Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

EEOC Proposes Rule on Employee Wellness Programs

The Equal Employment Opportunity Commission ("EEOC") has issued a notice of proposed rulemaking ("NPRM") regarding employee wellness programs. The proposed rule outlines and clarifies requirements that an employee wellness program must meet to comply with the Americans with Disabilities Act ("ADA"). The EEOC will accept comments from the public regarding the proposed rule until June 19, 2015.

Many employers maintain employee wellness programs, which sometimes use health risk assessments and biometric screenings to assess employee wellness. Employers sometimes implement either a "participatory" or "health-contingent" wellness program, which offer employees incentives for participating in health-related activities and achieving certain health-related results, respectively.

Employee wellness programs are not only popular among employers, but are also specifically permitted by the Health Insurance Portability and Accountability Act and Affordable Care Act, subject to certain limitations. Although the ADA allows an employer to make disability-related inquires or ask an employee to take a medical examination when done as part of a voluntary wellness program, last year the EEOC nevertheless sued a number of employers on the grounds that their employee wellness programs violated the ADA and other anti-discrimination laws. The EEOC's proposed rule provides employers with much anticipated guidance on maintaining employee wellness programs, and addresses the interplay of the ADA and other federal anti-discrimination laws.

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Under the EEOC's proposed rule, an employee wellness program, including any disability-related inquiries or medical examinations that are a part of the program, "must be reasonably designed to promote health or prevent disease." This requirement is met if the program has "a reasonable chance of improving the health of or preventing disease in participating employees," and is not "overly burdensome," "a subterfuge for violating the ADA or other laws prohibiting employment discrimination," nor "highly suspect in the method chosen to promote health or prevent disease."

Further, an employee wellness program that includes disability-related inquiries or medical examinations, including inquiries or examinations that are part of a health risk assessment, must be voluntary. Accordingly, an employer cannot require an employee to participate in such a program; deny coverage under "any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits"; or "take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees" who do not participate or do not achieve certain health results.

In general, the proposed rule provides that medical information that is collected as part of an employee wellness program may be disclosed to employers only in aggregate terms that do not, and are not reasonably likely to, reveal the employee's identity. An employer must also provide employees with disabilities with reasonable accommodations so that such employees are able to participate in an employer's wellness programs and earn whatever incentives the employer offers.

The NPRM also provides that incentive limitations and notice requirements contained in both the proposed rule and changes to the corresponding section of the interpretive guidance apply only to wellness programs that "are a part of or provided by a group health plan or by a health insurance issuer offering group health insurance in connection with a group plan."

With respect to programs maintained through such group plans, incentives offered to an employee under a program that involves disability-related inquiries or medical examinations cannot exceed 30 percent of the total cost of employee-only coverage. This limit would apply regardless of whether the incentives are financial or in-kind; in the form of a reward or penalty; or if the program is "participatory," "health-contingent," or a combination of the two.

Finally, an employer that implements such a program would be required to provide written notice to employees that describes the medical information to be collected,

how it will be used, with whom it will be shared, and the methods the employer will use to prevent medical information from being improperly disclosed.

Employer Tips

In light of the proposed rule, employers should review their current wellness programs to determine the impact of the proposed rule if adopted in its current form. Your employment attorneys can assist you in interpreting the proposed and final version of the rule, conducting a review of your employee wellness program, and recommending appropriate changes to your current program.

Additional relevant information may be found on the **EEOC's Questions and Answers** page and **Fact Sheet for Small Business** regarding the proposed rule, as well as the **FAQS regarding the Affordable Care Act issued jointly by the Department of Labor, Health and Human Services, and the Treasury**.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

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