

EEOC Issues Final Rules on Employer Wellness Programs with Important Clarifications for Employers

On May 17, 2016, the Equal Employment Opportunity Commission (“EEOC”) issued final regulations concerning employer wellness programs. The rules are effective starting July 18, 2016, but are applicable to plans starting January 1, 2017. These rules address Title I of the Americans with Disabilities Act (“ADA”) and Title II of the Genetic Information Nondiscrimination Act (“GINA”).

The main goals of the ADA rules were to clarify the definitions of wellness programs and voluntariness, explain the permitted use of incentives, and make more consistent these regulations with those under HIPAA and the Affordable Care Act also concerning wellness programs.

The rules cover wellness programs under employer-sponsored group health plans and those existing as a separate employment benefit. The ADA rules are specifically addressed to those wellness programs that make any disability-related inquiry or require medical examinations. Note, the interpretive guidance for the rules specifically advises that asking an employee whether they use tobacco is not a disability-related question. These programs must be “reasonably designed to promote health or prevent disease.” In order to be able to demonstrate that a wellness program meets this requirement, employers should consider providing results, follow up information, advice, or devise some sort of program based off of the health information collected.

These programs must also be voluntary. This means that employers cannot require employee participate, and other than the permitted incentives discussed below, cannot deny or limit health coverage or benefits, and cannot take any other adverse employment action or retaliate against the employee for choosing to not participate. Finally, the employer must provide employees with notice explaining the type of medical information to be collected, how this information will be used, to whom it will be disclosed, and all restrictions on disclosure. The rules add that employers can only disclose the identity of specific individuals when necessary to administer the plan and cannot require employees to agree to the disclosure of their information or waive the confidentiality protections.

Permissible wellness plan incentives include financial or “in-kind” rewards or penalties. However, such incentives or penalties cannot exceed 30% of the cost of either the self-only coverage of the employee (in those programs limited to employees enrolled in health plans), or the lowest plan offered (in those programs not opened to all employees regardless of health plan enrollment), or the second lowest cost Silver Plan for 40-year old non-smoker on the government health care exchange (in those programs where the employer does not offer health insurance at all).

The ADA’s safe harbor provision does not apply to wellness programs even if they are part of a health plan. Generally, this safe harbor provision allows employers and insurance companies to treat employees differently based on disabilities for purposes of insurance risk classification.

GINA protects genetic information of employees, including information of their blood relatives and dependents. The rules under GINA clarify that employers can offer limited incentives to employees if their spouses participate in wellness programs and provide health information or undergo medical examinations. These rules also apply to both kinds of wellness programs – those part of employer sponsored health plans and those that are simply separate employee benefits. The incentive limit is the same as those under the ADA regulations. The rule also clarifies that incentives for information about employees’ children, both adult and minor children, is still prohibited. Employers cannot retaliate against employees’ whose spouses refuse to provide the information. In addition, employers should remember to follow the GINA procedures in requesting genetic information.

For more information on the rules under the ADA, see the EEOC’s Questions and Answers at <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm> and the EEOC’s Small Business Fact Sheet at <https://www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm>. The rules and attendant information are located at <https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>.

For more information on the rules under GINA, see the EEOC’s Questions and Answers at <https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm> and the EEOC’s Small Business Fact Sheet at <https://www.eeoc.gov/laws/regulations/facts-gina-wellness-final-rule.cfm>. The rules and attendant information are located at <https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>.

If you have questions about whether your employer wellness program is in compliance with these rules or about starting an employer wellness program for your business, please contact any member of [Archer & Greiner’s Labor & Employment Law Group](#) in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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