

Management Alert



EEOC Issues Final Rules On Wellness Programs

By Joy Sellstrom, Diane Dygert, and Danita Merlau

Concluding many years of uncertainty regarding the EEOC's official enforcement position, on May 16, 2016, the agency issued two sets of final regulations affecting employer-sponsored wellness programs. The EEOC's proposed regulations (discussed [here](#)) were met with a great deal of criticism from the employer community, many of whom had designed robust wellness programs to comply with the detailed HIPAA requirements. The proposed regulations ignored the safe harbor for bona fide plans and imposed harsh standards. The EEOC received numerous comments urging them to bring their rules in line with HIPAA. However, the final regulations were issued without any significant concessions. Read on for a summary of the new final rules under the ADA and GINA.

Regulations Under The ADA

Like the proposed rules, the final ADA (Americans With Disabilities Act) rules purport to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations, whether offered as part of or *outside of a group health plan*. For example, many wellness programs ask employees to complete a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol) with incentives tied to merely participating in the program, or to achieving certain outcomes. Other wellness programs, such as those that provide general health and educational information, are not subject to the final rules.

[InSeyt: Wellness programs are generally considered group health plans. So, it is difficult to understand when a wellness program could be offered outside of a group health plan.]

Title I of the ADA prohibits employers from discriminating against individuals on the basis of disability in regard to compensation and other terms and privileges of employment.

EEOC Says Wellness Programs Must Be "Voluntary"

Under the rules, an employer may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. The final ADA rules set forth several requirements for employee health programs to meet this standard.

Reasonably Designed. An employee health program, including any disability-related inquiries or medical examinations, must be reasonably designed to promote health or prevent disease. A program consisting of a measurement test, screening or collection of health-related information without providing results, follow-up information or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses some of the conditions identified. A program also is not reasonably designed if it exists mainly to shift costs from the employer to targeted employees based on their health or simply to give an employer information to estimate future health care costs.

Voluntary. An employee health program that includes disability-related inquiries or a medical exam must be voluntary. In order to be “voluntary”:

- Employees must not be required to participate;
- The employer may not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits for employees who do not participate;
- The employer may not take any adverse employment action or retaliate against employees for not participating; and
- In keeping with government agencies’ penchant for notices, employees must be provided with a notice that:
 - is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;
 - describes the type of medical information that will be obtained and the specific purposes for which the information will be used; and
 - describes the restrictions on the disclosure of the employee’s medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the employer will use to ensure that medical information is not improperly disclosed (*including whether it complies with the HIPAA regulations*).

[InSeyt: As wellness programs are group health plans, this notice requirement appears to be largely duplicative of the required HIPAA Privacy Notices distributed by covered entity health plans.]

Limited Incentives Offered. The use of incentives (financial or in-kind) in a wellness program, whether in the form of a reward or penalty, will not render the program involuntary if the maximum available incentive under the program (whether the program is a participatory program or a health contingent program) does not exceed **30% of the cost of self-only coverage** (including employee and employer contributions).

Are there Spousal Incentive Limits? Numerous commenters pointed out that calculating the 30% limit on the total cost of self-only coverage does not align with the HIPAA regulations, which provide that the incentive limit applies to the total cost of coverage in which the employee and any dependents are enrolled, when wellness programs are available to an employee’s dependents or spouse. The preamble states that because the ADA’s prohibitions on discrimination apply only to employees, not their spouses and other dependents, the ADA rules do not address the incentives that wellness programs may offer in connection with dependent or spousal participation. Therefore, sponsors are left with the incentive limits for spouses that would apply under HIPAA or GINA.

The 30% limit is measured against the cost of the applicable group health plan depending on the enrollment of the affected individual and the reach of the wellness program as follows:

- the total cost of the group health plan option in which the employee is enrolled, when participation in the wellness program is limited to employees enrolled in that plan option;
- where the employer offers only one group health plan and participation in the wellness is offered to all employees regardless of whether they are enrolled in the plan, the total cost of that group health plan;
- where the employer offers more than one group health plan option, but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan, the total cost of the lowest cost self-only coverage under a major medical plan; and
- *if the employer does not offer a group health plan, other than the wellness program*, the cost of the second lowest cost Silver Plan for a 40-year-old non-smoker on an ACA Marketplace in the location that the employer identifies as its principal place of business.

[InSeyt: It is hard to understand how a stand-alone wellness program would be ACA compliant.]

What about the 50% standard for smoking cessation programs? A smoking cessation program that merely asks employees to certify whether or not they use tobacco is not an employee health program that includes disability-related inquiries or medical examinations. Therefore, the incentive limits described above do not apply to self-certification and an employer may offer incentives as high as 50% of the cost of self-only coverage pursuant to HIPAA. However, any biometric screening or the medical procedure that tests for the presence of nicotine, cotinine or tobacco is a medical exam under the ADA and the 30% incentive limit would apply.

Confidentiality. The final rules provide that medical records developed in the course of providing voluntary health services to employees, including wellness programs, must be maintained in a confidential manner. Unless disclosure is necessary to administer the health plan, information collected as part of an employee health program may only be provided to the employer in aggregate form and in a manner that does not disclose the identity of any employee. Of course, a wellness program is generally a covered entity health plan that will also have to comply with similar standards under the HIPAA privacy and security rules. Although only the group health plan (and not the employer) is subject to the HIPAA privacy and security rules, both the employer and the group health plan are responsible for ensuring compliance with the ADA's confidentiality provisions.

HIPAA Non-Discrimination Rules. Wellness programs that are part of a group health plan must also comply with the non-discrimination rules issued pursuant to HIPAA. While many employers sought a single wellness standard for compliance, the final ADA rules state the EEOC's position that wellness plan compliance with HIPAA is not determinative of compliance with the ADA.

Why doesn't the Safe Harbor apply? The ADA contains a "safe harbor" that the ADA "shall not be construed to prohibit or restrict" an employer from establishing or administering "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks." The EEOC goes to great lengths in the final rules to justify their position that the ADA benefit plan safe harbor does not apply to wellness programs. Note that court decisions are to the contrary, and place in jeopardy the legality of the final rules. (See our [alert on EEOC vs Flambeau](#) here. Notably, the Flambeau case is currently on appeal with the Seventh Circuit.) Note also that these rules have been criticized by employer groups as well as Republican leaders of relevant Senate and House committees. One Senator has vowed to pursue enactment of the Preserving Employee Wellness Programs Act (H.R. 1189, S. 620) to void the EEOC rules (to the extent that courts do not).

Regulations Under GINA

In a similar vein as the final rules issued under the ADA, the final GINA (Genetic Information Nondiscrimination Act) rules apply to all wellness programs that offer incentives to employees based on an employee's spouse providing genetic information as part of an HRA. GINA restricts employers from requesting, requiring, or purchasing genetic information, unless such action falls under one of six narrowly expressed exceptions. One exception is where an employer offers health or genetic services, including such services offered as part of a voluntary wellness program (provided several requirements are met). The final GINA rules closely track the final ADA rules regarding voluntary wellness program and confidentiality requirements and incentive limits. Note that GINA does not contain a benefit plan safe harbor.

Title II of GINA protects job applicants, current and former employees, union members and trainees from employment discrimination on the basis of genetic information. Genetic information is defined to include information about the "manifestation of a disease or disorder in family members of an individual." Family members include parents, grandparents and children, as well as spouses and adopted children.

Limited Incentives Offered

The major change included in the final GINA rules is the alignment of the maximum incentive amount with the maximum incentive amount provided in the final ADA rules. When an employee and spouse are given the opportunity to participate in a wellness program, the incentive to each may not exceed 30% of the cost of self-only coverage under the applicable group health plan as described above for the ADA rules. For example, if a wellness program is offered only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is 30% of the total cost of self-only coverage under the group health plan in which the employee and family members are enrolled.

So, the combined total incentive for both the employee and the spouse can be no more than twice the cost of 30% of self-only coverage. The final GINA rule clarifies that **no incentives** may be provided for the provision of genetic information about employees' children, including adult children.

The final GINA rules also clarify that an employer may not deny access to health insurance or any package of health benefits to an employee and/or his or her family members based on a spouse's refusal to provide information about his or her manifestation of disease or disorder to an employer-sponsored wellness program.

Notable Issues

Incentive Limit Based on Self-Only Coverage. The HIPAA rules provide that the incentive limit applies to the total cost of coverage in which the employee and any dependents are enrolled, if the wellness program is available to an employee's spouse or other dependents. The preamble states that because the ADA prohibitions on discrimination only apply to employees, not their spouses and other dependents, the rule does not address the incentives that may be offered in connection with spousal or dependent participation. However, because medical information about an employee's family members is considered genetic information about the employee, incentives offered in exchange for information about a family member implicates Title II of GINA.

Gateway Plans. A number of employers have tiered health plan benefit structures and base eligibility for a particular program on completing an HRA or undergoing biometric screenings. The preamble to the final rules states that when an employer denies access to a health plan or program because the employee does not answer disability-related inquiries or undergo medical examinations, it discriminates against the employee by requiring the employee to answer questions or undergo examinations that are not job-related and cannot be considered voluntary. Consequently, the final regulations do not allow for gateway plans.

Universal Wellness Coverage. In FAQ 2 posted on EEOC's website (as of May 18, 2016), the agency stated that "Title I of the ADA requires employers to make all wellness programs, even those that do not obtain medical information, available to all employees . . ." There is no mention of this standard in the actual final rule, and in fact the measurement of the 30% limit implies that only a certain segment of employees could be eligible for a wellness program. This statement in the FAQs should serve as another cautionary tale regarding the continuing uncertainty of the EEOC's position.

To-Do List

The final rules state that they will apply prospectively to employer wellness programs as of the first day of the first plan year that begins on or after January 1, 2017 (for calendar year plans, January 1, 2017). What should an employer do before then?

- Employers that have not done so already should analyze their wellness programs to determine if they are a group health plan. As noted above, most wellness programs provide some type of medical care and therefore fall within the definition of a group health plan. Wellness programs can be included in an employer's "wrap plan" in order to comply with many of the ERISA and Affordable Care Act requirements.

- Employers should consider whether to take the position that the EEOC final rules are outside the law and invalid.
- Alternatively, employers may decide to accept the final rules and comply. As a result:
 - Those with gateway plans should consider changing their plan design,
 - Those with incentives should ensure they meet the limitations of the final rules, and
 - Employee communications containing the required notice information should be developed. (The EEOC has indicated that it will provide an example of a compliant notice on its website by June 16, 2016.)

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