

## EEOC Issues Final Rules on Employer Wellness Programs

MAY 26, 2016

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) published two final rules in the Federal Register amending the regulations and interpretive guidance implementing (1) Title I of the Americans with Disabilities Act (ADA) and (2) Title II of the Genetic Information Nondiscrimination Act (GINA), in order to provide guidance for employers to ensure their wellness programs comply with those regulations. Both rules take effect on the first day of the first employer health plan year that begins on or after January 1, 2017.

According to the EEOC, the final rules purport to ensure that workplace wellness programs are actually promoting good health, to protect employees from discrimination, and to protect employees and their family members' confidentiality. In general, the final rules provide employers and employees with guidance regarding the manner in which employers may offer incentives to employees and their family members to participate in wellness programs, as well as the permissibility of health related questions, disability-related questions, and medical evaluations. The rules further set forth how employers may offer employees and their spouses limited incentives, in the form of rewards or penalties, to provide health information as part of a voluntary workplace wellness program.

### Regulations Under the ADA

The final ADA rule applies to "employee health programs" that ask employees to respond to disability-related inquiries and/or undergo medical examinations. The ADA rule includes a provision that the disability-related inquiries or medical exams, as part of the wellness plans, must be "reasonably designed to promote health or prevent disease." This standard requires that wellness programs do not demand an overly burdensome amount of participation, involve procedures that are unreasonably intrusive, are not a subterfuge for violating the ADA or other anti-discrimination laws, or require employees to undergo medical exams with significant costs.

Most notably, the final rule under the ADA provides that employers may offer incentives (financial or in-kind) of up to 30 percent of the total cost of self-only coverage to employees that answer disability-related health questions or undergo medical examinations as part of their participation in a wellness program. Importantly, the ADA rule applies this restriction to participatory wellness programs (*i.e.*, programs that do not require any particular health outcome in order to receive an incentive), health-contingent programs (*i.e.*, programs that provide incentives for achieving specific health outcomes), or some combination of the two. The ADA rule's approach conflicts with rules under the

Affordable Care Act that do not restrict the amount of incentives that may be provided under broad-based participatory wellness programs. Further, the final rules place no restrictions on incentives related to smoking cessation programs that merely ask an employee whether or not he or she smokes. However, the 30 percent incentive restriction applies if a biometric screening or other medical procedure is used to test for the presence of nicotine or tobacco.

Employee participation in a wellness program must be voluntary, meaning an employer:

- may not require employees to participate;
  - may not deny employees access to a particular health plan because the employee refuses to answer disability-related questions or submit to a medical examination;
  - may not retaliate against, interfere with, coerce, intimidate, or threaten an employee who chooses not to participate in a wellness program or fails to achieve certain health outcomes;
  - must provide employees with notice that clearly explains what medical information will be obtained, how it will be used, who will receive it, and restrictions on disclosure; and
  - must comply with incentive limits.
- Additionally, the final ADA rule adds two new confidentiality requirements to existing ADA regulations:
- an ADA covered entity may only receive information collected by a wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals, except as necessary to administer a health plan; and
  - an employer may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or waive confidentiality protections under the ADA as a condition for participating in a wellness program or receiving an incentive for participating, except as permitted by the ADA to carry out specific activities related to the wellness program.

## Regulations Under GINA

Title II of GINA protects workers from certain employment actions based on their genetic information, including the health status of their family. The final GINA rule amends the regulations to allow employers that offer wellness programs to provide some incentives, financial or in-kind, in exchange for an employee's spouse providing health information, as long as that information is not used to discriminate against an employee.

The rule provides that the maximum incentive that employers may offer, attributable to a spouse's participation, may not exceed 30 percent of the total cost of self-only coverage. When both an employee and spouse are offered the opportunity to participate in the wellness program, each may receive an incentive equal to 30 percent of the total cost of self-only coverage. However, employers may not offer incentives in exchange for health information regarding employees' children, or to obtain genetic information regarding employees or employees' spouses or children. The final rule applies to all wellness programs.

The final GINA rule protects employees' confidentiality by prohibiting employers from:

- requiring an employee's spouse to agree to the sale, exchange, transfer, or other distribution of health information in exchange for incentives or as a condition for participating in a wellness program; and
- disclosing individually identifiable genetic information about employees or their family members participating in health or genetic services.

## Applicability Date

The rules take effect on the first day of the first health plan year that begins on or after January 1, 2017.

The final [ADA](#) and [GINA](#) rules are available in the Federal Register. The EEOC also provided question-and-answer documents for the [ADA](#) and [GINA](#), and information for small businesses regarding the [ADA](#) and [GINA](#).

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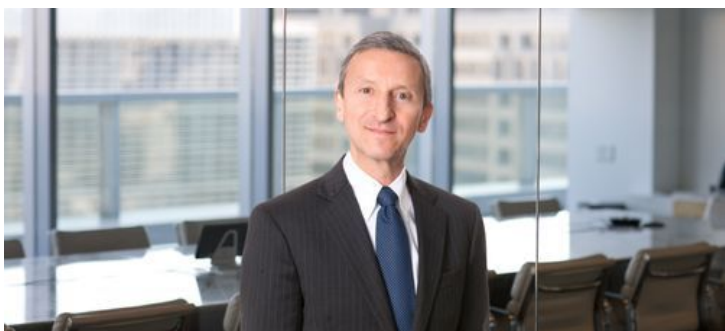
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