

# update

Compliance News for Staff Plans

June 9, 2016

## EEOC Issues Important New Standards for Wellness Programs

The Equal Employment Opportunity Commission (EEOC) has published a final rule governing wellness programs established by entities subject to the Americans with Disabilities Act (ADA) (the “EEOC/ADA rule”).<sup>1</sup> The EEOC/ADA rule will affect how employers and group health plans design a variety of health and wellness programs, including (but not limited to) health-risk assessments; biometric medical screening; classes to help individuals stop smoking or lose weight; physical activity programs; and coaching to help employees meet health goals. The rule will also affect employers and plan sponsors that collect health information and use it to design wellness programs.

The new rule sets standards that in some respects are stricter than those set by the Departments of Labor, Treasury, and Health and Human Services (HHS) — collectively, the “Departments” — in their wellness program rules implementing the Health Insurance Portability and Accountability Act (HIPAA).<sup>2</sup> The differences in the rules will make wellness program design more complicated.

The EEOC also published a separate final rule implementing the Genetic Information Nondiscrimination Act (GINA) (the “EEOC/GINA rule”).<sup>3</sup> This rule permits employers and plan sponsors to offer limited financial incentives to an employee whose spouse provides information about his or her own medical condition (e.g., through a health-risk assessment questionnaire, medical exam/test or both).

In general, the new requirements apply to plan years beginning on or after January 1, 2017.

### Wellness Programs Subject to the EEOC/ADA Rule

The EEOC/ADA rule applies to any wellness program that asks employees to:

- Respond to disability-related inquiries (e.g., complete a health-risk assessment questionnaire); and/or
- Undergo medical examinations or tests (e.g., medical screening for conditions such as high blood pressure, high cholesterol or high glucose levels).

The EEOC/ADA rule applies to all of these programs whether they are part of a group health plan or not.



### Health Compliance News Highlights:

- The EEOC/ADA rule sets new requirements for wellness programs that ask employees to provide medical information (whether through health-risk assessment questionnaires or medical exams/tests).
- The EEOC/ADA rule applies to any such program whether it is offered as part of a group health plan or outside of the plan.
- Starting with the plan year beginning in 2017, incentives are limited to 30 percent of the total cost of self-only coverage and new notice requirements apply.
- The EEOC/GINA rule permits employers and plan sponsors to offer limited incentives for an employee’s spouse to provide medical information.
- Spouses must complete an authorization form before they provide medical information.

<sup>1</sup> The final EEOC/ADA rule was published in the [May 17, 2016 Federal Register](#).

<sup>2</sup> See Segal Consulting’s July 11, 2013 *Capital Checkup*, “[New Rules for Wellness Programs](#).”

<sup>3</sup> The final EEOC/GINA rule was published in the [May 17, 2016 Federal Register](#).

Wellness programs that do not include disability-related inquiries or medical examinations/tests (e.g., offering classes to help individuals stop smoking or lose weight) do not have to comply with most of the additional requirements discussed in the next section of this *Update*. However, these programs must be available to all employees, and the employer must provide reasonable accommodations to employees with disabilities. For example, the employer would need to provide a sign language interpreter for a deaf employee who needs assistance in order to benefit from the classes. Written materials would also need to be available in alternate formats (e.g., in large print or on a computer disk) for an employee with a vision impairment.

## Overview of the EEOC/ADA Rule

Wellness programs subject to the new final EEOC/ADA rule must meet five general requirements. They must be reasonably designed, voluntary, provide certain notices, meet certain limits on incentives and keep medical information confidential. Details about each of these requirements are discussed below.

### Reasonable Design

Wellness programs must be reasonably designed to promote health or prevent disease.<sup>4</sup> They also must not be overly burdensome, a subterfuge for violating the ADA or other laws, or highly suspect in the method chosen to promote health or prevent disease. For example, a reasonably designed program could collect health information and use it to design a program to help employees with diabetes or high blood pressure or alert employees about health risks that they face.

### Voluntary

The voluntary requirement means that the employer or plan sponsor:

- Does not require employees to participate;
- Does not deny coverage under any of its group health plans or particular benefit packages within a group health plan for non-participation;
- Does not limit the extent of benefits under the group health plan, unless it is a permitted incentive (generally the financial incentives/penalties must be limited to 30 percent of the total cost of employee-only coverage); and
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten participants who do not participate.

In the preamble to the final rule, the EEOC notes that some plan sponsors have begun experimenting with tiered health plan benefit and cost-sharing structures, sometimes called “gateway plans,” which base eligibility for a particular health plan on completing a health-risk assessment or undergoing biometric screenings. The EEOC states that its rule explicitly prohibits “gateway” designs that allow employees who participate in the wellness program to enroll in a more comprehensive plan option and place non-participants in a less comprehensive plan option.

### Required Notices

The employer or plan sponsor must provide employees with a notice that:

- Is understandable;
- Describes the type of medical information that will be obtained and how it will be used; and
- Describes the restrictions on the disclosure of the information, with whom it will be shared, and how the employer will ensure that the information is not improperly disclosed.

The EEOC will publish a sample notice.

“Wellness programs subject to the new final EEOC/ADA rule must meet five general requirements.”

“The EEOC states that its rule explicitly prohibits ‘gateway’ designs that allow employees who participate in the wellness program to enroll in a more comprehensive plan option and place non-participants in a less comprehensive plan option.”

<sup>4</sup> These same standards apply under the HIPAA wellness program rules.

### Limits on Incentives and Penalties

In general, all incentives or penalties subject to the EEOC/ADA rule must be limited to 30 percent of the total cost of *self-only* coverage. Additional rules apply in certain conditions.

The rule is different from the HIPAA wellness rule, which authorizes incentives of up to 30 percent of the cost of coverage in which the employee is enrolled. Under that rule, if the employee is enrolled in family coverage and family members may participate in the program, the maximum incentive would be 30 percent of the cost of family coverage.

### Confidentiality

Medical information obtained as part of a wellness program must be kept confidential. When programs are operated as part of a group health plan, the HIPAA privacy and security rules need to be followed. The rule does *not* permit wellness programs to require that employees waive confidentiality rights in order to participate.

### The EEOC/ADA Rule and Smoking-Cessation Programs

If a smoking-cessation program uses a medical test to determine whether employees use tobacco, it is subject to the EEOC/ADA rule. The HIPAA wellness rules permit higher incentives (up to 50 percent of the total cost of coverage) for smoking-cessation programs. However, under the new EEOC/ADA rule, the higher HIPAA limit could not be applied if the plan sponsor tests employees for tobacco use.

If the smoking-cessation program merely asks employees whether they use tobacco, then it would not be subject to the EEOC/ADA rules, and the 50 percent limit could apply.

### GINA and Medical Information about Spouses

The final EEOC/GINA rule permits employers and plan sponsors to offer a limited incentive for the employee's spouse to provide information about his or her own past or current health status as part of a wellness program. The wellness program could include a questionnaire, a medical examination (*e.g.*, to detect high blood pressure or high cholesterol) or both. Various conditions apply, including the following:

- The wellness program must be reasonably designed to promote health or prevent disease;
- The incentive is limited to 30 percent of the total cost of self-only coverage. This is a separate limit from the 30 percent limit that applies under the EEOC/ADA rule when *employees* provide medical information;
- The spouse cannot be asked to provide his or her own genetic information<sup>5</sup> (*e.g.*, the results of his or her genetic tests); and
- The spouse must provide prior, knowing, voluntary and written authorization on an authorization form that meets certain requirements.<sup>6</sup>

The EEOC/GINA rule prohibits any incentives in exchange for health information about an employee's children, both biological and non-biological.

### Enforcement

Complaints regarding the ADA could be filed with the Equal Employment Opportunity Commission (EEOC) or designated state human-rights agencies. Individuals or the

### Tax Rules Affecting Wellness Programs

Employers should be aware of various tax rules which affect wellness programs. The Office of Chief Counsel of the Internal Revenue Service recently released a memorandum about certain wellness programs that have been marketed to employers.

Under those programs, employees pay a premium (via pre-tax salary reduction) to participate in a wellness program. The program's proponents asserted that employees who participated in the program could receive as a reward a tax-free reimbursement of their premium, for each activity completed under the program. However, the IRS memorandum concludes that any reimbursement of the employee's premium would be taxable income.

\* See this link on the IRS website: <https://www.irs.gov/pub/irs-wd/201622031.pdf>

<sup>5</sup> Genetic information includes information about an individual's genetic tests; information about the genetic tests of a family member; information about the manifestation of a disease or disorder in family members of an individual (*i.e.*, family medical history); requests for and receipt of genetic services by an individual or a family member; and genetic information about a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using assisted reproductive technology.

<sup>6</sup> The authorization must be understandable, describe the type of information that will be obtained and the general purpose for which it will be used, and describe the restrictions on disclosure of the information.

Justice Department may also file lawsuits. Remedies may include a range of options, including but not limited to restored benefits, reasonable accommodation, and attorneys' fees. Civil penalties may be up to \$55,000 for a first violation or \$110,000 for each subsequent violation. Compensatory and punitive damages may also be available. Special rules apply for governmental entities.

Penalties for violation of HIPAA could include fines of up to \$100 per day per violation.

## Implications for Plan Sponsors

It is imperative that all wellness programs be reviewed in light of the new EEOC rules.<sup>7</sup> Wellness programs that are part of a group health plan (whether self-insured or insured) will be the most challenging as the employer/plan sponsor must comply with different sets of rules (the HIPAA rules and the EEOC rules).

In particular, plan sponsors that have used tiered health plan benefit and cost-sharing structures that have denied access to more comprehensive plans to participants who did not complete a health-risk assessment or biometric screening will need to closely examine their programs to determine whether they have an impermissible "gateway" plan or a permissible design. Plan sponsors that use incentives or penalties will have to assure that they pass each test.

Plan sponsors that require a medical test to determine tobacco use may find designing smoking-cessation programs to be more challenging in light of the new EEOC guidance.

Employers and plan sponsors will also need to determine whether they have the appropriate notice and authorization available with respect to wellness programs governed by the EEOC/ADA and EEOC/GINA rules.

## How Segal Can Help

Segal works with employers/plan sponsors and their legal counsel on compliance issues. Segal can assist in reviewing the wellness program's design and determining whether it complies with applicable laws and regulations.

In addition, Segal can help employers and plan sponsors design wellness programs that address the specific health issues faced by their employees.

Integrating health benefits plans and wellness incentives can have a powerful impact on participant behavior. Now that gateway-style integrated designs, which have been shown to raise wellness participation to more than 90 percent, are prohibited, other behavioral economic techniques will need to be applied to raise or maintain participation at those levels.

## Questions?

For more information about how these new rules may affect your plan, please contact your Segal consultant or the [Segal office nearest you](#).

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<sup>7</sup> The ADA applies to employees but not to former employees, while GINA applies to both groups. This may mean that wellness programs open to retirees are subject to the EEOC/GINA rule but not the EEOC/ADA rule.

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