On January 18, 2013, the EEOC's legal counsel responded to questions posed by an employer regarding wellness programs and the need for the employer to provide reasonable accommodation in that context.

That letter is instructive as to EEOC's position regarding the application of Title I of the Americans with Disabilities Act ("ADA Title I") to the Affordable Care Act's (ACA's) incentives for the utilization and development of wellness programs, which you may be considering at this time.

Wellness Programs.

Health plans encouraging employees to lead healthier lives and reduce their risk of disease qualify as "wellness programs," according to the EEOC. EEOC takes the position that Wellness Programs may include, for example, disease management programs, smoking cessation programs, or case management programs.

Disability-Related Inquiries.

EEOC recognizes that in order to participate in a wellness program, employees may be asked to complete a health risk assessment (HRA) or to undergo medical testing or screening. However, even where no such disclosures are requested, because employees must disclose the presence of certain health conditions in order to qualify for such plans, this type of inquiry constitutes a disability inquiry. ADA Title I, however, strictly limits the circumstances in which employers are permitted to make disability-related inquiries or require medical examinations. Such inquiries and medical exams are permitted only if the corresponding wellness program is "voluntary," whereby the employer neither requires participation nor penalizes employees who do not participate.

Reward for Participation.

EEOC did not take a position in its letter as to whether a reward for participation, such as waiver of an annual deductible, amounts to a requirement to participate or whether the withholding of a reward would, in effect, constitute a penalty, rendering such program "involuntary."

The Employer's Mandatory Reasonable Accommodation Obligation.

EEOC takes the position that, if a wellness program is voluntary and an employer requires that participants meet certain health outcomes or engage in specific activities to earn rewards or stay in the program, then the employer "must provide reasonable accommodations, absent undue hardship, to those individuals who are unable to meet the outcomes or engage in specific activities due to disability." EEOC addressed the example whereby a wellness plan required a participant to take required medications more than 80 percent of the time but the employee could not meet that requirement because of a disability. EEOC stated that that employer would be required to provide a "reasonable accommodation to allow the employee to participate in the plan and still earn whatever reward is available."

Removal From a Higher Benefit Plan.

EEOC's position letter suggested that if a disabled person in a wellness program is unable to meet the plan's requirements because of a disability and is provided with reasonable accommodations, then "it would not be unlawful to remove an employee from the 'higher benefit' plan for failing to meet requirements, as long as he or she remained eligible to participate in the employer's standard benefit plan." Applying that reasoning, it appears that an individual with a disability may be removed from a wellness program for failure to meet its requirements, only so long as (s)he was provided with a reasonable accommodation and could still participate in the employer's "standard benefit plan."

Going Forward.

The law in this area is evolving, with many fundamental questions still unanswered. However, in conceptualizing, creating, and implementing wellness programs, the requirements of ADA Title I and the employer's reasonable

accommodation obligation must be carefully applied to avoid disability discrimination liability.

Regards,

Bert