A Closer Look at the EEOC’s Final Health & Wellness ADA and GINA Regulations

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The Equal Employment Opportunity Commission (EEOC) recently released long-awaited final regulations that clarify what employers must do so that their health & wellness plans comply with the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

We introduced the regulations in our eAlert. The EEOC's two new rules explain how employers can use incentives and penalties to encourage employees and their spouses to participate in health & wellness programs without violating the ADA or GINA.

Why the new rules? The Department of Health and Human Services' wellness plan rules under HIPAA (which were amended by the Affordable Care Act), and the EEOC's interpretations of what was a compliant wellness plan under the ADA and GINA, have confused employers for years. It was difficult to develop a wellness plan with "carrot and stick" incentives that followed HIPAA/ACA and EEOC rules.

When it came to using incentives, employers need to get it right because there is a lot at stake. Prior to releasing proposed regulations on ADA-compliant wellness plans, the EEOC began suing employers over wellness plans it considered to be out of compliance with the ADA, even when the wellness plan appeared to comply with HIPAA and ACA wellness rules.¹

Then, after the EEOC released proposed regulations under both the ADA and GINA in 2015, there were several areas where the proposed rules did not align with HIPAA/Affordable Care Act wellness rules. This confusion left employers questioning how to incent health & wellness plans in a way that wouldn't expose them to fines and penalties.

What Has Changed?

The new rules closely track the proposed regulations released in 2015, but clarify areas where there was considerable confusion.

ADA Clarifications

As a general rule, the ADA restricts employers from making disability-related inquiries (such as health risk assessments) and medical examinations (including blood tests and biometric screenings) unless the exams and inquiries are part of a voluntary employee health & wellness program, including a voluntary wellness program. The final regulation clarifies that a wellness plan is considered
voluntary if there is no requirement to participate, there is no retaliation or other adverse employment action for not participating, there is no denial or limitation of coverage under a group health plan for not participating, and it complies with certain notice, confidentiality and incentive requirements.

Additionally, courts have held that another exception to this general rule is that medical exams and disability-related inquiries are permitted if they are a part of a bona fide benefit plan, meaning that the wellness plan's biometric screening or other exam is used for underwriting risks, classifying risks, or administering risks for a health plan. This exception is referred to as the "bona fide benefit plan" safe harbor, which allows employers to require biometric screenings in a wellness program as a condition to enrollment in their group health plan. In both the proposed and final ADA regulations, the EEOC strongly opposed the courts' application of this safe harbor to employer-sponsored wellness plans.

This ongoing dispute between the EEOC and the courts is one that may ultimately be decided by the Supreme Court.

Another notable and much-welcomed clarification is that the final rules rejected a proposed rule that would have required employees to sign a written authorization of their understanding of the voluntary nature of the health & wellness plan. While the authorization requirement was rejected, there are still notice requirements that employers must follow. Fortunately, the EEOC recently released a helpful Sample Notice that can be used by employers to comply with the ADA's notice requirements.2

**GINA Clarifications**

Under GINA, an employer's wellness plan cannot discriminate on the basis of "genetic information," (which includes information about an individual's current or past health status) unless the wellness plan meets specific requirements of an exception. These exceptions include whether the wellness plan is reasonably designed, is voluntary, is authorized by the individual, and if it meets certain confidentiality requirements.

Most significantly, the GINA regulation clarified that employer-sponsored wellness plans can utilize incentives and penalties to obtain health information about employees' spouses. Another significant clarification applies to the inclusion of children in health & wellness plans. The final GINA regulations clarified that incentives and penalties are not permitted in exchange for health information about an employee's child, regardless of the child's age.

**Incentive Clarifications (Under Both ADA and GINA)**

Significantly, the final regulations clarified many questions about the application of wellness incentives to both employees and spouses, and about the application of wellness incentives to various plan designs.

The new incentive rules apply only to health & wellness plans that contain disability-related questions or medical examinations.
They’ve addressed four scenarios:

- If an employer requires employees to be enrolled in a particular health plan in order to participate in the wellness program, the maximum incentive amount is 30% of the total cost of self-only coverage under that plan.

- If an employer offers only one health plan, but employees do not have to be enrolled in the plan to participate in the wellness plan, then the incentive limit is 30% of the cost of self-only coverage under the employer’s plan.

- However, if an employer offers more than one health plan, but does not require enrollment in a particular health plan as a condition of participating in the wellness plan, then the limit is 30% of the employer’s lowest-cost self-only major medical coverage.

- If an employer does not offer a health plan at all, the incentive limit is 30% of the total cost to a 40-year-old non-smoker purchasing self-only coverage under the second-lowest-cost plan at the metal-tier coverage level of "Silver" on the Exchange in the location of the employer’s principal place of business.

The GINA rules apply these same ADA incentive standards to spouses providing health information to a health & wellness plan.

**Lingering Questions**

While these clarifications came to the relief of employers across the country, it is important to know that there are still several lingering questions that were not discussed at all in the final regulations.

For example, how should employers calculate the maximum incentive limit where they have multiple wellness plans? Additionally, if some of those health & wellness plans contain incentives that are tied to a disability-related inquiry or medical examination, but other wellness plans do not have any such exams or inquiries, should the incentives of all of these wellness plans be added together toward the maximum 30% incentive limit? The concern is that the EEOC could view all of these different wellness plans as one large wellness plan.

Other questions remain about large and hard-to-quantify incentives. For example, consider the common scenario where raffle tickets for a big prize, like a cruise vacation, are given out to all employees as the incentive (the more points the more tickets), but only one employee can actually win the cruise vacation. In valuing the incentive, should the employer count the value of the prize that is actually earned, the value of the prize that could be earned if each employee could win, or perhaps something in between (for example, the total value of the cruise vacation divided by the number of employees competing to win it)?

Employers should approach these areas with caution, and should generally calculate the total value of all incentives in all wellness plans toward that maximum 30% incentive limit.
When Do These Rules Go Into Effect?
The notice requirements and incentive limits of these final rules (for both the ADA and GINA rules) are applicable to all employer wellness programs on the first day of the plan year that begins on or after January 1, 2017. All other provisions of the EEOC's final regulations are already in effect.

What Should Employers Do Next?
Employers should begin reviewing their current health & wellness plan's notice requirements and incentive/penalty structures with their health & welfare benefits consultants to ensure that their plan aligns with the new rules before they go into effect in 2017.

If any parts of the health & wellness plan are currently out of compliance, employers should amend their wellness policies contained in plan documents, SPDs, benefits guidebooks, employee handbooks, collective bargaining agreements and other benefits policies.

1 EEOC v. Honeywell Int'l Inc., No. 0:14-04517 (D. Minn. 2014) and EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849 (W.D. Wis. 2015); Seff v. Broward Cnty., 691 F.3d 1221 (11th Cir. 2012).

2 EEOC, Sample Notice for Employer-Sponsored Wellness Programs

For more information, please call 1.877.426.7779