



EEOC Issues Proposed Rule on Permitted Wellness Program Incentives

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On January 7, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) issued a proposed rule discussing permissible incentives employers can offer participants in a wellness program. The EEOC previously issued a final rule in 2016 that provided guidance on this topic. After litigation was initiated by the American Association of Retired Persons (AARP), and the court overturned portions of the 2016 rule when siding with the AARP, the EEOC revoked the entire rule, leaving a lack of guidance for employers to follow. For a discussion on the old rule and its fall, see our other articles [here](#) and [here](#).

Understanding the type and value of incentives that can be provided to wellness plan participants under the new proposed rule is vital to ensure that employers do not overstep the rules outlined in the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Nevertheless, it is also critical to understand that this is a proposed rule, and it therefore has no effect on actual law or regulations until finalized. The proposed rule is subject to a 60-day public comment period and may be revised prior to being finalized.

At a high level, the ADA prohibits employment discrimination based on health status and generally forbids employers from inquiring about workers' health status. Working somewhat in tandem, GINA prohibits employment discrimination based on genetic information and forbids employers from asking about individuals' genetic information, including information about family members' health status or family history. Both the ADA and GINA provide for an exception for inquiries through voluntary wellness programs.

There are two types of employee health programs under the ADA: participatory wellness programs and health-contingent wellness programs. Examples of participatory wellness programs include

those that reward employees for participation in health seminars or diagnostic testing or screening. Examples of health-contingent wellness programs include those that require employees to attain a certain outcome or meet a health standard (e.g., lowering blood sugar or completing a walking program) in order to earn an incentive. Regardless of the type of program, an employer may not retaliate against or otherwise threaten employees who elect not to participate in the program.

To conform to the requirements of the ADA and GINA, participation in a participatory wellness program that includes disability-related inquiries or medical examinations must be voluntary. In other words, a participatory wellness program cannot coerce employees to participate in the program and respond to disability-related inquiries or undergo medical examinations. Financial incentives such as an employer paying the cost of a participant's health insurance premiums to encourage participation in a participatory wellness program could result in the employee's participation being considered involuntary. However, the proposed rule clarifies that an employer providing "de minimis" incentives in exchange for participation is permitted. For example, an employer providing small items such as a water bottle or a gift card of "modest value" to encourage participation does not violate the voluntary participation requirement. Offers like paying the annual fees of the participant's gym membership, however, violate the voluntary participation requirement.

The EEOC's proposed rule provides for a "safe harbor" under the ADA for health-contingent wellness programs that are part of, or qualify as, a group health plan and meet Affordable Care Act and HIPAA standards. Under the "safe harbor," the program may provide incentives that are more than de minimis. To qualify as a health-contingent wellness program, the program must meet the following five requirements set forth in the 2013 HIPAA final regulations:

- The program provides participants an opportunity to qualify for a reward at least once per year.
- The reward provided does not exceed 30% of the total cost of the employee-only coverage (or total coverage if any class of dependents may also participate in the wellness plan) under

the plan or 50% if the plan is designed to target tobacco use.

- The program is “reasonably designed to promote health or prevent disease.”
- The program does not discriminate amongst like participants and provides alternative programs to those who, due to a medical condition, are unable to reasonably satisfy the program requirements.
- The alternative program offerings are disclosed to participants.

In determining whether a health-contingent program is part of a group health plan for purposes of the ADA, the EEOC considers the presence of the following factors:

- The program is only offered to employees who are enrolled in an employer-sponsored health plan.
- Any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan.
- The program is offered by a vendor that has contracted with the group health plan or issuer.
- The program is a term of coverage under the group health plan.

Health-contingent wellness programs meeting these requirements may offer the maximum allowed incentive under HIPAA regulations, which is currently 30% of the total cost of employee-only coverage (or total coverage if any class of dependents may also participate in the wellness plan), or 50% if the program is designed to prevent or reduce tobacco use, instead of the de minimis offerings that participatory programs are limited to.

Although a similar “safe harbor” is not present within GINA, the proposed rule allows a de minimis incentive to be provided in exchange for employees’ family members providing information regarding their diseases or disorders. For example, a \$150 cash incentive is permitted to encourage employees with a current diagnosis or family medical history of diabetes, heart disease, or high blood pressure to participate in a wellness program designed to encourage weight loss and a healthy lifestyle.

We will provide updates on the status of the proposed rule as they develop. If you have any questions regarding the proposed rule, please contact [Carl Lammers](#), [Edward Rivin](#) or any other attorney with Frost Brown Todd's [Employee Benefits & ERISA](#) team.

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