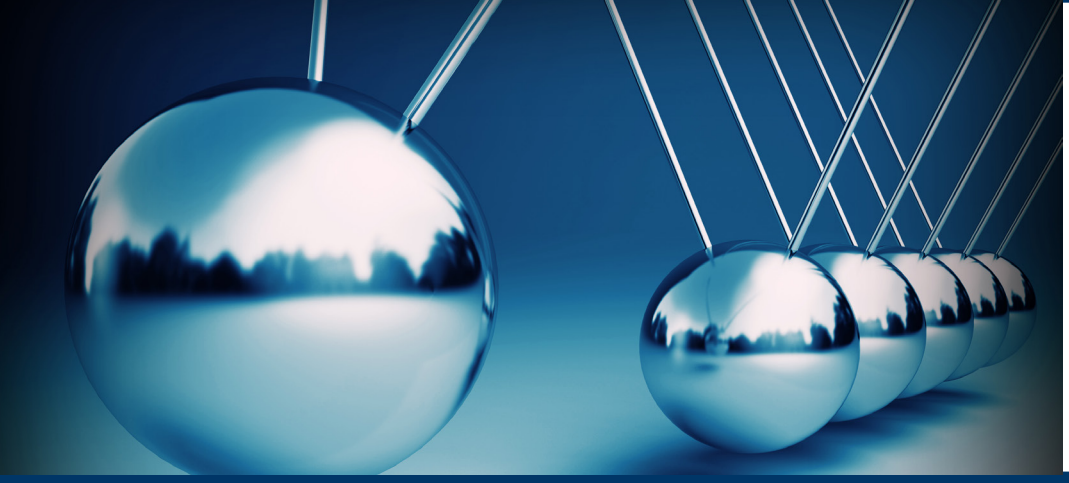

MURTHA MEANS
MORE
INDUSTRY INSIGHT

LABOR AND EMPLOYMENT NEWS

April 2015

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PROPOSES RULES FOR WELLNESS PROGRAMS

Wellness programs have come into vogue in recent years. By allowing significant premium reductions for participation, the Affordable Care Act ("ACA") explicitly encouraged them. However, the Equal Employment Opportunity Commission (EEOC) has long cautioned that aspects of wellness programs could violate the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The tension between the ACA, the ADA and GINA has created significant uncertainty for employers trying to implement lawful Wellness Programs.

After a long wait, the EEOC finally issued proposed rules clarifying the relationship between the ADA and the ACA. After a notice period and comments, the EEOC will issue final regulations. Here's a link to the proposed rule and a link to a Q&A for small businesses.

The ACA permits employers to offer wellness programs and award employees who comply with the requirements, either through fulfilling certain health related requirements (i.e. blood pressure and cholesterol testing) or meeting certain standards (i.e. Body Mass Index (BMI) or cholesterol levels), with premium reductions of up to 30%. The programs can also be designed to increase premiums for those who do not participate, or fail to meet the levels required.

The EEOC had looked askance at such programs. It recently filed suit against Honeywell Corp. claiming that Honeywell's wellness program violated the ADA and GINA. The Plan required employees to undergo biomedical testing including a blood draw for cholesterol, glucose and nicotine levels. Employees who failed to participate did not receive a Health Savings Account (HSA) worth up to $1,500, and had to pay an additional $500 surcharge for health insurance coverage.

The ADA prohibits employers from requiring non-job related medical examinations. These include answering Health Risk Assessments (HRAs) and the blood tests mentioned above. The EEOC claimed that the value of the Honeywell financial penalties made the program "involuntary." The EEOC had contended that only very minor financial incentives could be "voluntary". The court denied the EEOC's motion for an order stopping Honeywell's wellness plan.

The lawsuit created great uncertainty within the employer community. Many wellness programs contained incentives like Honeywell's. Members of Congress expressed displeasure with the EEOC's position on wellness plans because it did not support the ACA's promotion of wellness initiatives.

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

Susan J. Baronoff

Michael Colgan Harrington

Lauren M. Hopwood

Hugh F. Murray, III

Lissa J. Paris

Rachel Faye Smith

Barry J. Waters

Jennifer A. Corvo

Stella Szantova Giordano

Colleen O'Neill

Monica P. Snyder

Kristen L. Zaehringer

The EEOC's proposed rule modified its previous position extensively. It generally falls in line with HIPAA's requirements (as modified by the ACA) although it leaves some remaining questions. In summary the EEOC proposes that:

A Program is Voluntary if:

The amount of incentive offered does not exceed 30% of the employee's total cost of employee-only coverage.

Note: this counts single employee coverage, not family coverage.

Employees may not be required to participate, and they cannot be denied health insurance or given reduced benefits if they do not participate. Lack of participation cannot lead to discipline.

HRAs and other medical information can be used only if:

Employers receive aggregated medical information that helps to design appropriate workplace wellness programs; or Employers provide feedback to Employees about their health.

Employers provide employees notices describing the medical information collected, who receives it, how it will be used and how it will be kept confidential.

The new proposal also requires that:

Design:
Wellness programs must be designed so that they provide a reasonable chance of "improving health or preventing disease."

Accommodations:
Programs offering incentives must provide reasonable accommodations that enable employees with disabilities to participate and earn incentives.

Confidentiality:
HIPAA compliance and other confidentiality programs are maintained.

Remaining Issues:

-- The proposed regulations do not address the GINA issues which wellness programs raise. Consequently HRAs still cannot request family (including spousal) history and other "genetic information."

-- The proposed regulations limit incentives to 30% of an individual's plan cost—not the cost for family coverage.

-- The proposed regulations do not add the 20% additional tobacco cessation reward/penalty for participating in such programs.

-- The EEOC continues to deny protection under the ADA's insurance plan "safe harbor." Although at least one court has held otherwise, the EEOC asserts that wellness plans that are part of a group health policy do not have protections from ADA enforcement.

The Future:

Final regulations will probably be issued sometime in the fall. We will keep you up to date. In the meantime, the EEOC has allowed more flexibility in designing wellness plans. The proposed rule provides a "safe harbor" for Employers who follow its lead.

Please contact Lissa J. Paris at 860.240.6032 or lparis@murthalaw.com if you have any questions concerning the issues discussed in this article.