

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.

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.

EEOC proposes to count “participatory programs” towards incentive caps:

This proposal is in direct conflict with the current ACA/Tri-Agency Framework. Participatory program incentives should not be subject to the incentive limits that apply to “health – contingent” programs today.

EEOC proposes to limit allowance for 50% premium incentive cap for smoking cessation programs:

After public comments, extensive research and legal review, the Tri-agency final regulations concluded that 50% of premium financial 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.

EEOC proposes limiting the calculation of “cost of coverage” to employee-only:

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.

EEOC proposes to count non-financial incentives toward incentive caps:

Counting non-financial incentives is inconsistent with the ACA/Tri-agency framework. In addition, such in-kind incentives (prizes or days off) would need to be valued and calculated by employers and will add an additional administrative burden and possibly discourage the use of these additive incentives designed to improve the health of employees.

EEOC seeks comments on including incentives in calculating the “affordability standard”:

The current ACA/Tri-Agency framework addresses incentives and reversing course to include these

incentives would have a chilling effect on employee wellness programs.

EEOC seeks comments on written consent:

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

The EEOC rejects the current “Safe Harbor” provisions of the ADA for certain wellness programs:

The EEOC’s comments on the “safe harbor” are concerning. The current safe harbor provisions should remain as they are and at a minimum, the EEOC should have offered what it deemed the necessary compliance steps for the safe harbor provisions for public comment in its proposed rule and not simply dismiss federal case law.

The EEOC proposed rule does not address GINA:

The EEOC’s Proposed Rule stated that they decided not to address the issue of GINA but will do so in a future EEOC rulemaking. Until addressed, employee wellness programs will still be unclear regarding compliance under the EEOC.

Physician Attestation:

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

Effective Date:

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.

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.