

EEOC Issues Final Regulations on Wellness Programs

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Employers who provide employees with incentives to encourage healthy behavior must contend with an alphabet soup of federal law — ERISA, GINA, HIPAA, the ACA, the ADA, just to name a few. Earlier this week, the EEOC weighed in and finalized its latest [guidance](#) on how employer wellness programs should be structured. These final regulations largely adopt the proposed regulations that were issued in 2015.

For an employer wellness program to meet the newly finalized EEOC requirements, it must be reasonably designed to promote health or prevent disease. To meet this standard, the program cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating federal laws prohibiting employment discrimination, or require employees to incur significant costs for medical examinations. For example, a program that tests employee health factors but does not follow-up with employees or provide results of the tests that were taken to participating employees generally would not meet the new requirements. A wellness program also is prohibited from having as its primary purpose the shifting of costs from the employer to targeted employees based on their health.

A main focus of the EEOC guidance is to ensure that employer wellness programs remain “voluntary” so that employees do not feel compelled to participate. A program will be considered voluntary if it: (i) does not require employees to participate; (ii) does not deny coverage under any group health plan or particular benefit package offered under such group health plan for employees who do not participate in the wellness program, or limit the benefits available to them under such group health plans; (iii) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees; and (iv) provides a detailed notice describing the wellness program.

Further, for a wellness program to be considered a “voluntary” program, the incentives offered to employees must be limited. The guidance notes that the maximum permitted incentive is generally 30 percent of the total cost of self-only coverage under the employer’s group health plan. The incentive may be in the form of either an award (e.g., a cash payment or a reduction in group health plan premium costs) or a penalty (e.g., a surcharge on the premium costs for the health plan).

The final rule applies both to wellness programs that are offered as part of a group health plan and to those that are stand-alone programs. Importantly, the rule applies only to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. Programs that provide an incentive to employees who engage in certain activities (such as attending a health-related information session sponsored by the employer and then receiving a \$10 gift card) are not subject to the rule.

The EEOC regulations make clear that employers who collect information from wellness programs remain subject to strict privacy and confidentiality rules. The EEOC also notes that complying with these regulations does not automatically relieve an employer from its obligation to comply with still other federal laws, including Title VII of the Civil Rights Act of 1964 and other federal employment statutes.

Within 30 days of the rules publication, the EEOC will provide an example of a notice that complies with the rule on its website, www.eeoc.gov. To the extent that employers already use forms that provide the requisite information in an applicable document that complies with disclosures under ERISA and HIPAA, the rules state that employers do not have to create a new notice to satisfy the requirements of these provisions.

The final rule goes into effect January 1, 2017. To ensure that your company's wellness program is not DOA upon an EEOC investigation, review your program to ensure it fits within the EEOC's guidance and make sure that all notices and disclosures related to the wellness program are consistent with the requirements of the new rule. Need help? Contact [Tony Antognoli](#) or [Aimee Delaney](#) in Hinshaw's Chicago, IL office, or your regular Hinshaw [lawyer](#).

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