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Employee Wellness Programs, the EEOC, and the Americans with Disabilities Act

On April 20, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") published a Notice of Proposed Rulemaking on the Americans with Disabilities Act ("ADA") and Employee Wellness Programs. While this is not a final rule and is not binding, the Proposed Rule provides insight into the EEOC's focus on wellness programs. The proposed rule would amend ADA regulations and the EEOC's own interpretive guidance with regard to these programs, and provides employers with guidance on how to structure a wellness program that does not run afoul of the ADA.

The proposed rule explains what an employee wellness program is, what it means for the program to be "voluntary," what incentives employers can offer as part of a voluntary employee health program, and what requirements apply concerning confidentiality of employee medical information obtained by the employer during the course of the program.

What are wellness programs?

Wellness programs have become an increasingly popular way to both control health care costs for employers and to improve the wellbeing of employees. Wellness programs can be designed in a number of ways. Some wellness programs merely ask employees to engage in healthier behavior, such as becoming more active or eating better, while other programs are contingent on the employees' health and seek medical information or documentation from employees or request that employees undergo certain screening for risk factors, such as high blood pressure or cholesterol. Programs that fall into the second category have implications under the ADA and other federal laws, as they can include medical exams.

What is a permissible wellness program under the Proposed Rule?

Under the proposed rule, an employer may only offer limited incentives, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations if employee participation is voluntary. In most circumstances, the incentives are limited and cannot exceed 30 percent of the total cost of employee-only coverage. Therefore, an employer cannot require employees to participate, cannot deny coverage under any of its group health plans or particular benefits packages within a group health plan, and cannot take any other adverse

action against employees who decline participation in an employee health program or fail to achieve certain health outcomes.

To summarize, the proposed rule provides the following:

- Wellness programs must be voluntary
- Wellness programs must be reasonably designed to promote health or prevent disease
- Employers may offer limited incentives for employees to participate in wellness programs or to achieve certain health outcomes
- Medical information obtained as part of a wellness program must be kept confidential
- Employers must provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employer offers

What should employers do in the meantime?

While the proposed rule is not yet binding, employers may already be subject to certain requirements under the ADA or other laws. Employers should ensure that wellness programs are voluntary, employers are not denying health insurance to employees who do not participate, and employers are not taking any adverse employment action against employees who do not participate in wellness programs. Employers should also provide reasonable accommodations to employees with disabilities to allow those employees to participate in the programs.

The proposed rule can be accessed here. Please contact Denis Jacobson at (336) 271-5242 (djacobson@tuggleduggins.com), or Sarah Negus at (336) 271-5256, (snegus@tuggleduggins.com) in the employment law and litigation practice groups, if you have any questions concerning your wellness program.