EUCLID MANAGERS®
LEGISLATIVE REVIEW

VOL. XX, ISSUE 3 JUNE 2015

Wellness Program Rules Complicate and Illuminate

As employers increasingly adopt measures to "bend the cost curve" to actually lower health costs, one of the more common - wellness programs – was dealt a blow when the EEOC (Equal Employment Opportunity Commission) sued Honeywell International claiming their wellness plan violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

This issue of *Legislative Review* explores the latest rules issued by the EEOC to add clarity to steps employers can take to implement wellness programs.

Honeywell's Plan

Honeywell's wellness program featured biometric tests to identify health risks. Among the biometric measures were blood pressure checks, cholesterol screening, and body mass index (BMI). Blood was screened to check for tobacco use.

A key feature of the wellness plan was the penalty structure of the plan. Employees could be penalized by surcharges applied to health plan costs as well as loss of health savings account contributions from Honeywell.

Honeywell maintained that it had followed guidance as provided by the ACA and HIPAA.

continued on page 2

Letter from Karen Knippen

One of the challenges that employers and insurers have struggled with over the years is how to engage employees to take positive steps to reduce their health costs by improving their health. Some employers have implemented robust wellness programs in an effort to "bend the cost curve" of health costs.

This recent and ongoing ambiguity between different federal laws – not to add in possible state laws – has had a chilling effect on adoption of wellness programs. The EEOC rules shed a bit more light on what employers can do. Actions pending in Congress as well as the result of this proposed rule process will, hopefully, provide much needed clarity.

Sincerely yours,

Karen Knippen, RHU, REBC, CLTC
Senior Vice President

EEOC Proposed Rule

The EEOC responded to the call for more clarity in wellness programs with a proposed rule issued April 20, 2015. **The rule attempts to define the permissible financial incentives employers can take to comply with the ADA and other federal statutes. Comments can be made on the rule until June 19, 2015.**

Types of Wellness Plans

There are two (2) general types of wellness plans. These are participatory plans and health-contingent programs.

Participatory wellness plans either don't include rewards or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard related to a health factor. **Common participatory programs include reimbursement for membership in a fitness center, a reward for participation in a smoking cessation program and the like.** Participatory programs are permissible under HIPAA as long as they are available to all similarly situated individuals.

Health-contingent wellness programs are either activity-only or outcome based. Individuals must satisfy a standard related to a health factor to obtain a reward. The significant difference in the two (2) is that outcome based programs require that an individual "attain or maintain a specific health outcome" to obtain a reward.

Health-contingent wellness programs must meet five (5) requirements under the Public Health Services Act (PHS). They are:

1. Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year.
2. The total reward offered under all health-contingent programs with respect to the plan cannot exceed 30% of the total cost of the employee-only coverage under the plan or 50% for tobacco prevention or reduction programs
3. They must be reasonably designed to promote health or prevent disease.
4. The full reward must be available to all similarly situated individuals. An activity-only program must have a reasonable alternative standard or waiver for a person who may have medical difficulty meeting the standard. An outcome-based program must allow a reasonable alternative standard or waiver for obtaining the reward for a person who does not meet the initial standard based on a measurement, test or screening.
5. Plans and issuers must disclose the availability of the reasonable alternative.

Key Criteria – Plan must be Voluntary

The EEOC states that for a program to be in compliance with the ADA, disability-related inquiries or medical exams, including those that are part of a health risk assessment (HRA), must be voluntary.

For a program to be considered voluntary, a covered entity may not "require an employee to participate in such a program and may not deny coverage under any of its group health plans or particular benefits packages with a group health plan, generally may not limit the extent of such coverage, and may not take any other adverse action against employees who refuse to participate in an employee health program or fail to achieve certain health outcomes."

The EEOC determined that excessive incentives or penalties may result in the program being involuntary rather than voluntary, as required. As such, the maximum incentive under the program, combined with the maximum incentive for other programs that include a

disability-related inquiry or medical examination cannot exceed 30% of the total cost of employee-only coverage.

This limit also seems to apply to tobacco-cessation programs if there is a biometric screening to ascertain compliance. If a program merely asks about compliance, 50% appears to be the allowable incentive for tobacco programs.

To be voluntary, employers must provide employees with a notice explaining;

- What medical information will be obtained
- How it will be used
- Who will receive the medical information
- Restrictions on the disclosure of the information
- The methods the covered entity uses to prevent improper disclosure of the medical information.

Programs must be Reasonably Designed

Programs that collect medical information, including voluntary medical histories with or without medical exams must be "reasonably designed to promote health or prevent disease."

A reasonable design means that there must be a chance of improving health or preventing disease in participating employees. The program must not be "overly burdensome or a subterfuge for violating the ADA or other laws prohibiting employment discrimination."

The guidance states that collecting medical information on a health questionnaire without providing follow-up information or advice would not be reasonably designed to promote health. A plan is also not reasonably designed if conditions for obtaining a reward are "overly burdensome" or have "unreasonably intrusive procedures, or place significant costs related to medical examinations." **A plan that merely shifts costs to targeted employees based on their health will, likewise, not pass scrutiny.**

Action Steps

Employers that have wellness programs in place, or who are contemplating adding one, should review or consider the following:

- Programs that limit an employee's options regarding which plans they may participate in based on biometric or activity-based criteria
- Whether incentives impinge on an employee's perception of the program being voluntary, e.g., is the penalty so high that an employee is compelled to participate to keep the underlying health plan affordable. In some cases a program may meet the 30% threshold and still be found to not be voluntary
- Whether the tobacco cessation program involves a medical exam
- Whether the employer is providing sufficient notices regarding alternatives
- Steps necessary to ensure confidentiality of any collected medical records.

Final Caution

FAQs issued on April 16, 2015 in conjunction with the release of the proposed rules address wellness programs and the ACA. The second of the two (2) questions in the FAQ (FAQS About Affordable Care Act Implementation (Part XXV)) is:

Is compliance with the Departments' wellness program regulations determinative of compliance with other laws?

The answer: No.

The answer goes on to explain that the regulations do not necessarily mean it complies with any other provisions of the PHSA, ERISA, ACA, HIPAA and other state state and federal laws.

EUCLID MANAGERS®
Serving the independent agent since 1976
234 Spring Lake Drive, Itasca, Illinois 60143

Inside:

Wellness Program Rules Complicate and Illuminate

EUCLID MANAGERS®
LEGISLATIVE REVIEW

A service publication for brokers from Euclid Managers®, proudly representing UnitedHealthcare of Illinois, Delta Dental of Illinois, MetLife and UnitedHealthOne.

HealthiestYou and Lifelock available through Euclid Managers Concierge Services.

EUCLID MANAGERS®
Serving the independent agent since 1976

Visit us online www.euclidmanagers.com.

Legislative Review is published by Euclid Managers®, 234 Spring Lake Drive., Itasca, IL 60143. For more information, contact your Marketing Representative or **Marcy Graefen at (630) 238-2915** or marcy@euclidmanagers.com. Outside Chicagoland: (800) 345-7868, Fax (877) 444-2250.