Workplace wellness programs have become commonplace in corporate America, a development in part due to incentives in the Affordable Care Act ("ACA"). The influx of such programs has not gone without notice, however, as the Equal Employment Opportunity Commission ("EEOC") has recently challenged wellness programs in an effort to ensure compliance with the Americans with Disabilities Act ("ADA"), and the Genetic Information Nondiscrimination Act of 2008 ("GINA"). In EEOC v. Honeywell International, the EEOC lost a motion for a preliminary injunction where it alleged the company’s wellness program violated Title VII of the Civil Rights Act ("Title VII"), and the ADA. Given the high burden of the preliminary injunction standard, the U.S. District Court for the District of Minnesota ruled that the EEOC failed to demonstrate that Honeywell employees would face irreparable harm, or that employees’ right to privacy in their protected health information ("PHI") was compromised.

In response to this defeat, on April 16, 2015, the EEOC drafted new wellness regulations to address the concerns identified in the Honeywell case and others. These amendments relate specifically to wellness programs. The proposed rule provides new guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations, and the manner in which such programs may be offered. The time for public notice and comment on the proposed rule began on April 20, 2015, and closed on June 19, 2015.

The proposed rule has five main components employers should consider in creating or revising wellness programs. The proposed rule essentially requires that a wellness program: (1) be reasonably designed to promote health or prevent disease; (2) be voluntary; (3) not have incentives totaling more than 30 percent of the total cost of employee-only coverage; (4) provide adequate notice to employees; and (5) ensure confidentiality of PHI.

**REASONABLY DESIGNED TO PROMOTE HEALTH OR PREVENT DISEASE**

First, any wellness program that includes disability-related inquiries or in-depth medical examinations must be reasonably designed to promote health or prevent disease. To meet this standard, the wellness program must have a reasonable chance of improving the health of, or preventing disease in, participating employees. The program also must not be overly bur-
densome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.

For example, conducting a biometric screening of employees for the purpose of alerting them to health risks of which they may have been unaware would meet this standard, as would the use of aggregate information from employee Health Reimbursement Arrangements by an employer, if that information is then used to design and offer health programs aimed at specific conditions that are prevalent in the workplace. Conversely, if a wellness program collected PHI from a health questionnaire without providing employees follow-up information or advice, the program would not be reasonably designed to promote health according to the new proposed EEOC rule. Additionally, a wellness program would not be in compliance with the new EEOC rule if the program imposed, as a condition to obtaining a reward, an overly burdensome amount of time for participation, required unreasonably intrusive procedures, or placed significant costs related to medical examinations on the employee. The program may not be designed for the purpose of shifting healthcare costs from the employer to the employee based on their health.

VOLUNTARY

Second, a wellness program must be voluntary. To meet this requirement, the employer may not require an employee to participate in a wellness program, and may not deny coverage or other benefits under any of its group health plans or particular benefits packages within a group health plan as a penalty for non-participation. Generally, an employer 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. Additionally, an employer may not retaliate against, interfere with, coerce, intimidate, or threaten employees for not participating in the wellness program by coercing an employee to participate or threatening to discipline an employee who does not participate.

THE 30 PERCENT LIMIT

The EEOC rule does not prohibit the use of incentives to encourage participation in employee wellness programs, but it does set limits on incentives to ensure that employee participation is voluntary. The total allowable incentive available under all programs may not exceed 30 percent of the total cost of employee-only coverage. Incentives include not only financial incentives, but also in-kind incentives, such as time-off awards, prizes, or other items of value. This 30 percent limit relates only to wellness programs that require disability-related inquiries or medical examinations in order to earn an incentive. A wellness program without such requirements, such as a nutrition, weight loss, or smoking cessation program, would not be subject to this rule, although it may be subject to a similar rule under HIPAA.

For example, consider a group health plan under which an enrolled employee has a total annual premium for employee-only coverage of $5,000, including the employer’s and employee’s contributions. If the wellness plan provides a $1,500 reward for participation in a program regarding cardiovascular health, that incentive is 30 percent of the employee-only coverage, and is permissible under the new EEOC rule. If, however, the program provided a $1,500 reward for the cardiovascular program, and an additional award of $500 for participation in a health risk assessment screening program, the total award would be $2,000, which would exceed the 30 percent limit and violate the proposed EEOC rule.

Additionally, reasonable accommodations must be provided for persons with disabilities regardless of whether the program includes disability-related inquiries or medical examinations. The program should provide a reasonable alternative, and notice to the employee of the availability of that alternative. For example, if a program required employees to have blood drawn, but one employee had a disability rendering such activity dangerous, the employer would need to provide an alternative test or certification requirement so that employee could participate and earn the benefit.

NOTICE

Fourth, if the wellness program is part of a group health plan and deemed to be voluntary, a covered entity must provide notice to the employee, clearly explaining: (1) what medical information will be obtained; (2) how the medical information will be used; (3) who will receive the medical information; (4) the restrictions on its disclosures; and (5) the methods the covered entity uses to prevent improper disclosure of medical information.

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2 26 C.F.R. § 54.9802-1(f).