EEOC Rules Allow Significant Rewards, Penalties In Connection With Wellness Program Participation

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Implementing Health Reform. Workplace wellness programs are controversial. Employers believe that they improve employee health, reduce absenteeism, and cut the cost of employee health benefit programs. Employers are encouraged in this belief by wellness program vendors, who aggressively tout the benefits of their programs.

On the other hand, some are concerned that wellness programs are perpetuating discrimination against the disabled and encouraging health status underwriting. Privacy advocates worry about who has access to the sensitive medical information that wellness programs demand of participants. Others worry about the control that employers assert over their employees’ lives through wellness programs, as employees spend hours of off-the-clock time every week meeting the demands of wellness programs while wearable devices track their footsteps.

Wellness programs are a product of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This legislation outlawed health status underwriting in group health benefit programs but allowed group health plans to offer employees incentives to for participation—or to impose penalties for nonparticipation—in wellness programs that met certain requirements. The Affordable Care Act extended HIPAA’s prohibition against health status underwriting to the individual and small group markets, but
reaffirmed the wellness program exception, in fact increasing the size of incentives or penalties that employers could offer or impose. Final ACA wellness program regulations were promulgated by the Departments of Labor, Health and Human Services, and Treasury (the “tri-department” rules) in June of 2013, defining the conditions under which wellness programs could be offered.

Questions have persisted, however, as to the legality of certain aspects of wellness programs. In particular, questions remained as to limits placed on wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). On May 16, the Equal Employment Opportunity Commission (EEOC) released final rules concerning the regulation of wellness programs under the ADA, as well as interpretive guidelines under those rules. On the same day, it released final rules addressing the impact of GINA on wellness rules. With the rules, the EEOC issued a press release, and questions and answer sheets on the ADA and GINA rules.

The ADA rule finalizes rules proposed in April of 2015 (blog coverage). The GINA rule finalizes a notice of proposed rulemaking released on in October 2015 (blog coverage).

The Scope Of The ADA And GINA Rules

Unlike the tri-department rule, which applies only to wellness programs connected with employer-sponsored health insurance or health plan coverage, the EEOC ADA and GINA rules apply to employer wellness programs whether a wellness program is part of employer-sponsored health plan, is offered to employees whether or not they participate in a health plan, or is offered by employers that do not sponsor a health plan or health insurance.

Both the ADA and GINA rules apply to employers with 15 or more employees. (The ADA and GINA also apply to employment agencies, unions and their members, and joint-labor management training and apprenticeship programs, although the ADA and GINA wellness rules are primarily addressed to employer wellness programs). Both rules are applicable prospectively as of the first day of the first plan year of the health plan used to determine the level of incentives permitted under the regulations (see below) that begins on or after January 1, 2017.

Background: The Wellness Program Landscape
The tri-department regulations recognize three different types of wellness programs. Participatory wellness programs either do not offer a reward or do not make a reward contingent on an individual satisfying a condition related to a health status factor. A participatory program might simply pay for a gym membership or a smoking cessation program or reward an employee who completes a health risk assessment or biometric screening test. Participatory programs must be offered to all similarly situated employees on a nondiscriminatory basis.

Activity-only health contingent wellness programs require an employee to perform or complete an activity related to a health factor to obtain an award. Outcome-based health contingent wellness programs further require a participant to achieve a certain health based outcome, such as cessation of smoking or achieving a certain biometric measure, to obtain a reward.

Activity-only or outcome-based health contingent programs must meet five requirements under the tri-department rules. First, all eligible individuals must be given the opportunity to qualify for the reward at least once per year. Second, the total reward offered under health contingent programs cannot exceed 30 percent of the total cost of employee-only coverage under the plan (50 percent for tobacco prevention and reduction programs), including both employer and employee contributions.

Third, health-contingent wellness programs must be reasonably designed to promote health or prevent disease. The reasonably designed standard requires that programs must have a reasonable chance of improving health of or preventing disease in participating employees and must not be overly burdensome, a subterfuge for discrimination, or use a highly suspect method to promote health or prevent disease. Importantly the reasonably designed standard does not require programs to be based on scientific evidence or to collect or report any data on efficacy.

Fourth, the full reward must be available to all similarly situated individuals, and thus must allow for reasonable alternative standards or waiver of otherwise applicable standards for individuals for whom it is unreasonably difficult or medically inadvisable to achieve a program standard. Fifth, plans and issuers must disclose the availability of reasonable alternatives for meeting standards.

Title I of the ADA prohibits discrimination by employers against employees in the terms and conditions of employment, including fringe benefits, on the basis of disability, and
requires employers to make reasonable accommodations for disabilities. The ADA generally prohibits employers from obtaining medical information from employees through disability-related inquiries or medical examinations. It does, however, allow employers to make medical inquiries or conduct medical examinations as part of a voluntary employee health program, which includes workplace wellness programs.

The ADA Rule

The EEOC ADA rule amends current EEOC regulations and interpretive guidelines under Title I. The rule specifically addresses the question of to what extent employers may use incentives or penalties to encourage employees to participate “voluntarily” in wellness programs that ask them to respond to disability-related inquiries like health risk screening assessments or to undergo medical examinations, such as biometric tests.

The question under the ADA is: when do the incentives offered or penalties imposed under a wellness program render participation, including submission of health data and submission to biometric screening, involuntary, and thus prohibited by the ADA.

Requirements For A Wellness Program To Be Considered Voluntary

The final rule clarifies under what circumstances disability-related inquiries and medical examinations conducted under workplace wellness programs will be considered voluntary. First, the rule provides that an employee health program that involves disability-related inquiries and medical examinations must be reasonably designed to promote health or prevent disease, adopting the tri-department definition of this standard. The program must not be overly burdensome or a subterfuge for violating the ADA or other employment discrimination laws, and it may not use a highly suspect method to promote health or prevent disease. Unlike the tri-department rule, the EEOC rule applies the “reasonably designed” requirement to participatory as well as health-contingent wellness programs and, as already noted, to wellness programs whether or not they are related to a group health plan.

Reasonably Designed To Improve Health

The ADA rule adds further requirements for reasonably designed wellness programs. A program that collects biometric information from employees without either providing employees with follow-up information or advice or using aggregate information to design
programs to treat specific conditions would not be reasonably designed to promote health. Neither would a program be reasonably designed that requires as a condition to obtaining a reward the expenditure of an overly burdensome amount of time for participation, or imposes unreasonably intrusive procedures, or places significant costs on employees.

Programs must not simply shift costs from employers to targeted employees based on their health, or be designed simply to give an employer information to estimate future health care costs. The interpretive guidelines offer examples of programs that would not meet the reasonableness standard. Reasonable design will be determined considering all facts and circumstances.

**Prohibition On Employer Coercion**

For a wellness program to be deemed voluntary, an employer may not require an employee to participate in the program, deny coverage under its group health plans or particular group health plan benefits, or take any adverse action against an employee who refuses to participate in a wellness program or fails to achieve certain outcomes under such a program. An employer may not retaliate against, interfere with, coerce, intimidate, or threaten an employee who does not participate in a wellness program. An employer may offer a less comprehensive or lower-tier health plan to employees who do not participate in the wellness program, but only if employees who refuse to participate can buy up to the higher-level plan without exceeding the 30 percent cost limit discussed below.

**Notice Of Required Medical Information**

An employee’s participation in a wellness program is only considered voluntary if his or her employer provides a notice clearly explaining what medical information will be obtained from an employee, how the medical information will be used, who will receive the medical information, with whom it will be shared, and how its confidentiality will be protected.

The notice requirement applies to all wellness programs with no de minimis exception. If an employer’s existing wellness program notice includes all of the required elements, however, the employer does not need to provide a separate notice for EEOC compliance. The EEOC intends to provide model notices in the near future. The final
rule does not require written acknowledgment by program participants, however, that participation is voluntary.

**The 30 Percent Cost Limit**

Wellness programs that include disability-related inquiries or medical examinations will only be considered voluntary if they do not offer incentives or penalties that exceed 30 percent of total employer and employee cost of sole-employee coverage. The cost of financial as well as non-financial incentives is included, although employers have flexibility to assign a reasonable value to in-kind incentives.

The EEOC rule extends the 30 percent maximum, which under the tri-department rules only applies to health contingent wellness programs, to participation wellness programs that include disability-related inquiries or medical examinations. Moreover, the EEOC rule extends the 30 percent maximum rule to wellness plans not connected to an employer-sponsored health plan.

When a wellness program is connected with a particular health plan, the employer may not offer an incentive or penalty in excess of 30 percent of the cost of sole-employer coverage, considering both employer and employee contributions. When an employer offers a single health plan, but participation in its wellness program is not dependent on enrollment in that plan, the employer may not offer incentives or impose penalties in excess of 30 percent of the total sole-employee cost of that plan.

If an employer offers several health plans but participation in the wellness program does not depend on enrollment in any plan, the employer may only offer incentives or impose penalties up to 30 percent of the total cost of sole employee coverage in the lowest-cost plan offered by the employer. Finally, when an employer does not offer a group health plan, it may not offer incentives or impose penalties in its wellness program that exceed 30 percent of the cost of self-only coverage for a 40-year-old non-smoker under the second lowest-cost silver plan through the marketplace that covers the location of the employer’s principal place of business.

Unlike the tri-department rule, the ADA rule only considers the cost of self-only coverage rather than the cost of coverage of the employee and dependents in applying the 30 percent rule. The separate GINA rule, however (described below), which applies
to the collection of medical information from dependents, applies to incentives that can be offered to employees' spouses to obtain health information from them.

**Tobacco cessation programs**

The tri-department rule permits incentives of up to 50 percent for smoking cessation programs. A question about tobacco use posed by a health plan is not subject to the EEOC rule since it is not a disability-related question. Incentives or penalties imposed by a penalty for failing to participate in a smoking cessation program are therefore not subject to the EEOC 30 percent rule. If a wellness program uses biometric screening or other medical tests to determine the presence of nicotine, however, the 30 percent limit would apply.

**Protecting Medical Information**

The final rule clarifies that medical information collected through a wellness program may only be provided to an employer in aggregate terms that do not disclose and are not reasonably likely to disclose the identity of specific individuals. A covered entity may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as required to carry out the wellness program), or to waive confidentiality protections, as a condition of participating in or earning incentives from a wellness program.

If the wellness program is administered as part of a group health plan, it is also subject to HIPAA privacy, security, and breach notification rules. This means that information that an employer might have access to under general ADA employee confidentiality rules (for example, when an employee needs a reasonable accommodation) is only accessible without employee authorization if the employer certifies to the health plan that it will safeguard the information and not improperly use or share it. Compliance with HIPAA privacy rules for information provided to group health plan-related wellness programs will generally suffice for ADA rule compliance. The interpretive guidance provides further directions to ensure the proper use of medical information covered by the rule.

The final rule clarifies that wellness programs are also subject to other discrimination prohibitions enforced by the EEOC, including prohibitions against discrimination on the basis of age, sex, religious, race, or national origin. While the rule does not apply to
employee wellness programs that do not use disability-related inquiries or medical examinations, these programs may also not discriminate on the basis of disability. For example, programs that only provide health information must make that information accessible to those who are hearing or vision impaired.

The ADA’s Safe Harbor And Wellness Programs

Finally, the final rule clarifies that the ADA’s insurance “safe harbor” provision does not apply to disability-related inquiries or medical examinations imposed by wellness programs. The ADA safe harbor provides that insurers or benefit plan administrators are not prohibited from “establishing, sponsoring, observing or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.”

The preamble to the final rule states that this safe harbor is directed at insurer underwriting and rate-making as it existed before the ACA and does not apply to wellness program-related disability-related inquiries and medical examinations, which are governed by a separate ADA provision. In the ADA rule preface, the EEOC specifically rejects two court decisions, holding that the safe harbor provision allows employers to penalize employees who fail to answer disability-related questions or undergo medical examinations as part of a wellness program. The EEOC notes that neither court held that the safe harbor unambiguously covered wellness programs; thus, the EEOC, as the agency charged by Congress to interpret the employment provisions of the ACA, is free to reject these decisions as wrongly decided and conclude that the safe harbor does not apply. The agency does so in the final rule.

Finally, the ADA rule rejects a couple of suggestions mooted in the preface of the proposed rule. First, the EEOC decided not to excuse individuals from disclosing medical information if they can produce a certification from a medical professional that they are under the care of a physician and that identified medical risks are under active treatment. The EEOC concluded that this approach could undermine the effectiveness of wellness programs as a means of collecting data and was unnecessary.

Second, the EEOC rejected a proposal that would have limited incentives to those that are “affordable” under the ACA, that is do not increase the cost of employer-sponsored coverage above 9.66 percent (for 2015) of household income for individuals. The EEOC
notes that the 30 percent limit promotes affordability and that IRS regulations disregard wellness discounts in determining affordability for tax credit eligibility.

The GINA Rule

The Statutory Background

GINA is a federal law that protects genetic information. Title II of GINA prohibits covered employers with 15 or more employees and other covered entities from using genetic information for making employment decisions. It also forbids employers from requesting, requiring, or purchasing genetic information regarding their employees unless one or more of six narrow exceptions applies. It strictly limits the disclosure by employers of genetic information.

Genetic information includes information about the “manifestations of a disease or disorder in family members of an individual.” (The EEOC concludes that this phrase does not include information about tobacco use, including blood tests to determine nicotine levels.) Family members obviously include spouses and children.

One of the exceptions to GINA’s information request prohibition applies when an employee voluntarily accepts health services from the employer, which can include wellness program services. Employer wellness programs often cover not only employers but also their spouses. The question thus arises as to when wellness programs may legally offer incentives to obtain “voluntarily” current or past health information regarding the spouses or children of employees. This EEOC final rule addresses this question.

Permissible Inducements For Information From Spouses

The final GINA rule allows employers to offer limited inducements (financial or in-kind and in the form of rewards or penalties) to obtain information about a “manifestation of disease or disorder” from the spouses of employees covered by the employer’s group medical plan through a medical questionnaire or examination. Provision of spousal information can be considered “voluntary” even though these inducements were offered if the GINA rules are followed.
As with the ADA rules, the GINA rules apply to wellness programs whether they are offered only to spouses that enroll in a group health plan, to spouses regardless of whether an employee or spouse is enrolled in a group health plan, or by employers who do not sponsor a group health plan.

As required by wellness program regulations promulgated under the tri-department and ADA rules, a wellness program must be reasonably designed to promote health or prevent disease and not be a subterfuge to violate GINA or be highly suspect. To be reasonably designed, a program must offer follow-up information and advice in conjunction with health assessments or examinations, not impose overly burdensome time or cost requirements, and not be unreasonably intrusive. If the wellness program involves a test, screening, or collection of health-related information, it must provide participants with results, follow-up information, or advice unless the collected information is being used to design a program that addresses the conditions identified. Reasonable design will be determined considering all facts and circumstances.

The GINA rule does not apply to inducements offered for spousal participation in wellness programs unless the program collects information on the spouse. It would not, for example, apply if the program simply rewarded a spouse for participating in a weight loss or nutrition program without collecting health information.

The total inducements offered for the provision of health information of a spouse under GINA cannot exceed 30 percent of the total annual cost of self-only plan coverage. The maximum inducement that an employer can offer for an employee’s provision of information on himself or herself, as noted above, is also 30 percent of the cost of sole-employee coverage. The maximum inducement that an employer can, therefore, offer for the provision of information by both an employee and spouse is twice the cost of 30 percent of self-only coverage.

The relevant referent plan for the 30 percent test depends on the nature of the wellness program and is the same as that used for the ADA 30 percent test, as described above. The inducement need not be paid directly to the spouse but can be used, for example, to reduce premiums or cost-sharing. The GINA rule, similar to the ADA rule, prohibits employers from denying an employee or an employee’s spouse or dependents access to insurance and from retaliating against an employee due to a spouse’s refusal to
provide information about the manifestation of a disease or disorder to an employer-sponsored wellness program.

**Prohibition On Inducements For Information About Children And Genetic Information**

An employer is not permitted to offer inducements to obtain health status or genetic information on an employee’s children (biological or non-biological). Health information on an employee’s children is much more likely to reveal prohibited genetic information about the employee than health information about the employee’s spouse, and it is thus more carefully protected. The final rule clarifies that this prohibition applies to information on adult as well as minor children.

Inducements may also not be offered in return for spouses providing genetic information other than information about manifestations of a disease or disorder, including the results of genetic tests and family genetic information. The GINA rules do not, however, prohibit employers from requesting genetic information, on a voluntary basis without inducements, from an employee’s spouse or children in conjunction with providing medical treatment (including participation in wellness programs). The information must be provided pursuant to a knowingly signed written authorization that explains that individually identifiable information is only available to the person receiving the services and to treating health care and genetic professionals, and only disclosed to employers in aggregate, deidentified, form.

Employers can also ask questions about genetic information in medical questionnaires, but must clearly state that questions about genetic information need not be answered in order to obtain an inducement. Employers cannot use genetic information as the basis for employment decisions and must keep genetic information in medical files that are separate from personnel files and treated as confidential information. The GINA rules, like the ADA rules, prohibit the conditioning of participation in an employer-sponsored wellness program on waiving confidentiality or agreeing to the sale, exchange, sharing, transfer, or other disclosure of genetic information.

**Addressing Alternatives Raised In The GINA Proposed Rule**

As with the ADA rule, the EEOC requested comments on a number of alternatives in the preface of the proposed GINA rule. As it did under the ADA rule, the EEOC dismissed the possibility in the GINA final rule of allowing spouses, in lieu of providing medical
information, to provide a doctor’s statement that they are under the care of the doctor and all their medical risks are being addressed. The EEOC also rejected the suggestion that *de minimis* inducements could be excluded from the rule, as it could not come up with a workable principle for defining *de minimis*.

The final rule does not specifically adopt additional protections against employers using information collected from spouses to shift costs in a discriminatory way; the EEOC concluded that protections contained in the “reasonably designed” standard should be adequate protection. The EEOC also declined to adopt additional safeguards for the protection of electronic information in addition to existing confidentiality requirements. In addition, the EEOC rejected the need for additional safeguards to protect spouses’ medical information from disclosure, although the preface discusses best information privacy practices, with more information in the ADA interpretive guidance.

Finally, the GINA final rule does not include a requirement that collection of information must be limited to that minimally necessary, or a prohibition against programs accessing genetic information from other sources such as claims data or medical records. Privacy and consumer advocates had commented that such protections were needed to limit data mining of personal health information by wellness programs. The EEOC contends that the reasonable design standard adequately addresses potential problems.

The final GINA regulations do not limit the protections offered by other federal laws including HIPAA, the ACA, and the ADA. The final GINA rule generally corresponds to the other rules, which should give employers assurance that compliance with one set of rules will not cause problems with compliance with the others.

The ultimate conclusion of the ADA and GINA rules, however, is that provision of an employee’s or an employee’s spouse’s medical information to a wellness program is “voluntary” when employees can be charged thousands of dollars more for their health coverage if they refuse to provide the information. This is a remarkable conclusion.

**TAGS:** ADA, EEOC, GINA, HIPPA