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Compliance Advisor

What every HR leader should know about compliance

Proposed Rules on Wellness Programs subject to the ADA or GINA

4-Minute Read

The Equal Employment Opportunity Commission (EEOC) released unofficial proposed rules for wellness programs subject to the Americans with Disabilities Act (ADA), referred to as the proposed ADA wellness rules, and for wellness programs subject to the Genetic Information Nondiscrimination Act (GINA), referred to as the proposed GINA wellness rules (collectively, the proposed rules). The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Wellness programs may provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, or coaching to help employees meet health goals. In October 2016, the American Association of Retired Persons challenged the incentive provisions under the 2016 wellness rules, which were subsequently vacated effective January 1, 2019.

The proposed rules amend the current ADA and GINA wellness program rules, with the most anticipated change being the proposed establishment of the level of incentive (or penalty) that employers may provide under wellness programs. Under the proposed rules, as was the case with the prior wellness rules, the incentives (and penalties) apply in connection with wellness programs that require disclosure of the employee's or their participating family members' medical or disability-related information through a medical examination, biometric screen, or a health risk assessment. Currently, the rules for wellness programs that are subject to the ADA or GINA do not provide what level of incentive or penalty may be provided. For more information on the current rules for wellness programs see our Advisor.

Public comments on the proposed rules must be received within 60 days of the proposed rules being published in the Federal Register.

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Incentive Level

The proposed rules provide that wellness programs that use programs such as medical examinations, biometric screenings, or health risk assessments may only provide a de minimis incentive (for example, a water bottle or gift card of modest value) as a reward for the disclosure of information such as medical or disability-related information of the employee (governed by the ADA rules) or the manifestation of disease or disorder of a family member (governed by the GINA rules) provided that family member participates in the wellness program and discloses the information. The proposed rule does not alter the prohibition on providing incentives in return for genetic information (such as family medical history) of an employee unless, as noted above, it is medical information regarding the manifestation of disease or disorder of a family member that is provided by the family member who is participating in the wellness program.

However, under the proposed ADA wellness rules safe harbor, if the wellness program is part of a group health plan or qualifies as a standalone group health plan and requires employees to satisfy a standard related to a health factor (i.e., a health-contingent wellness program), the wellness program incentive limits under HIPAA will apply (30 percent of the total cost of coverage or 50 percent to the extent the wellness program is designed to prevent or reduce tobacco use) provided the wellness program complies with the HIPAA requirements. The safe harbor does not apply if the wellness program is subject to the GINA rules. Participatory wellness programs that simply collect employee health information through health risk assessments or biometric screenings without tracking results and requiring employees to achieve certain health goals in order to earn an award must comply with the de minimis incentive level.

The proposed ADA wellness rules list four factors that the EEOC believes are helpful in determining when a wellness program is part of a group health plan for purposes of the ADA wellness rule:

1. The program is only offered to employees who are enrolled in an employer-sponsored health plan.
2. Any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan.
3. The program is offered by a vendor that has contracted with the group health plan or issuer.
4. the program is a term of coverage under the group health plan.

The proposed rules would remove the requirement that wellness programs subject to the ADA or GINA must be reasonably designed to promote health or prevent disease. The EEOC notes that it is removing this requirement because it is unlikely that employees and family members would choose to participate in a wellness program that requires an employee to disclose disability-related or medical information or requires a family member to disclose information on the manifestation of disease or disorder unless the employee or family member believes the program will help promote health or prevent disease. Also, health-contingent wellness programs

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are subject to the HIPAA requirements which include the requirement that the wellness program be reasonably designed to promote health or prevent disease.

Wellness programs subject to the ADA or GINA must continue to be voluntary, meaning an employer cannot 1) require employees to participate, 2) deny coverage under any of its group health plans or particular benefits packages within a group health plan, 3) limit the extent of such coverage, and 4) may not take any other adverse action against employees who decline to participate in an employee wellness program or fail to achieve certain health outcomes. A wellness program subject to the ADA or GINA must not impose any condition that would adversely affect the terms, conditions, or privileges of employment of any employee who does not want to participate.

The proposed rules note that the confidentiality provisions that currently apply to wellness programs subject to the ADA or GINA will continue to apply.

ADA

ADA Safe Harbor

Under the proposed ADA wellness rules, the ADA's safe harbor provision would allow insurers and plan sponsors (including employers) to implement a wellness program that provides an incentive up to the HIPAA limit noted above for the disclosure of medical or disability-related information. Currently, employer wellness programs do not fall under the ADA safe harbor. The proposed ADA wellness rules would apply the safe harbor to health-contingent wellness programs where employees answer disability-related questions or undergo medical examinations if the program is part of, or qualifies as, a group health plan and complies with the nondiscrimination requirements under HIPAA provided the program uses the aggregate data it obtains to help employees improve their health. For example, a program that includes a physical examination and biometric screening can be beneficial in identifying key health indicators related to chronic disease that can be measured and tracked over time, including blood pressure, cholesterol levels, and blood sugar. Employers then can take steps to help employees manage their specific risk factors and use the data to create future benefit plans. Under the proposed ADA wellness rules, participatory wellness programs would not fall within the safe harbor.

ADA Notice

The proposed ADA wellness rules would remove the requirement that employers with wellness programs subject to the ADA must provide a unique ADA notice that includes information such as the type of medical information that will be obtained, who will receive the medical information, and the purposes for which the information will be used. Under the proposed rules, regardless of whether notice is given, employers cannot condition participation in a wellness program on an employee allowing information to be disclosed to a third party.

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GINA

The proposed GINA wellness rules maintain the current rules that employers may only maintain wellness programs that involve the disclosure of genetic services, if

- participating employees provide prior, knowing, voluntary, and written authorization;
- only the employee (or family member if the family member is participating) and the licensed health care professional or board certified genetic counselor involved in providing such services receive the individually identifiable information concerning the results of such services; and
- any individually identifiable genetic information provided in connection with the services is only available for purposes of the wellness program and may be disclosed to the employer only in aggregate terms that do not disclose the identity of specific employees or family members.

However, unlike the current rules, the proposed GINA wellness rule would permit employers to provide a de minimis incentive for participating family members, not just spouses.

As noted earlier in this Advisor, the proposed GINA wellness rules maintain the general prohibition on offering an incentive for an employee to disclose their genetic information such as family medical history. However, an employer can offer an incentive for an employee to provide their genetic information if the employer makes clear that an employee can qualify for the incentive even if they do not provide the genetic information. For example, an employer offers $150 to employees who complete a health risk assessment with 100 questions, the last 20 of them concerning family medical history and other genetic information. The instructions for completing the health risk assessment make clear that the incentive will be provided to all employees who respond to the first 80 questions, regardless of whether the remaining 20 questions concerning family medical history and other genetic information are answered.

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