding by the current framework.

3. **EEOC proposes to count non-financial incentives towards incentive cap** – Employee wellness programs differ in some cases on how they align financial incentives to encourage participation in their respective wellness programs. Some offer prizes or in-kind incentives such as "days-off." Under the current ACA/Tri-Agency Framework, only financial incentives are counted. Including more amorphous prizes and days off under the Proposed Rules would have to be valued and counted against the incentive cap.

   Recommendation: Counting non-financial incentives is inconsistent with the current ACA/Tri-Agency Framework. It will add an administrative burden and possibly discourage the use of these additive incentives designed to improve the health of employees.

4. **EEOC proposes to limit the 50 percent premium incentive cap for smoking cessation programs** – On behalf of the Tri-Agencies, the RAND Corporation analyzed

[2] Section 2705 of ACA: "The Secretaries of Labor, Health and Human Services and the Treasury may increase the reward under this subparagraph to up to 50 % of the cost of coverage if the Secretaries determine that such an increase is appropriate."

[3] http://www.businessgrouphealth.org/pub/29d50202-782b-cb6e-2763-a29a9426f589

the database of the Population Health Alliance (formerly named CCA).[4] As cited in the Tri-Agency final regulation, "RAND found notable evidence of the effectiveness of smoking cessation programs in its analysis of the CCA database and case studies. The CCA database analysis found that participation in a program targeting smoking cessation decreases the smoking rate among participating smokers by 30% in the first year."[5] The Tri-Agency regulation also recognized that employers, especially large ones, are adding incentives to their overall wellness programs and many were looking to strengthen their smoking cessation programs. The enormous health and economic benefits to our society from helping people quit smoking is without question. This is why the Tri-Agency regulation permitted employers to offer up to 50 percent of the cost of coverage for premium incentives toward smoking cessation programs. To measure smoking status, many wellness programs offer biometric screenings for employees to test for cotinine (a byproduct of nicotine) and to verify whether or not they are engaged in this unhealthy behavior. The Proposed Rules provide that using a test to verify this status would be subject to the 30 percent cap and not the larger 50 percent cap available for smoking cessation.

Recommendation: After public comments, extensive research and legal review, the current ACA/Tri-Agency Framework concluded that 50 percent of the cost of coverage should be available for incentives for smoking cessation should be permitted. The EEOC should not reverse course on the efforts being made by wellness programs to discourage tobacco use.

5. **The EEOC seeks comments on including incentives in calculating the "affordability standard"** - The EEOC is seeking comments on whether it should further restrict incentives employers offer to employees based on an affordability standard where the costs an employee would pay for employee-coverage may not exceed 9.56 percent of an employee's household income. Including incentives in this calculation would severely undermine current programs and the current 30%/50% limits set under the current ACA/Tri-Agency Framework.

   Recommendation: *The current ACA/Tri-Agency Framework currently address incentives and reversing course to include incentives as it relates to an "affordability standard" would have a chilling effect on wellness programs.*

6. **EEOC seeks comments on written consent** – The EEOC poses the question of whether "a requirement that employees participating in wellness programs that include disability-related inquiries and/or medical examinations,... provide prior, written and knowing confirmation that their participation is voluntary?"[6]

   Recommendation: The notice included in the Proposed Rule should suffice and there should be no need to add a further administrative burden on employee wellness programs.

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[4] A Review of the U.S. Workplace Wellness Market" February 2012 (http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf)
[5] http://www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf
[6] http://federalregister.gov/a/2015-08827

7. **<u>The EEOC rejects the current "Safe Harbor" provisions of the ADA for certain wellness programs</u> –** The ADA includes a statutory exemption or "safe harbor" that generally exempts the following from the ADA:

    a. an insurer, medical provider, HMO, agent, third party benefit plan administrator, or similar organization, in underwriting risks, classifying risks, or administering risks based on or consistent with State law; or
    b. a covered person or organization in establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering risks based on or consistent with State law; or
    c. a covered person or organization in establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.[7]

    In 2011, this "safe harbor" claim was put to the test when a public employee challenged his employer's wellness program[8] that required him a get a biometric screening, which entailed a "finger stick for glucose and cholesterol," and an online Health Risk Assessment questionnaire, to obtain a $20 premium discount. Plaintiff Bradley Seff filed a class action lawsuit, alleging that defendant Broward County's employee wellness program violated the ADA's prohibitions on disability-related inquiries and medical examinations. The district court granted Broward's motion for summary judgment, finding the employee wellness program fell within the ADA's safe harbor provision for insurance plans. The decision was later affirmed by the United States Court of Appeals for the Eleventh Circuit.

    The District Court stated the following:

    > "The wellness program falls under the [ADA's] safe harbor provision because it is designed to develop and administer present and future benefits plans using accepted principles of risk assessment. The program renders aggregate data to the County that it may analyze when developing future benefit plans. The County uses this information to classify various risks and decide what type of benefits plans will be needed in the future in light of these risks. The County is thus determining what kind of coverage will need to be provided. Though it is not underwriting or classifying risks on an individual basis, it is underwriting and classifying risks on a macroscopic level so it may form economically sound benefits plans for the future. Furthermore, the wellness program is an initiative designed to mitigate risks. It is based on the theory that encouraging employees to get involved in their own healthcare leads to a more healthy population that costs less to insure. In other words, the program is based on underwriting, classifying, and administering risks because its ultimate goal is to sponsor insurance plans that maintain or lower its participant's premiums."

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[7] http://www.littler.com/publication-press/publication/new-life-eleventh-circuit-turns-back-ada-challenge-employers-wellness-

[8] http://law.justia.com/cases/federal/appellate-courts/ca11/11-12217/11-12217-2012-08-20.html

In the Proposed Rule, the EEOC states it "does not believe that the ADA's "safe harbor" provision applicable to insurance, as interpreted by the District Court in *Seff v. Broward County*.

Recommendation: The current safe harbor provisions should remain as they are and at a minimum, the EEOC should offer what it deems the necessary compliance steps for the safe harbor provisions for public comment in its Proposed Rule .

8. **The EEOC proposed rule does not address GINA**– On October 27, 2014, the EEOC sued Honeywell International claiming that their wellness program violated GINA because employees are penalized if their spouse did not complete a biometric screening. The EEOC charged "Honeywell is offering an inducement within the meaning of GINA to obtain medical information of its employees' spouses, including information that can show hypertension, diabetes, and potentially other conditions… Medical information relating to manifested conditions of spouses is family medical history – or genetic information – under GINA." After a U.S. District Court denied the EEOC's request for a temporary restraining order, a cloud of uncertainty remains as the EEOC could sue on these grounds again in the future.

   Recommendation: The EEOC's proposed rule does not address the issue of GINA but will do so in a future EEOC rulemaking. Until it does with respect to GINA, employee wellness programs will continue to be in a state limbo as it concerns the EEOC interpretation of the GINA Act and wellness programs.

9. **Physician Attestation** – The EEOC is seeking comments on "whether to be 'voluntary' under the ADA, entities that offer incentives to encourage employees to disclose medical information must also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the employee is under the care of a physician and that any medical risks identified by that physician are under active treatment." This would create a different standard under the Proposed Rule than the standard that exists under the current ACA/Tri-Agency Framework.

   Recommendation: Employees currently have protections for reasonable alternatives under the current ACA/Tri-Agency Framework for health-contingent programs and for reasonable accommodations under the ADA to provide them with protection. No additional standard is needed.

10. **Effective Date** – Because the EEOC's timeline for promulgating a final rule is unclear, uncertainty is being created that will limit and/or possibly deter the use of employee wellness programs.

    Recommendation: While the EEOC should implement its final rules as soon as possible to provide clarity to employers in implementing their wellness programs, the effective date of implementation should grant enough time for wellness programs to come into compliance.

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There are portions of the Proposed Rules that conform to existing law and regulations, which will prove helpful in dispelling uncertainty. Notably, the guidance conformed with the current ACA/Tri-Agency Framework that should be adopted such as the following:

1. **<u>EEOC's proposed guidelines for Use of Information, Privacy and Confidentiality</u>** –

    a. **Use of Information** – The Proposed Rule provides that medical information collected may only be provided to a covered entity in aggregate terms that do not disclose the identity of the specific individual except as needed to administer the health plan.

    Recommendation: This provision is aligned with the current ACA/Tri-Agency Framework *and should apply.*

    b. **Protected Health Information –** The Proposed Rule provides that information collected or created from participants in a wellness program should be treated as protected health information ("PHI").

    Recommendation: This provision is aligned with the current ACA/Tri-Agency Framework *and should apply.*

    c. **Required Notice –** The Proposed Rule requires a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the information will be used, the restrictions on its disclosure and the method the covered entity will employ to prevent the improper disclosure of the information.

    Recommendation: This provision is a welcome addition to the current ACA/Tri-Agency Framework *and should apply.*

2. **<u>Prohibition on Coercive Action</u>** – The Proposed Rule would prohibit employers from denying coverage, taking any adverse employment action or taking any other coercive or threatening action against an employee who does not participate.

    Recommendation: This provision resembles prior EEOC comments in 2009[9] and should apply.

[9] http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html

In Summary: The bi-partisan provision (sponsored by Senators Harkin (D)-Enzi (R) of the HELP Committee and Senators Carper (D)-Ensign (R) of the Finance Committee) in the ACA to enact greater incentives for wellness programs is one of the few bi-partisan provisions the public can point to in the ACA debate. According to the Kaiser Family Foundation's Employer Health Benefits 2014 Annual Survey, 98% of large companies (200 or more workers) and 73% of smaller companies in the United States offered at least one wellness program in 2014, and more than 75% of U.S. employees now have access to such programs. According to the Sixth Annual Wellness in the Workplace Study conducted by the Optum Resource Center for Health & Well-being, 87% of employers are offering incentives to drive engagement in their wellness programs. For these programs to continue and succeed, we must work to ensure current laws and regulations work in harmony to improve health outcomes and lower rising health costs. We look forward to working with the EEOC, Members of Congress and other stakeholders to bridge these remaining divides so that the general public is more knowledgeable about wellness programs and the benefits that can be achieved.

The proposed rule was published in the Federal Register on April 20, 2015 and the EEOC is accepting comments until June 19, 2015.