WELLNESS PLANS: PREPARATION FOR NEXT PLAN YEAR INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) issued guidance about wellness program compliance under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). In addition, the Office of Chief Counsel of the Internal Revenue Service issued a memorandum (Chief Counsel Memorandum) confirming the tax treatment of certain wellness rewards. This *Briefing* will summarize the key provisions of the ADA, GINA and the Chief Counsel Memorandum as they relate to wellness programs. Sponsors should address these issues in preparation for the 2017 Plan Year.

AMERICANS WITH DISABILITIES ACT (ADA)

The ADA prohibits employers from obtaining medical information about employees. An exception to this prohibition allows employers to make inquiries about employees' health (e.g., health risk assessment) and conduct medical examinations (e.g., biometric screenings) that are part of a voluntary employee health program, including a workplace wellness program, provided that certain conditions are satisfied. Unlike the rules governing wellness programs under the Health Insurance Portability and Accountability Act (HIPAA) that apply to wellness programs associated with a group health plan, the ADA requires all wellness programs that obtain medical information from employees, whether or not associated with a group health plan, to be (i) "reasonably designed to promote health or prevent disease;" and (ii) "voluntary," as these terms are defined under the ADA.

A wellness program comprised of health risk assessments and/or biometric screenings would be "reasonably designed to promote health or prevent disease" if, for example, it collects information to alert employees about health risks or to offer programs to employees for the purpose of addressing specific health conditions in the workforce. Collecting health information about employees without providing feedback is not "reasonably designed."

In order to be considered "voluntary" under the ADA, a wellness program **may not** (i) require participation; (ii) deny a non-participating employee access to health coverage; (iii) take any adverse employment action against an employee for not participating; or (iv) have a reward with a value in excess of 30% of the cost of self-only coverage. Lastly, a specific notice must be provided to employees.

The EEOC final ADA regulations require employers that offer wellness programs to give employees a notice that clearly explains what medical information will be obtained, how it will be used, who will receive the medical information, and the restrictions on its disclosure. The notice is required for the first day of the plan year that begins on or after January 1, 2017.

The EEOC has provided a sample notice which can be found at:

https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

In addition, the EEOC has provided a set of Q&As about the notice at:

https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm

Recent case law has applied the ADA's "medical plan safe harbor" to wellness programs to allow the collection of employee information without regard to being reasonably designed or voluntary as long as the information collected was used by the plan sponsor or insurer for purposes of making medical plan design decisions. The EEOC has *rejected* this safe harbor with respect to wellness programs.

Q&As regarding wellness programs under the ADA, as written by the EEOC, can be found at:

https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

Genetic Information Nondiscrimination Act (GINA)

Generally, GINA prohibits the use and disclosure of employee genetic information for purposes of making employment decisions. Employee genetic information includes information about the manifestation of disease or disorders in spouses of employees. The EEOC issued final GINA regulations governing the use of incentives for an employee's spouse to participate in a wellness program. The rules under GINA only apply to those wellness programs that conduct medical examinations (i.e., biometric screenings) of spouses or make health inquiries of spouses (i.e., health risk assessment). It does not apply to other wellness programs where a spouse does not provide such information (e.g., attending a weight-loss program).

Under GINA, an employer is prohibited from denying access to health insurance or any package of benefits to, or retaliating against, any employee whose spouse refuses to provide information about past or current health status to a wellness program. However, an employer may provide an incentive of up to 30% of the total cost of self-only coverage to encourage spouses to participate. This 30% incentive reward is separate and distinct from the 30% reward maximum given to employees as part of a wellness program.

An employer who requests health information from a spouse is required to obtain from the spouse prior knowing, voluntary and written authorization. The authorization form must describe the confidentiality protections and restrictions on the disclosure of genetic information. Moreover, the authorization form must (i) be written so that the spouse is reasonably able to understand it; (ii) describe the type of genetic information that will be obtained and the general purpose for which it will be used; and (iii) describe the restrictions on disclosure of genetic information.

Q&As regarding wellness programs under GINA, as written by the EEOC, can be found at:

https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm

Taxation of Wellness Rewards

The Office of Chief Counsel of the Internal Revenue Service issued a Memorandum regarding cash rewards, gym fees (and other excludable rewards) and reimbursements of wellness premiums. The Chief Counsel Memorandum can be found at: https://www.irs.gov/pub/irs-wd/201622031.pdf.

According to the Memorandum:

- Cash rewards, including gift cards, are always taxable and never excluded as a de minimis fringe benefit. For example, a $5 gift card is taxable but a T-shirt or company mug would not be taxable because the T-shirt or mug is a de minimis benefit.

- Gym fees (and similar nonexcludable rewards) would not be excludable from income because such fees are nonexcludable cash benefits. The fair market value of any nonexcludable reward must be included in income and subject to employment taxes. Notably, a company gym is not a taxable benefit.

- Reimbursements of premiums paid tax-free through a cafeteria plan paid by salary reduction are fully taxable and there is no difference in taxation of premium reimbursements that are paid as rewards under a wellness program.

When designing wellness rewards, please keep in mind that the rules governing the regular rate for overtime purposes under the Fair Labor Standards Act may apply.

For questions regarding this *Briefing*, please contact your Keenan Account Manager.