

Labor & Employment Law Alert: EEOC Finalizes Employer Wellness Program Incentive and Confidentiality Rules

On May 16, 2016, the Equal Employment Opportunity Commission (EEOC), which enforces federal laws prohibiting employment discrimination, issued two final rules providing guidance to employers and employees regarding how workplace wellness programs can comply with the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The new rules, which take effect on **January 1, 2017**, generally provide that certain workplace wellness programs may offer limited incentives and that only aggregate wellness program information may be disclosed to employers.

The EEOC's press release and additional guidance can be found here:

<https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm>

Many employers offer programs (typically called “employer wellness programs” or “workplace wellness programs”) intended to encourage healthier lifestyles or to prevent disease among their employees. Some collect health data through the use of medical questionnaires, health risk assessments, or biometric screenings, or they offer incentives for employee participation or certain health outcome achievements.

The ADA and GINA generally prohibit the collection and use by employers of health condition information regarding employees or their family members. Employers may, however, ask health-related questions and conduct medical examinations as part of a voluntary wellness program. The EEOC issued proposed rules last year, and has finalized a version of those rules intended to answer the question of whether offering incentives for employees or their family members to provide health information as part of a wellness program would render the program involuntary and therefore unlawful.

Here are the key provisions of the final rules:

1. To qualify as **voluntary**, workplace wellness programs: (a) must have a reasonable chance of improving the health of or preventing disease in participants, (b) must not overly burden employees, (c) may not exist for the **sole** purpose of shifting costs from the employer to employees, and (d) may not be used **solely** to predict the employer's future health costs.
2. A workplace wellness program may require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. The **award or penalty** may be financial or in-kind and can be **no greater in value than thirty percent of the cost of self-only health coverage**, which is determined differently depending on whether the employer offers health insurance, the variety of plans the employer offers, and whether eligibility to participate in the workplace wellness program is tied to health plan enrollment.
3. A workplace wellness program **may offer incentives**, subject to the same limitations described in the

preceding paragraph, to employees for their **spouses** to provide information regarding their current or past health status or undergo a medical examination. However, no incentive may be offered in exchange for health information concerning the current or past health status of employees' children.

4. Employers **may not deny** health insurance or any benefits package to, or otherwise retaliate against, any employee or employee's spouse who refuses to provide information about his or her current or past health status to a workplace wellness program.
5. Employers **must notify** employees participating in workplace wellness programs about what information will be collected, with whom and for what purpose that information will be shared, what disclosure limitations apply and how confidentiality will be maintained.
6. Employers **may not require** employees or their family members to agree to the sale, exchange, transfer, or disclosure of their health information to participate in a workplace wellness program or to receive an incentive.
7. Employers **may receive information** collected by a workplace wellness program **only in aggregate form** that neither discloses nor is reasonably likely to disclose the identity of individuals.

The new rules are designed to prevent employers from coercing employees or their spouses to undergo involuntary medical examinations or to disclose genetic information. They apply to all health promotion and disease prevention programs and activities offered to employees, including both participatory and health-contingent programs, regardless of whether the workplace wellness program is part of the employer's group health plan. The final ADA and GINA rules depart somewhat from workplace wellness plan regulations issued by other agencies, so compliance with one set of rules does not guarantee compliance with the others.

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