

COMPLIANCE BULLETIN

Proposed Rules Would Amend Requirements for Wellness Program Incentives

On Jan. 7, 2021, the Equal Employment Opportunity Commission (EEOC) issued two proposed rules on wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA).

These proposed rules were issued in response to a federal court decision that vacated a portion of EEOC regulations describing the incentives that an employer could offer:

- Under the ADA as part of wellness programs that ask about employees' health and/or ask them to undergo medical examinations; or
- Under GINA to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of a wellness program.

This Compliance Bulletin provides an overview of the proposed amendments to the wellness program rules.

Action Steps

These proposed rules have not been finalized and may not be relied upon. The EEOC is requesting comments on the provisions in the proposed rules. Comments on the proposals are due 60 days after the proposed rules are published in the Federal Register.

Highlights

- Prior regulations established a 30% limit on the permissible incentives a wellness program may offer under both the ADA and GINA.
- These proposed rules would establish a limit generally allowing de minimis incentives to be offered as part of wellness program participation.
- Exceptions allowing larger incentives would apply to health-contingent wellness programs that are part of, or qualify as, group health plans under the ADA rules.

Important Dates

Jan. 1, 2019

The EEOC removed the prior incentive limit provisions, effective Jan. 1, 2019, due to a court ruling that invalidated the limit.

Jan. 7, 2021

Two proposed rules were released that would establish new wellness incentive limits under the ADA and GINA.



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Background

Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**. In 2016, the EEOC issued a final rule that established a **30% limit** on the permissible incentives a wellness program could offer for participation while still qualifying for the ADA exception for voluntary wellness programs.

GINA's restrictions apply to a wellness program when it requests genetic information (for example, family health history). In 2016, the EEOC issued a separate final rule that allowed an employer to offer limited incentives for an employee's spouse to provide current or past health status information as part of a wellness program. Under the final rule, the maximum incentive attributable to a spouse's participation could not exceed 30% of the total cost of self-only coverage, which was the same as the incentive allowed for the employee under the final ADA rule.

However, the EEOC removed the incentive limit provisions from both of these final rules, effective Jan. 1, 2019, due to a court ruling that invalidated the limit.

Proposed ADA Amendments

The proposed rule would amend two sections of the ADA regulations related to:

- Medical examinations and inquiries specifically permitted; and
- Health insurance, life insurance and other benefit plans.

The amendments explain how the ADA's voluntary requirement and safe harbor provisions apply when determining the extent to which employers may offer incentives for employees to participate in wellness programs that obtain medical information.

The proposed rule adopts the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty and, therefore, states that most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than **de minimis incentives** to encourage employees to participate.

Unlike the 2016 rule, this rule proposes that, under the ADA's safe harbor provision, health-contingent wellness programs that are part of, or qualify as, group health plans to which the wellness regulations apply are an exception to the de minimis standard. Therefore, this proposed rule interprets the safe harbor as permitting health-contingent wellness programs that are part of, or qualify as, group health plans to offer the maximum allowed incentive under existing HIPAA regulations (currently, 30% of the total cost of coverage, or 50% to the extent that the wellness program is designed to prevent or reduce tobacco use), as long as they comply with HIPAA requirements for those plans.

Proposed GINA Amendments

The proposed rule addresses the extent to which an employer may offer incentives to an employee in exchange for the employee's spouse (or other family member) providing information about that family member's manifestation of disease or disorder and/or for that family member to achieve health outcomes as part of an employer-sponsored wellness program. Information about a family member's manifestation of disease or disorder is one type of genetic information about the employee (also known as "family medical history"), but is not genetic information about the family member for purposes of Title II of GINA.

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Under the proposed rule, the general prohibition on providing incentives in return for genetic information would remain. However, the proposed rule would allow a limited exception where wellness programs could offer a **de minimis incentive** to all family members—not just spouses—in exchange for family members providing information about their manifestation of diseases or disorders.

The proposed rule does not alter the prohibition on providing incentives in return for genetic information of an employee in any circumstance other than where an employee's family member provides information about his or her manifestation of diseases or disorders and/or achieves health outcomes as part of an employer-sponsored wellness program. For example, the Title II GINA regulations will continue to prohibit any incentives in exchange for inquiries directed to an employee about the employee's family medical history or other genetic information.

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