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The EEOC Issues Final Rules on Employer Wellness Programs

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The final rules provide guidance on how wellness programs can comply with the ADA and GINA, and attempt to reconcile the ADA and GINA with the Health Insurance Portability and Accountability Act (HIPAA), as amended by the ACA, which governs wellness programs that are part of group health plans.

Under the new rules, a wellness program that collects medical or health information qualifies under the ADA and GINA as an allowable voluntary health program if it meets the following requirements:

- *The program must be "reasonably designed to promote health or prevent disease."* This means the program must have a reasonable chance of improving health or preventing disease. For example, completing a questionnaire or undergoing a biometric screening for the purpose of alerting employees to health risks would meet the standard, as would employers gathering this information in the aggregate to design or offer health programs tailored to the needs of its employees. Asking employees to provide medical information without providing any feedback about risk factors or without using aggregate information to design a program would not meet the standard. Nor would programs that exist merely to shift costs from the employer to the employee or to predict future health costs.
- *The program must be "voluntary."* This means participation in the program must be optional, and not conditioned on access to healthcare coverage. Employers also may not take any adverse action against employees who chose not to answer disability-related questions.
- *Employers must provide notice for the program to be considered voluntary.* The notice must clearly explain what medical information will be obtained, how it will be

used, who will receive it, restrictions on disclosure and the methods that will be used to prevent improper disclosure.

- *Incentives are limited to 30 percent of coverage costs*. Incentives, whether in the form of financial awards or discounts, time-off awards, prizes or other items of value, generally may not exceed 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution).
- *Confidentiality safeguards must be implemented.* These confidentiality safeguards are consistent with HIPAA and also include ensuring that employers only receive de-identified aggregated information from the program, and prohibit conditioning participation in the program to allowing for the sale, transfer or distribution of health information.
- *The program must be accessible to persons with disabilities.* This means that reasonable accommodations must be provided, absent undue hardship, that enable persons with disabilities to earn any incentive being offered. This requirement applies even if there is no medical inquiry. For example, sign interpretation would need to be provided for a nutrition class tied to the incentive.

The final rules also clarify that certain wellness programs that are encouraged by ACA regulations do not implicate the ADA or GINA incentive limitations. For example, a smoking cessation program that merely asks whether or not an employee uses tobacco makes no medical inquiry and, therefore, employers may offer incentives as high as 50 percent, as allowed by the ACA regulations. Likewise, programs that offer incentives to attend nutrition or weight loss classes, or to exercise or walk, are subject to the ACA incentive limits, but not the ADA or GINA limits.

The final rules apply to all wellness programs, regardless of whether the wellness program is offered through a group plan or not. The final rule also clarifies that the ADA safe harbor provision for insurance plans does not apply to wellness programs that include disability-related inquires.

The new rules do not go into effect until 2017, giving companies some lead time to ensure their wellness programs are in compliance. The final rules can be found in the Federal Register here (ADA) and here (GINA) as well as the question-and-answer documents here (ADA) and here (GINA).

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