



COMPLIANCE SERVICES **ALERT** LOCKTON BENEFIT GROUP



May 19, 2016

EEOC Finalizes ADA/GINA Wellness Rules; New Requirements for Most Programs

The Equal Employment Opportunity Commission (EEOC) has simultaneously issued two sets of final regulations, a combined 142 pages, addressing workplace wellness programs. One set is issued under the Americans with Disabilities Act (ADA) and one is issued under the Genetic Information Nondiscrimination Act (GINA).

While employers have become relatively familiar (and mostly comfortable) with the wellness program rules under the Affordable Care Act (ACA) and HIPAA, the EEOC's rules graft *additional* requirements onto the most common wellness arrangements. The EEOC's rules apply to a broader swath of programs, and for some of them, constrict the maximum incentives or penalties the ACA/HIPAA rules would otherwise allow.

While the EEOC appears to have hoped to minimize the disruptive effect of its regulations on the wellness landscape, we think the disruption will be significant and force dramatic alterations in the way most robust wellness programs operate today.

The effective date of the EEOC's regulations for wellness programs offered under health plans is the first day of the plan year beginning on or after Jan. 1, 2017. Where the program is not offered under a health plan, the rules' effective date is the first day of the plan year (beginning in 2017) of the health plan whose cost is used to determine the EEOC-imposed limit on incentives, as further discussed below.

The EEOC's Wellness Program Universe

Unlike the ACA/HIPAA wellness program rules, which apply to wellness programs that either are themselves health plans or are offered as part of health plans, the final EEOC rules apply

more broadly. The ADA-related rules apply to any wellness program that includes a medical examination or disability-related inquiry (ME/DRI), even if the program is offered to individuals not enrolled in the employer's health plan.

The GINA-related rules apply to programs, essentially health risk assessments, under which employees are offered incentives *for a spouse's* participation.

The Final ADA Rules

Most employers know the ADA imposes restrictions on the employer's ability to conduct medical examinations and disability-related inquiries (ME/DRIs) of employees. That theme is reflected in the ADA-related rules governing wellness programs.

Where a wellness program involves a ME/DRI, special requirements and restrictions apply. Because most wellness programs involve some sort of ME/DRI, such as a biometric screening or a health risk questionnaire, most programs will have to satisfy the EEOC's rules. The key elements of the rules are:

- A prohibition on requiring the employee to participate, or denying coverage under a health plan (or under a coverage option under a plan) for employees who choose not to participate. The EEOC has lost a court case over this prohibition, but in the regulations is standing by its view.
- A notice requirement. Employees submitting to the ME/DRI must receive a notice describing the medical information that will be obtained and what it will be used for. The EEOC will supply a model notice within 30 days.
- A limit on incentives. If the employer offers a single health plan, the total of all incentives or penalties related to the employee's participation cannot exceed, in the aggregate, 30 percent of the total cost of employee-only coverage. *This limit applies whether the program is offered only to health plan enrollees, or to enrollees and non-enrollees.*

If the employer offers multiple plans or options, the limit is 30 percent of the total cost of coverage for the *least expensive* plan or option.

If an incentive is "in kind," as opposed to cash or an incentive described as cash value (such as a premium adjustment under a health plan), the employer must assign a reasonable value to the incentive.

Lockton Comment: The ADA-related rules do not govern incentives that may be offered for a spouse's or other dependent's participation in a medical examination, like a biometric screening. But the GINA-related rules may impose limits or even outright bar the incentive.

- Health-related information developed under the wellness program about an employee may only be shared with the employer *in aggregate, de-identified terms*. However, the employer may receive information sufficient to allow it to administer the wellness program (e.g., the employer might need to know who qualified for an incentive so it can administer changes to premium payments).
- Like other employee-related medical information falling under the ADA's purview, medical information developed under the wellness program must, if it makes its way into the employer's hands, be maintained in the employee's separate medical file.

Final GINA Rules

GINA restricts an employer from requesting genetic information – which includes family medical history – from employees and job applicants. Most relevantly for this discussion, the employer can't offer *incentives* to an employee in exchange for his or her provision of genetic information, which is defined by GINA to include family medical history. As we'll see below, it's the incentives that cause all the trouble here.

Lockton Comment: Thus, while an employer may *ask* an employee for his or her family medical history as part of a wellness program, the employer can't offer an incentive for it. Nor may the employer ask for the information prior to or in connection with the employee's health plan enrollment, even if no incentive is offered.

Following GINA's enactment, most wellness programs simply stopped asking employees for family medical history. Nevertheless, some programs continued to offer incentives to an employee in exchange for the *spouse's* participation in a health risk assessment. This created a potential problem because information about the *spouse's* health history or status is, by definition under GINA, "family medical history" with respect to the employee, even though the employee and spouse are not blood relatives.

Lockton Comment: Of course, employers could moot the issue by offering spouses a health risk assessment *without* an incentive. But many employers believe they get the biggest bang for their HRA buck by incenting spouses to participate.

The EEOC's final GINA regulations permit employers to offer incentives to employees in exchange for a spouse's participation in a typical health risk assessment, such as one involving a questionnaire, a medical exam (such as a biometric screening) or both, as long as the employer meets specific requirements very similar to the conditions the EEOC imposes on wellness programs under its final ADA-related rules:

- The employer cannot require a spouse's participation in the health risk assessment, nor deny coverage to the employee, the spouse or other dependent under a health plan – or even a coverage option under a plan – based on the spouse's refusal to participate.

- The employer can't offer an incentive in exchange for the spouse's disclosure of his or her *own* genetic information, such as his or her own family medical history, or about the diseases or disorders (or family medical history) of the employee's children. A spouse may supply this information voluntarily, just not in exchange for an incentive.

Lockton Comment: The GINA-related rules make clear that while an employer can offer wellness program participation to employees' *children*, the employer cannot offer inducements in exchange for information about the children's diseases that have been diagnosed or could reasonably be diagnosed. That information is genetic information, or family medical history, with respect to the employee.

This seems to call into question an employer's ability to offer incentives to an employee (including "points" under a wellness program) for his or her children's participation in a typical health risk assessment that might reveal a disease.

- The spouse must authorize the program's collection of information about his or her health condition. The authorization may be electronic, but it must describe the type of genetic information that will be obtained, the purposes for which it will be used, and restrictions on the information's disclosure.
- The GINA-related rules limit the size of the incentives that may be offered in exchange for the spouse's participation in a health risk assessment. Where an employer offers employees and spouses the opportunity to participate in the wellness program, the maximum incentive for the employee is the same "30 percent of the total cost of employee-only coverage" described above in the discussion of the ADA-related rules. The maximum incentive for the spouse is an additional amount that is also capped at 30 percent.

Lockton Comment: All the same rules described above about how the 30 percent is determined where there are multiple plans or options, or where the employee and spouse are not even enrolled in the employer's health plan, apply here too.

- Genetic information obtained via the health risk assessment may only be shared with the employer *in aggregate, de-identified terms*. Identifiable genetic information may be shared only with the spouse and his or her medical providers.

What Does All This Mean, in the Real World?

Contemporary wellness programs come with a variety of features, some merely looking for employees' participation in activities like education programs and health screenings. Others encourage employees to join an activity, like walking, running or biking. And some programs ask employees to achieve certain health-related outcomes. Some programs allow and even encourage spouses and other dependents to participate.

With the EEOC's final regulations, the workplace wellness universe now has multiple similar, overlapping, but not identical sets of rules regulating specific aspects of these programs. To analyze a workplace wellness program today we must disassemble the program into its various components, and analyze each component under the somewhat competing sets of rules, to ensure that no part runs afoul of any of the rules. Because of the breadth of these rules, it will be the rare, toothless, almost casual wellness program that doesn't have to comply with at least some of these regulations.

We leave for another day – for example, for our upcoming June 2, 2016, [webcast on the EEOC regulations](#) – the discussion of the substantial tremors these rules will have on existing, robust wellness programs. The rules will clearly affect:

- Programs involving a variety of activities and standards, and an array of awards, and that also include a medical examination or disability-related inquiry such as a health risk assessment.
- Programs where incentives are expressed as points or other in-kind awards.
- Programs where points are redeemable for prizes *and also applied to reduce employee contributions under a healthcare plan.*
- Incentives currently being earned and that will be awarded or applied in 2017.
- Programs offered to employees not eligible for or enrolled in the employer's health plan, particularly where the employer offers a very inexpensive coverage offering. Maximum incentives under the wellness program will be severely constrained by the EEOC rules.
- Programs offering substantial incentives expressed as a percentage of the cost of employee-plus-spouse or family coverage in exchange for an employee's and spouse's participation in a health risk assessment.

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