

May 18, 2016

Related Practices

Labor & Employment Relations

EEOC Releases Wellness Regulations Under ADA and GINA

On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) released final regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) directing how the respective laws interact with wellness programs.

Generally, the ADA rules limit wellness programs where the program contains a disability inquiry or requires a medical examination. On the other hand, the GINA rules limit a wellness program's ability to request, require or purchase genetic information about employees. For this purpose, genetic information includes a family member's medical history. EEOC's concern with wellness programs focuses in large part on the use of health risk assessments (HRA), but is in fact broader than just HRAs.

Regulations Limit Incentive to Participate in Wellness Arrangements

The biggest change under the regulations is a reduction in the value of incentives that employers can offer under a wellness arrangement subject to the ADA or GINA, and that such limits apply to all types of wellness programs, not just health outcome-based. This is a narrowing of the limits set forth under the Health Insurance Portability and Accountability Act (HIPAA). *Note:* the ADA limits do not apply if there is no disability inquiry or medical examination under the wellness program. Similarly, the GINA limits would not apply if there is no request for genetic information (most commonly, a request for a family member's medical history).

The regulations focus on the EEOC's desire to ensure that wellness arrangements are voluntary and not coercive. A key element of the voluntary nature is the cost of participating (or failing to participate) in the wellness program. To that end, the EEOC goes into overlapping detail in both rules, addressing inducements to encourage employees to participate in wellness programs:

- If participating in the employer's group health plan is a condition of participating in the wellness program, the inducement cannot exceed 30% of the total cost of self-only coverage under the employer's group health plan in which the employee enrolled.
- If participating in the employer's group health plan is not a condition of participating in the wellness program, the inducement cannot exceed 30% of:
 - *Where the employer only offers one plan:* the total cost of self-only coverage under the employer's group health plan (where offered).
 - *Where the employer offers multiple plans (e.g., two tiers of coverage):* the total cost of the lowest cost self-only coverage offered by the employer.
 - *Where the employer offers no plan:* the cost of self-only coverage available to a 40-year old, non-smoker under the second lowest cost Silver Plan available on the exchange for the location the employer identifies as its principal place of business.
- In-kind inducements factor into the EEOC's determination that the wellness program is not voluntary. Such inducements must be valued and added to any "financial" inducements. The EEOC will respect an employer's determination of value so long as it is "reasonable."
- Employers with fewer than 15 employees are not subject to either rule.

The regulations make some other changes that are of note, but do not overlap.

ADA Changes

In addition to the incentive limits, the ADA regulations clarify:

- Employers may not require participation in a wellness program and may not deny access to group health benefits where an employee refuses to participate in such program.
- Employers may not discriminate or retaliate against an employee who does not participate in the wellness program or fails to achieve a health outcome under the program.
- Employers must provide a notice to employees explaining the medical information obtained under the program, specify how it will be used, who will receive it and the restrictions on disclosure (including referencing whether or not it complies with HIPAA). This information must be written in a manner that employees can understand. The EEOC will release a model notice in the future.

The EEOC also used the preamble to reiterate its position in the wellness program litigation currently pending in the Seventh Circuit. Specifically, the EEOC stated its position that the underwriting safe harbor set forth under the ADA regulations was not intended to extend to wellness programs and that the EEOC believes the two reported cases were wrongly decided.

Smoking cessation programs have some leeway under the ADA regulations. Employers that engage in smoking cessation programs still have the ability to make an incentive up to the 50% mark in a health outcome based program, as permitted under the Affordable Care Act (ACA), so long as the program does not contain a medical exam or disability inquiry on the smoking element. However, as a practical matter, many employers use biometric screening (a medical exam) to detect cotinine (evidencing tobacco use)—

in which case, the 30% limit would apply under the ADA regulations. Thus, the EEOC's final ADA regulations effectively eliminate an employer's ability to impose additional tobacco incentives as authorized by the ACA, unless the employer forgoes biometric testing for tobacco use. For this reason, building these types of programs will be more difficult under the ADA regulations.

GINA Changes

GINA prohibits an employer from discriminating on the basis of genetic information, including acquiring genetic information about an employee. GINA's definition of genetic information about the employee includes the manifestation of a disease or disorder in a family member. Thus, GINA prohibits employers from incentivizing employees to provide medical history of family members, including spouses and adopted children (despite there being no connection to the employee's health).

Without an exception (of which there are six), employers who offer an inducement to employees to provide the information are violating the act. GINA provides such an exception where the employer offers voluntary health or genetic services to the employee or their family members. As described above, the new final GINA rule defines the scope of this exception:

- Wellness arrangements may solicit genetic information of an employee by making inquiries of the employee's spouse (i.e., of the spouse's medical history), but may not inquire of any other family member or domestic partner.
- Wellness arrangements soliciting this information must meet certain standards:
 - The wellness program must be reasonably designed to promote health or prevent disease, must not be overly burdensome and must not be a subterfuge for violating GINA or other laws prohibiting employment discrimination.
 - The inducement must be within the ranges referenced above.

GINA also elaborates on the rules governing the exceptions to the prohibition on disclosing genetic information. The regulations do not change the six limited circumstances, but do recommend best practices that employers may implement to ensure the genetic information is properly safeguarded. Such practices include:

- Adoption and communication of strong privacy policies
- Training for individuals who handle confidential medical information
- Encryption of electronic files
- Notification policies to promptly inform affected employees where information is compromised

GINA also prohibits an employer's conditioning participation in an employer-sponsored wellness program to the employee's agreement that the employer can sell the genetic information. The new GINA rule expands the prohibition to other forms of sharing genetic information, such as exchanges and transfers.

Effective Dates

Employers should exercise caution because there are multiple effective dates.

ADA

- The rules regarding notice and incentive limits become effective on the first day of the first plan year beginning on or after January 1, 2017.
- The EEOC takes the position that other portions of the rule are clarifications and take effect on July 18, 2016.

GINA

- The rules regarding wellness program incentives become effective on the first day of the first plan year beginning on or after January 1, 2017.
- The EEOC takes the position that other portions of the rule are clarifications and take effect on July 18, 2016.

Next Steps

Employers need to review their wellness arrangements to ensure compliance with the ADA and GINA, as modified by these new regulatory standards, to ensure:

- Incentive structures are properly set; in particular, if there is a spousal component to the program, the incentive must be properly allocated.
- Wellness questionnaires are not required of children/other non-spouse family members and the questionnaires do not solicit information regarding conditions affecting children, etc.
- Proper ADA notices to employees are created to provide required information regarding the program's use of employee information [a notice/authorization requirement already exists under GINA].

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