

EEOC Issues Final Rules on Wellness Plans

Labor & Employment Law Update

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The EEOC has finalized 2 rules relevant to employer wellness programs. The Final Rules, which can be found [here](#) and [here](#), amend existing regulations implementing the Americans With Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act ("GINA"), respectively, and specifically address employer-sponsored wellness programs.

The ADA prohibits employers from making disability-related inquiries or requiring medical examinations, except in limited circumstances. GINA prohibits employers from requesting, requiring or purchasing "genetic information" about employees and their family members, except in limited circumstances. These prohibitions, coupled with the statutes' expansive definitions of "disability" and "genetic information" have complicated employers' well-intentioned efforts to implement incentives aimed at promoting health and disease prevention.

Although the Final Rules differ slightly from proposed rules issued last year, there are no major surprises. The Final Rules permit employers to offer incentives to employees who choose to participate in voluntary wellness programs or who achieve certain health outcomes as long as:

- The program is "reasonably designed to promote health or prevent disease." The rule explains that this generally means the program provides useful feedback to employees (or their participating spouses) rather than simply alerting the employer to estimated future health care costs;
- The program is truly voluntary, meaning employees are not required to participate and those who choose not to participate (or who fail to achieve certain goals) are not denied coverage, or subjected to adverse employment actions (i.e. termination, or other on-the-job retaliation);
- The program may, as part of a "Health Risk Assessment," offer inducements for an employee or participating spouse to provide information about his or her own "manifestation of disease or disorder" but may not offer inducements or otherwise request this information specific to the employee's children;
- The employees receive notice describing the medical information that will be obtained, the specific purposes for which it is obtained, with whom the information will be shared, and the methods used to prevent improper disclosure;

- Any incentives offered (financial or in-kind) may not exceed 30% of the total cost (employee-paid plus employer-contributed) of employee-only insurance coverage (or 30% of the cost of the second lowest cost Silver plan for a 40 year old non-smoker if the employer offering the wellness program does not offer health insurance). The 30% limit is applied separately to any incentives offered to the employee and any incentives offered to the employee's participating spouse. It is not a cumulative total;
- With limited exceptions, the medical information gathered must be kept confidential and shared with the employer only in an aggregate form not reasonably likely to disclose information specific to any individual employee; and
- The employer provides reasonable accommodation to allow employees with disabilities equal opportunity to participate in the programs and to earn incentives.

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