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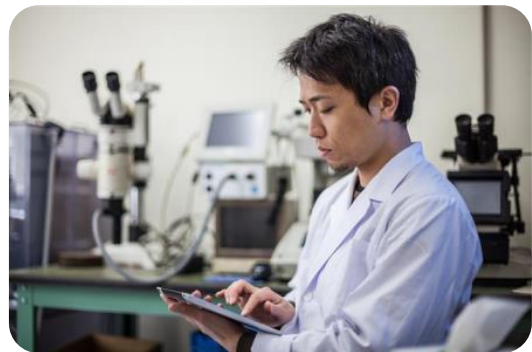
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## EEOC Challenges Employer Wellness Programs

The EEOC has asked a federal court in Minnesota to block the implementation of any penalty or cost imposed on employees who decline participation in biometric testing under an employer's wellness program. The EEOC is seeking a temporary restraining order and preliminary injunction, claiming the imposition of any such costs or the loss of incentives violates both the ADA and GINA. This is the third EEOC lawsuit in recent months to challenge an employer-sponsored wellness program. It highlights the importance of plan design, employer culture, and employee communications. Employers will want to carefully monitor these cases and confer with trusted advisors and legal counsel to assess any risks associated with their wellness program designs.

### Background

Title I of the Americans with Disabilities Act (ADA), which is enforced by the Equal Employment Opportunity Commission (EEOC), prohibits employment discrimination on the basis of disability. Among other things, the ADA severely restricts when an employer may make disability-related inquiries or require medical examinations unless they are job-related and consistent with business necessity. However, the ADA makes an exception for certain wellness programs. An employer may make disability-related inquiries (health risk assessments) or conduct medical examinations (biometric screenings) that are part of a voluntary wellness program (provided any medical records acquired as part of the program are kept confidential and separate from personnel records). Under EEOC enforcement guidance, a wellness program is considered "voluntary" if the employer neither requires participation nor penalizes employees who do not participate.



The EEOC (and other agencies) also enforce the Genetic Information Nondiscrimination Act (GINA), which generally prohibits employers from acquiring an employee's genetic information — including family medical history. Under GINA, medical information relating to manifested conditions of a spouse is considered family medical history, and an employer may not offer financial inducements for an employee to obtain it as part of a wellness program.

## The EEOC's Latest Action

In this latest [action](#), the EEOC claims that the employer's wellness program violates the ADA by requiring employees (and their spouses covered under the plan) to complete biometric testing and imposing penalties on those who do not. The biometric screening includes checking blood pressure, HDL and total cholesterol, non-fasting glucose, BMI, and waist circumference. In addition, employees and their spouses are screened for nicotine (or cotinine). The EEOC states that employees who choose not to participate face a penalty of as much as \$4,000 (the program appears to have multiple components) and maintains that the biometric screening is not voluntary. The EEOC asserts, as it has in two other recent lawsuits, that the financial rewards and penalties associated with this testing create a program that is not voluntary and thus is unlawful under the ADA. The EEOC further asserts that this program violates GINA by requiring employees' spouses to undergo medical testing and imposing surcharges or eliminating employee rewards based on a spouse's failure to participate.

**Comment.** It sometimes can be difficult to determine when a wellness program design triggers ADA, GINA, or HIPAA nondiscrimination concerns. HIPAA generally prohibits a group health plan and insurer from discriminating against individual participants and beneficiaries with respect to eligibility, benefits, or premiums based on a health factor. There is an exception for a wellness program that promotes health and prevents disease. Under the HIPAA regulations, a health assessment and biometric screening that does not reward a specific health standard is considered a participatory program. A participatory wellness program must be available to all similarly situated individuals, but is not considered discriminatory (and need not meet heightened scrutiny under the HIPAA regulations). With respect to ADA (and GINA Title II) compliance, the EEOC generally has not been swayed by a program's compliance with HIPAA and the ACA.

## Employer Considerations

In recent months, the EEOC has filed two other lawsuits alleging that employees were terminated or denied tax-free group health plan coverage for declining to complete a health risk assessment or biometric testing. While the facts asserted in these other claims are rather unconventional, this latest EEOC action involves a more mainstream program that offers employees financial incentives/penalties to undergo biometric screenings. The EEOC previously announced its intent to issue regulations on wellness programs under the ADA and GINA. To date, however, no decisive regulatory or other agency guidance addressing financial inducements, and/or penalties to employees or their family members or other aspects of employer-sponsored wellness programs has been forthcoming. In the meantime, the EEOC's regional attorney in the Chicago District Office has been in the forefront of legal challenges to employer wellness programs, but other EEOC offices could follow suit.

**Comment.** This litigation and likely media attention may cause an uptick in calls to human resource departments or call centers about employer wellness programs, particularly those that require bloodwork. There's a chance that employees might push back on such programs, and additional claims could be filed with the EEOC. But much of this depends on the value of the incentives or penalties, the culture of the organization, and how these programs are communicated to employees.

## In Closing

The EEOC's actions have called into question the extent to which employers may seek to influence healthy behaviors through employer-sponsored wellness programs. Clearly, employers with programs that provide financial incentives or penalties for completing health risk assessments or biometric screenings should closely monitor legal developments. Until a court actually rules on the issues, it will be difficult for employers to gauge the parameters of acceptable programs under the ADA and GINA, and without guidance from the EEOC (in particular a definition) the concept of a "voluntary" program is extremely subjective. In light of these developments, employers should consult with trusted advisors and legal counsel to take a measure of their program (with particular attention to reward/penalty amounts); review plan designs and communications; consider the acceptable amount of risk (if any) associated with the program design (continuum of plan design options from conservative to aggressive); and determine whether and what type of messaging or reassurances employees might need about the program and what would be most effective.

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