



Compliance Services Alert

Jan. 14, 2021

EEOC proposes new wellness regs ... but will they survive?

Finally responding to a court decision that struck down nearly all its 2016 wellness program rules, the Equal Employment Opportunity Commission (EEOC) has re-proposed wellness program regulations under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA).

The new rules, if finalized, would provide some welcome clarity but they would still contradict key aspects of existing wellness program rules under the Health Insurance Portability and Accountability Act (HIPAA) and Affordable Care Act (ACA). Specifically, the new EEOC rules would put a huge dent into employers' ability to offer incentives for mere participatory wellness programs like health risk assessments and biometric screenings. They would also effectively confine most health-contingent wellness programs to enrollees in the program sponsor's group medical plan.

Lockton comment: Details of the proposed rules are below. Note, however, that at this time they are merely *proposed* rules, awaiting public comment and then final modifications from the EEOC. Regulators hope to finalize the rules before April, but another wild card is the incoming Biden administration which, like administrations before it, is freezing proposed regulations pending additional review.

Background

Understanding the newly proposed rules will be easier with a little context. If you prefer to skip the backstory and cut right to the chase, see the section below titled, "The newly proposed rules."

Our story begins with HIPAA, which included a slate of nondiscrimination rules. Those rules generally barred discriminating against an individual in eligibility, benefits or premiums under a healthcare plan on the basis of health factors (like obesity, high cholesterol or nicotine addiction) but carved out an exception from that general rule for certain wellness programs.

Regulations under the HIPAA scheme effectively broke wellness programs into three categories: (1) programs that did not relate to group health plans (and thus are not regulated by HIPAA) vs. those that did, and with respect to the latter programs, (2) mere participation-based programs, like health questionnaires and biometric screenings, and (3) health-contingent programs aimed at individuals with health factors like obesity, high cholesterol, addiction to nicotine, or even anything less than optimal health status.

Wellness programs whose incentives or penalties had nothing to do with group health plans (e.g., theater tickets, extra day of vacation, airline tickets, etc.) were arguably unregulated by the HIPAA rules, but could be subject to other federal and even state nondiscrimination rules.

Mere participation-based programs, even if the incentive related to a group healthcare plan (like premium discounts), were largely unregulated. Employers were not limited by the HIPAA rules in the amount of the incentive or penalty they could offer to or impose upon an employee for not participating, although questions about the legality of such programs under the ADA would linger for nearly 20 years. *Health-contingent* programs, on the other hand, were allowed to impose a relatively hefty incentive or penalty, as long as the employer offered employees who failed the program's health standards a reasonable opportunity to earn their way into the incentive or out of the penalty.

Next up was the Affordable Care Act, which codified into federal law the existing HIPAA wellness program regulations, with some important differences: The incentive or penalty an employer could impose for a non-tobacco related outcomes-based program increased to 30% of the total cost of the employee's coverage, while the incentive or penalty for tobacco-related programs could be as high as 50%.

Regulations under the ACA then made additional tweaks, like requiring that even mere participation-based programs be available to all similarly situated employees, and subdividing health-contingent wellness programs into two categories: activities-based programs (where the program participants are merely asked to do something – walk a 5K race, for example – *but their ability to do it might be compromised by a health condition*), and traditional outcomes-based programs, where the program participants are asked to meet a health standard (e.g., recommended BMI or cholesterol level, non-tobacco use, etc.) and, if they cannot, are offered a reasonable alternative method to earn the incentive or avoid the penalty.

Lockton comment: Hanging like a cloud over the HIPAA/ACA wellness program rules was the open question about the ADA's (and later, GINA's) application to wellness programs. The ADA bars most disability-related inquiries, such as a typical health risk questionnaire, and medical examinations, such as biometric or cotinine testing, unless the inquiries and exams are voluntary. What the EEOC took its sweet time in answering was, "What level of incentive or penalty is so large as to render the inquiry or exam *involuntary*?"

In 2016, the EEOC finally issued wellness program-related guidance under the ADA and GINA. While the HIPAA/ACA rules drew a distinction between whether the program related to a healthcare plan and, if it did, a further distinction between mere participation-based programs and health-contingent programs, the ADA-related rules turned the analysis 90 degrees and looked instead to see whether the program involved no disability inquiry or medical examination (e.g., a mere health education program) and thus was not impacted by the ADA, or whether the program – whether participatory or health-contingent, whether related to a healthcare plan or not – involved a disability-related inquiry like a health risk questionnaire or a medical examination like a biometric screening.

The latter programs, concluded the EEOC, were subject to the ADA. The EEOC's rules barred making eligibility for health coverage contingent on participating in most wellness programs. They mostly – although not perfectly – mirrored the incentive levels permitted by the HIPAA/ACA rules for outcomes-based programs, but applied those limits more broadly, even to mere participation-based programs like health questionnaires and biometric tests. They also required specific disclosures to those participating in the program and imposed typical ADA-related confidentiality rules.

Lockton comment: The EEOC's GINA-related rules applied to wellness programs where an employee was offered an incentive in exchange for the *spouse's or other family member's* participation in a health screening that sought or might obtain family medical history or other genetic information.

The rules lasted a little more than a year. By late 2017 a federal court had struck the substantive aspects of the rules as not having been adequately justified by the EEOC. The EEOC acquiesced and vowed to rewrite the rules. Four years later, here we are.

The newly proposed rules: The ADA-related regulation

Application of the proposed regulation

The newly proposed ADA-related regulation would apply to any wellness program involving a disability-related inquiry, such as a health risk questionnaire, or a medical examination, such as a biometric screening. They would apply, like the prior rule, whether or not the program is merely participation-based or health-contingent, and whether or not the program is related to a healthcare plan.

Lockton comment: The proposed ADA-related regulation would not apply to a program that does not involve such an inquiry or examination, such as a program that is solely educational.

Voluntariness is the key to safe passage through the ADA

The challenge the EEOC has always had with wellness programs, viewed through the lens of the ADA, is that because these programs almost universally include some form of health risk questionnaire or biometric screening, they must be "voluntary." The fact that an employee might be denied an incentive or suffer a penalty for not participating immediately begs the question: When can such a program be considered voluntary when bad things happen to the employee who says, "No thanks"?

Lockton comment: Courts have split on this question, some concluding that where an employee has a choice to participate or not, even if denied an incentive when choosing not, the program is entirely voluntary. Others have concluded that the size of the incentive is a factor. The EEOC seems to reside in the latter camp.

In the newly proposed ADA-related regulation, the EEOC answers that question differently, depending on the type of wellness program.

A mere participation-based program, if it involves a disability-related inquiry or medical exam, is considered involuntary if the incentive or penalty is more than *de minimis*. The EEOC thinks a water bottle or a gift card of modest value is *de minimis*, and hopes public comments in response to the proposed regulations will help define the scope of the term.

Lockton comment: This is huge, and effectively denies the employer the ability to offer any meaningful incentive for a routine wellness program involving a questionnaire or biometric screen, basically trumping the nearly unfettered discretion given the employer under the HIPAA/ACA scheme. Why the hypersensitive treatment for participation-based programs? We suspect it's because they're the ones that have generated the most ADA-related litigation over the voluntariness issue.

Interestingly, the more intrusive *health-contingent* wellness programs get an easier pass, with more generous incentives or stiffer penalties, as long as they're offered as part of a group health plan or the wellness program is itself a group health plan, and satisfy the HIPAA/ACA requirements for health-contingent programs (e.g., participants have a chance to qualify at least once a year, the program offers reasonable alternative standards for those who don't satisfy the program's health-related goals, the employer publicizes the alternative standards, etc.).

Lockton comment: It's typically a better idea to install the health-contingent wellness program as *part* of a healthcare plan, rather than try to treat it as its own plan. As a stand-alone plan the program would typically need to satisfy ACA-imposed benefit mandates, like the full panoply of cost-free preventive care, as well as other compliance requirements such as COBRA. They would rarely meet those requirements on a stand-alone basis, but typically would if part of a larger plan.

For these programs, employers may offer an incentive or penalty up to the limits permitted by the HIPAA/ACA rules, that is, 30% of total cost of the employee's coverage for non-tobacco programs and 50% for tobacco.

Lockton comment: How do we know whether the EEOC considers the program part of a group health plan? The EEOC lists several factors in the preamble to the newly proposed regulation:

- The program is only offered to healthcare plan enrollees.
- Any incentive or penalty is tied to cost-sharing or premium adjustments under the healthcare plan.
- The program is offered by a vendor that has contracted with the plan (or presumably, the plan sponsor) or its insurer.
- The program is an aspect of coverage under the healthcare plan.

And the usual suspects

In addition to imposing limits on incentives, the proposed ADA-related regulation (like its 2016 predecessor) would treat as involuntary any wellness program that:

- Requires employee participation.
- Denies coverage, or limits benefits, for employees who decline to participate.
- Takes adverse personnel action including retaliation, interference with, coercion or intimidation of, or threats against employees for not participating or for failing to achieve desired health outcomes.
- Conditions participation on the employee's agreement to allow the employer to share the employee's health information with third parties.

Lockton comment: The 2016 ADA-related regulation imposed a notice obligation on employers offering a wellness program involving a disability-related inquiry or medical examination. The notice had to disclose what kind of health information the program would obtain from the employee, how the information would be used, etc. The *proposed* ADA-related regulation would eliminate that notice obligation because the EEOC believes most programs are merely participation-based and those programs would only be able to provide *de minimis* incentives, a factor that the EEOC believes mitigates the need for a notice.

The proposed regulation would also retain the *confidentiality* requirements from the 2016 regulation.

Tying it all together

The upshot of the proposed rule is this:

- An employer offering a participation-based health risk questionnaire or biometric screening would be able to offer only a *de minimis* incentive or impose only a *de minimis* penalty. No ADA-related notice to the employee would be required.
- An employer wishing to offer a health-contingent wellness program would be able to continue to do so, and offer incentives or impose penalties up to the maximum amount permitted by the HIPAA/ACA rules, but would effectively need to offer the program only to enrollees in the employer's healthcare plan. The program would, of course, have to also satisfy the HIPAA/ACA rules' requirements.
- In no event would the employer be permitted to make eligibility for healthcare coverage or benefits contingent on participation in the wellness program, nor take adverse personnel action against an employee who declines, nor condition participation in the program on the employee's consent to allowing the employer to share health information with third parties.
- Typical ADA-required confidentiality protections would attach to health information about an employee developed through the wellness program (e.g., separate forms and separate files from personnel files, etc.).

The newly proposed rules: The GINA-related regulation

Like the 2016 GINA rules, the newly proposed regulation addresses when employers may offer an employee an incentive for a spouse's (or other family member's) participation in a wellness program aimed at acquiring family medical history or other genetic information. And like the 2016 regulation, the proposed regulation would require the employer to obtain, in advance of the spouse's or other family member's participation, a written authorization for the employer to obtain the information.

Unlike the 2016 regulation, but like the newly proposed ADA-related regulation, the employer may offer the employee only a *de minimis* incentive for the participation of the spouse or other family member.

What are we waiting for?

The new regulations are merely proposed and can't be finalized until the expiration of a 60-day public comment window. But during that window, the nation will install a new president from the political party that was not in the White House when the new rules were proposed.

Lockton comment: The EEOC has five commissioners, three of which were appointed by Republicans. It was this Republican-dominated commission that issued the newly proposed regulation.

The incoming Biden administration, like administrations before it, will pause pending regulations until it can review and reevaluate them. But President-elect Biden won't be able to appoint his first commissioner to the EEOC, tilting the balance in favor of the Democrats, until the middle of next year. It is possible his administration will freeze the proposed rules until they can be rewritten and republished then.

What in the proposed rules might a Democrat-controlled commission change? That is difficult to say. On the one hand, Biden was a key player in the construction of the ACA and might wish to allow participation-based programs to offer more than mere *de minimis* incentives for participation in them.

On the other hand, when the EEOC is controlled by Democrats it tends to take a more pro-employee, rather than pro-employer, stance on things, and the *de minimis* incentive limit is certainly pro-employee.

Indeed, there is a philosophical conundrum with these rules. Wellness advocates note that pushing people to act in ways that will improve their health is an unalloyed good, even if it results in some pain. Others, however, believe that many people will simply be disadvantaged by that push and will never be able to achieve the outcomes that are sought, so they should not be discriminated against. Reconciling these viewpoints is difficult and the advocates of each come from various points on the political spectrum, making it hard to predict what will happen.

But whatever happens with these proposed regulations, rest assured we will let you know.

Ed Fensholt, JD
Director, Compliance Services

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Lockton Benefits | 444 West 47th Street | Suite 900 | Kansas City | MO | 64112
