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[Carl C. Lammers](#)

What's Going on with Wellness Plans? EEOC Withdraws Incentive Rules and Creates Uncertainties

Last December, the Equal Employment Opportunity Commission (EEOC) formally withdrew its rules on incentives in wellness plans under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) and left those sections reserved for future rulemaking. Limitations on incentives were once part of the EEOC's final wellness rules that went into effect in mid-2016. The final rules allowed employer-sponsored wellness plans to offer employees discounts of up to 30% of the cost of the cheapest individual health insurance plan, or 60% for couples, in exchange for participating in the program and providing certain private medical information. Plans could also instead impose penalties of up to 30% for not participating.

But shortly after the final rules were published, AARP sued the EEOC in the Federal District Court for the District of Columbia, arguing that the incentives allowed employers to coerce employees into submitting to medical examinations or inquiries. The district court found that the EEOC did not adequately justify the incentive limits and ordered the EEOC to reconsider them. When the EEOC responded that any revised final rule would likely not be applicable until the beginning of 2021, AARP filed a motion asking that the rules be vacated in order to prevent "manifest injustice." The court agreed with AARP, but to avoid the potential for disruption to employers that had already begun to comply with the final rules, the court ordered that the incentive rules not be vacated until January 1, 2019. Consistent with the court's order, the EEOC removed the incentive sections in January and left them reserved for future rulemaking. The EEOC has not yet proposed any new incentive rules, although its spring 2019 agenda notes that a notice of proposed rulemaking will be issued in December 2019.

Notwithstanding its removal of the sections on incentives, the EEOC's other rules governing wellness program design under the ADA and GINA remain intact. Specifically, the ADA allows employers

to conduct voluntary medical examinations and activities, including voluntary medical histories, that are part of an employee health program available to employees at the work site. Any wellness program offered must be (i) voluntary, (ii) confidential, and (iii) reasonably designed to promote health or prevent disease. To be considered voluntary, the wellness program cannot, among other things, require participation, deny coverage or particular benefits packages to employees who don't participate, or limit the extent of benefits for employees who don't participate "(except as allowed under paragraph (d)(3))." Paragraph (d)(3) is the incentive section that the EEOC withdrew and is now reserved, so it is currently not clear whether and to what extent benefits can be limited for non-participation.

Under GINA, the requirements are similar but not identical. GINA prohibits employers from requesting genetic information from their employees except in certain limited exceptions, one of which is pursuant to a voluntary wellness program that: (i) is reasonably designed to promote health or prevent disease, (ii) is voluntary, (iii) requires the participant's written authorization, (iv) only provides the genetic information to the participant (or family member if applicable) and the licensed healthcare professional, and (v) aggregates or de-identifies any individually identifiable genetic information that is provided to the employer.

In addition, the employer cannot offer an inducement (financial or in-kind) for individuals to provide their genetic information, whether in the form of a reward or penalty, except as described in paragraph (b)(2)(iii) of the rules. Paragraph (b)(2)(iii) is the section that the EEOC withdrew and is now reserved, so it remains unclear as to what type of inducement, if any, is permitted under GINA. However, the rules clearly prohibit some practices. For example, employers cannot condition participation in the wellness program on an agreement permitting the sale, transfer or other disclosure of genetic information, or provide any inducement to an employee, spouse or dependent in exchange for entering into such an agreement. The wellness program also can't deny access to health insurance or any benefits based on a spouse's refusal to provide information on the spouse's disease or retaliate against the employee for the spouse's refusal.

The wellness program may offer inducements to complete health risk assessments; however, if the health risk assessment includes questions about family medical history or other genetic information, the employer must make clear that the inducement will be available whether or not the participant answers questions about genetic information. Employers can also offer financial inducements to participants who voluntarily provide genetic information indicating they are at increased risk for future health conditions to participate in disease management programs and programs promoting healthy lifestyles or attainment of particular health goals. However, the same programs must be offered to individuals who currently have those health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing the conditions.

Ultimately, despite the removal of the incentive provisions, there are aspects of the EEOC's final rules under the ADA and GINA that remain in effect and are applicable to wellness programs. These rules must be applied in addition to the rules for wellness plans under the Health Insurance Portability and Accountability Act (HIPAA).

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