

in the news

Employee Benefits & Executive Compensation



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Time for a Wellness Check on your Wellness Program? New EEOC Regulations Could Diagnose Need for Change

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In light of new rules from the Equal Employment Opportunity Commission (EEOC), employers should examine their wellness programs now (and during open enrollment for next year) to determine the potential impact of the final regulations, as many wellness programs will need to be changed to comply with the new rules.

In May, the EEOC published its much anticipated final regulations implementing the Genetic Information Nondiscrimination Act of 2008 (GINA) and the Americans with Disabilities Act (ADA), as those laws relate to employer-sponsored wellness programs. The most significant changes under the EEOC's final rules require compliance for plan years beginning on or after January 1, 2017, but some clarifications are effective immediately.

Specifically, the EEOC provided guidance on how employers can incentivize employees to participate in wellness programs that include disability-related inquiries and medical examinations. The EEOC also clarified the extent to which an employer may offer an inducement for an employee's spouse and children to provide information regarding the spouse or child's diseases or medical disorders as part of a health risk assessment (HRA).

With respect to the new requirements for next year, the major takeaways for employers with respect to their wellness programs include:

- **New 30% Limit on Certain Incentives**

If an employer's wellness program includes a medical examination and/or a disability related inquiry, there is a new incentive limit of 30% of the total cost of employee-only coverage.

This rule applies even if that wellness program is:

(1) NOT tied specifically to the employer's group health plan (i.e., the incentive is offered to all employees regardless of their eligibility for the company's health plan)



(2) a “participatory” wellness program (i.e., the employee receives an incentive simply by participating in the wellness program without having to achieve any specific medical outcome), or

(3) a tobacco cessation program that requires blood work (or other medical examination) to confirm the absence of nicotine use

- **Be Careful What Questions Are Asked of an Employee’s Dependents**

If a wellness program asks questions about the health status of an employee’s dependents (spouse or children) through an HRA or otherwise, employers should review those questions immediately, as some inquiries may no longer be permitted under the final EEOC regulations, or they may be subject to the above limitation on permitted incentives.

- **New Notice Requirement**

Participants must be notified of certain information when the wellness program requires a medical examination, whether or not such wellness program is part of a group health plan.

For health plan years that begin on or after January 1, 2017, employers should evaluate their wellness programs to ensure that the following key requirements are met:

- **New 30% Limit on Incentives for Wellness Programs not Part of Group Health Plan**

The incentive limitations imposed by the HIPAA wellness regulations apply only to wellness programs that are part of a group health plan. The final EEOC regulations limit the incentives provided by all wellness programs that include a medical examination and/or a disability related inquiry to 30% of the total cost of employee-only coverage. The incentive limitation from the final EEOC regulations arguably applies if a medical examination or disability related inquiry is an element of a wellness program, even if not required to earn the maximum available incentive.

- **New 30% Limit on Incentives for Certain Participatory Programs**

Even though the HIPAA wellness regulations do not impose a limit on the reward that may be given under a participatory wellness program, the final EEOC regulations

limit the incentives provided under participatory wellness programs that include medical examinations or disability related inquiries to 30% of the total cost of employee-only coverage.

- **New 30% Limit on Incentives for Certain Tobacco Programs**

The EEOC did clarify that merely asking wellness program participants about their tobacco use is neither a disability related inquiry, nor a request for information about the manifestation of disease or disorder. However, even though the HIPAA wellness regulations permit a reward of up to 50% of the total cost of coverage for wellness programs intended to reduce or eliminate tobacco use, the final EEOC regulations limit the incentives provided under tobacco use programs that require employees to be tested for nicotine use to 30% of the total cost of employee-only coverage.

- **New Methods for Calculating the 30% Limit**

The 30% limit calculation is different depending on whether the employer also sponsors a group health plan and whether participation in a group health plan sponsored by the employer is a precondition for participation in the wellness program.

- **Information Requests About Spouses**

The final EEOC regulations clarify that GINA prohibits employers from incentivizing an employee’s spouse to provide his or her own genetic information. Employers may, however, incentivize an employee’s spouse to provide information about the spouse’s manifestation of disease or disorder, as long as (i) the spouse is enrolled in a group health plan sponsored by the employer and (ii) the reward for providing the requested information is no more than 30% of the total cost of employee only coverage (generally, as discussed above).





- **Information Requests About Children**

Under the final EEOC regulations, employers are prohibited from providing any incentive whatsoever in conjunction with a request for (i) genetic information about an employee's child (of any age, and including both adopted and step children) or (ii) information about the child's manifestation of disease or disorder. Any incentives provided under a wellness program that are tied to information about an employee's children should be scrutinized carefully to avoid violation of this prohibition.

- **New Notice Requirement**

Participants must be notified when a wellness program requires a medical examination. Unlike in the proposed version of the EEOC regulations, this new notice requirement applies to all wellness programs that include a medical examination or disability related inquiry, whether or not they are part of a group health plan. A sample notice can be found on the EEOC's website by clicking [here](#).

The final EEOC regulations also include some provisions which the EEOC considers to be clarifications only, meaning that they are immediately effective (rather than becoming effective for plan years beginning after January 1, 2017). The provisions include:

- **Wellness Program Design Must Promote Health or Disease Prevention**

In the final regulations, the EEOC emphasized the need for a wellness program that collects medical information to provide results, follow-up information or advice designed to actually improve the health of participating employees in order for the program to be "reasonably designed to promote health or prevent disease." A wellness program should in all events be reevaluated to be sure that your wellness program is well-designed to meet these requirements.

- **Reasonable Accommodations for the Disabled in Participatory-Only Programs**

While the EEOC noted in the final regulations that the ADA's "reasonable accommodation" requirements would generally be satisfied with respect to health contingent wellness programs that are required to include "reasonable alternative standards" under the HIPAA

wellness regulations, the final regulations also require employers to provide reasonable accommodations as necessary to allow disabled individuals to take advantage of participatory wellness programs, which are not otherwise required to include "reasonable alternative standards." An example of "reasonable accommodations" would be providing a sign language interpreter to allow a deaf employee to participate in an educational seminar offered as part of a participatory wellness program.

- **Participant Privacy Must Be Protected**

An employee may not be required to (1) agree to the sale, exchange, sharing, transfer or other disclosure of medical information (unless related to the wellness program), or (2) waive any confidentiality protections as a condition for participating in or earning any incentives under a wellness program.

- **Using Wellness Program as a Gateway to Richer Health Benefits**

The final EEOC regulations clarified that an employer may not condition an employee's eligibility for any particular employer-sponsored health plan on that employee's participation in a wellness program. For example, an employer who offers bronze, silver and gold tier health plans cannot make participation in a wellness program a prerequisite for enrollment in the gold tier health plan. If your wellness program includes this design element, an employer should consider other options.

Finally, employers should continue to monitor the case law and other guidance on wellness programs issued by the EEOC and other agencies, as certain employers are vigorously challenging the EEOC's enforcement and interpretation of ADA and GINA as applied to wellness programs.





For More Information

Please contact the authors or one of Polsinelli's other Employee Benefits and Executive Compensation attorneys should you have any concerns regarding the possible impact of these new EEOC rules on your company's wellness program.

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Many of our employee benefits professionals have prior backgrounds with well-known actuarial, accounting, and consulting firms, as well as significant in-house experience with the government agencies that enforce the myriad of highly technical laws that apply to companies and their benefit plans. This diverse mix of prior experiences and backgrounds enables our team to provide counseling services that align legal strategies with practical approaches to achieve successful outcomes for our clients.

About Polsinelli

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* 2016 BTI Client Service A-Team Report

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