

Is it ok under the ADA and the GINA to offer wellness incentives? The EEOC explains it all for you

By Robin E. Shea on July 29, 2011



Is it legal to bribe your employees to be healthy? Wouldn't that violate the Americans with Disabilities Act, or the Genetic Information Nondiscrimination Act, or something?

In other words, is it legal any more for an employer to offer incentives -- like, *money*? -- to employees to participate in "voluntary" wellness programs?

The Bureau of National Affairs has obtained and released an [opinion letter](#) from Peggy Mastroianni, legal counsel for the Equal Employment Opportunity Commission, addressing these questions.

Voluntary Wellness Programs and the ADA

As most of our readers know, the Americans with Disabilities Act generally prohibits employers from asking for medical information from current employees. One exception to the rule is when the inquiry is "job-related and consistent with business necessity," which is not the subject of today's post.

Another exception applies to inquiries that are part of a "voluntary wellness program," provided that the information obtained is kept confidential and not used in a manner that violates the ADA.

What many readers may not know is this: The EEOC has never taken a formal position on whether incentives to participate in a wellness program mean that the program is no longer "voluntary." If the wellness program is not voluntary, then any medical inquiries without "cause" would violate the ADA.

Many, many, *many* wellness programs today offer cash or other incentives to employees who participate. Although the EEOC has not taken a position, it has indicated its approval of incentives (with some provisos) in its regulations interpreting the Genetic Information Nondiscrimination Act. Based on this, employers are probably safe in continuing to offer wellness incentives, and we can

hope that if the EEOC decides to take a contrary position on the ADA implications, the agency will enforce it prospectively and not retroactively.

What the GINA Regulations Say About Voluntary Wellness Programs

The EEOC's regulations on the employment-related part of the GINA (aka "Title II") deal extensively with wellness programs. Mastroianni's opinion letter is essentially consistent with the GINA regs. **It is ok to ask for "genetic information" in connection with an "incentive" voluntary wellness program IF**

***The employee first provides a knowing and voluntary written authorization allowing the wellness provider to request this information.**

***The paperwork that the employee has to fill out clearly designates questions that may elicit "genetic information" and clearly indicates that the employee does not have to answer those questions and will not forfeit any part of the incentive by refusing to answer.**

***If the employee chooses to answer and provides "bad" information** (for example, a family history in which every male has died of a heart attack before the age of 50, and the employee is a 49-year-old male), the employer cannot use that information as the basis for any adverse action against the employee. (In fact, the employer should never receive this information at all, as discussed below.) On the other hand, **the wellness provider may use the information to recommend a disease management program for the employee.** For example, it would be fine for the wellness program to recommend that the employee consult with a cardiologist, take steps to lower his "bad" cholesterol, and be assessed for bypass surgery, angioplasty, or catheterization.

***Even the disease management program itself can offer incentives to participants without violating the GINA.** In other words, the program can offer an "incentive within an incentive." But the incentive must be equally available to those who are at risk "through no fault of their own" (for example, because of bad family history), and to those who are at risk because of unhealthy lifestyles (for example, because they live on a diet of french fries smothered with gravy and nacho cheese, and smoke four packs a day).

***The wellness provider may not disclose any individually identifiable health information to the employer, although it may disclose aggregated information.**

*******Keep in mind that the GINA definition of "genetic information" includes family history information.*******

As the EEOC would say, We hope this has been helpful to you.

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