

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## Long-Awaited EEOC Wellness Regulations Released

The EEOC has issued proposed regulations that describe ADA requirements for compliant employer wellness programs. The regulations also address the interaction of the HIPAA wellness program rules, amended by the Affordable Care Act, and the ADA — a source of confusion for employers. Generally, the regulations provide that incentives can be offered to employees as long as they meet certain criteria and the maximum incentive offered under an employer's group health plan is not more than 30% of the total cost of employee-only coverage. This limitation applies to the program generally, regardless of whether it is participatory, health-contingent, or some combination. While questions remain, these regulations are a step in the direction of creating a more consistent legal framework for employer wellness programs. Final rules will be published after public comments are reviewed by the EEOC.

### 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 restricts when an employer may make disability-related inquiries (e.g., health risk assessments) or require medical examinations (e.g., biometric screenings) 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 or conduct medical examinations that are part of a voluntary wellness program (provided medical records 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. This provision and the lack of definitive guidance from the EEOC has been the subject of controversy for a number of years.

In recent months, the EEOC's regional attorney in the Chicago District Office filed three law suits, alleging that penalties imposed on employees who declined to participate in their employers' wellness programs violated the ADA. (See our [October 30, 2014](#) and [November 4, 2014 FYI Alerts](#).) Congress has also introduced bills and held hearings focused on clarifying the standards that apply to employer wellness programs. Venting frustrations with litigation and the lack of guidance, some politicians suggested that Congress might act in the absence of EEOC guidance. (See our [March 27, 2015 Legislate](#).) While consistently listed on the EEOC's regulatory agenda, until now, the agency had failed to issue decisive guidance on financial incentives associated with wellness programs. (See our [March 23, 2015 FYI Alert](#).)

## Proposed Regulations

The [proposed regulations](#) amend the existing regulations and interpretive guidance. They discuss ADA compliance and the extent to which employers can offer employees incentives to promote participation in wellness programs that include disability-related inquiries and/or medical examinations. The EEOC adopts the overarching theme endorsed in the ACA (through the HIPAA regulations) that a wellness program must promote health or prevent disease and cannot be subterfuge for discrimination. To that end, the EEOC attempts to reconcile the role of the ADA to limit employer access to an employee's medical information with the ACA's goal of promoting wellness.

Among other things, the proposed regulations:

- Define "employee health program"
- Describe what it means for an employee health program to be voluntary
- Indicate what incentives employers can offer as part of a voluntary employee health program
- Outline notice and confidentiality requirements

More specifically, the proposed regulations maintain that an employer can make disability-related inquiries and/or conduct medical examinations under a voluntary wellness program. In defining a voluntary program, the regulations provide that incentives, offered under a group health plan to promote participation in a wellness program, can be offered to employees as long as participation is not required, and nonparticipating employees are neither denied coverage under any employer group health plan or benefits package, nor subject to any adverse employment action (e.g., retaliation). For programs provided under the group health plan, an employer can offer incentives up to 30% of the total cost of employee-only (aka self-only) coverage, whether in the form of a reward or penalty. Additionally, the employer must provide employees with a notice that describes the medical information that will be collected, with whom it will be shared, how it will be used, and how it will be kept confidential.

The proposed regulations include special rules for smoking cessation programs. A smoking cessation program that only asks employees if they use tobacco (e.g., an honor system) would not be considered an employee health program that includes disability-related inquiries or medical examinations, and would not be subject to the EEOC incentive limitation. However, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination and the financial incentive limitation rules (e.g., maximum of 30% of employee-only coverage) would apply.

## Questions Remain

For years, the employer community has questioned how the ADA applies to wellness programs. While these proposed regulations address many of the concerns, questions remain and further clarification will be needed. For example:

- The proposed regulations do not address how the 30% maximum incentive (based on the total cost of employee-only coverage) applies when an employee's family members also participate in the wellness program and are enrolled in the group health plan. Thus, it is unclear how the incentive limit applies to wellness programs available to employees and their families. Hopefully final regulations will clarify that the 30% maximum may be based on the cost of the family coverage.

- The proposed regulations do not address how employer wellness programs comply with the Genetic Information Nondiscrimination Act (GINA). The EEOC indicates that future rules will describe the extent to which GINA permits employers to condition incentives on a family member's participation in a wellness program.

### Additional information

The EEOC has asked for public comments by June 19 on the proposed regulations generally, as well as on some specific issues. Additional guidance and information include:

- [Press Release](#)
- [Fact Sheet for Small Business](#)
- [Questions and Answers document](#)
- [Wellness Programs and Workplace Wellness Programs Report \(RAND\)](#).

### In Closing

There is little doubt that public comments on these proposed regulations will abound since their final version could have a significant impact on employer wellness programs. In the meantime, employers should seek counsel with their trusted advisors to determine what, if any, changes need to be made to their wellness programs in light of the proposed rules. We will discuss the EEOC's guidance in broader detail in a future *For Your Information* publication.

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