HCR ALERT

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EEOC Releases Final Rules for Wellness Programs under ADA and GINA

On Monday, May 16, the Equal Employment Opportunity Commission (EEOC) released final regulations (Final Regulations) under Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) governing wellness programs. The ADA rules cover an employer's requests for health information from employees and the GINA rules cover requests for health information from family members.

The Final Regulations can be found here (ADA) and here (GINA). Additional Q&A guidance and information for small employers can be found here. The Final Regulations are effective for plan years beginning on or after January 1, 2017, and they apply to all workplace wellness programs, including those offered to employees or their family members that do not require participation in a particular health plan.

The rules clarify the EEOC's stance on wellness programs and how to determine limits on incentives for spouses, although it is not all good news for employers. As discussed below, there continues to be significant disconnect between EEOC rules on wellness programs under ADA and GINA and wellness program rules under the Health Insurance Portability and Accountability Act (HIPAA) as amended by the Affordable Care Act (ACA) (issued jointly by the Departments of Labor, Health & Human Services & Treasury ("the Departments")). Most notable of those differences are the types of wellness plans to which rules apply and the treatment of health risk assessments (HRAs) and biometric screenings when used as a gateway to eligibility.

Overview of the Final ADA and GINA Regulations

The Final Regulations apply to any wellness program—both participation-based and outcome-based—that includes disability-related inquiries and/or medical examinations. In other words, if there's no medical exam or inquiry, the program isn't subject to the ACA and GINA Final Regulations.

Under the ADA rules, the maximum reward (or penalty) attributable to an employee's participation in a wellness program is 30% of the total cost of self-only coverage. Likewise, under GINA, the maximum reward (or penalty) attributable to a spouse's participation in a wellness program is also 30% of the total cost of self-only coverage.

The Final Regulations reaffirm that the 30% limit includes financial (cash) rewards as well as in-kind incentives (e.g., time-off awards, prizes, and other items), even those of minimal value. To be clear: rewards under both participation and outcome-based wellness programs are counted toward the 30% limit, and there is no "de minimis" rule for cash or non-cash incentives.

As shown in the table below, the 30% limit applies differently depending on whether the wellness program is offered to all employees or only enrolled employees, and whether the employer also sponsors one or more group health plans.

Wellness Program Design		**Reward Limit Is Based On**
Employer offers group health plan with one or more benefit options	Wellness program is offered to health plan enrollees only	Total cost of self-only coverage under benefit option in which employee is enrolled (e.g., PPO, POS, HDHP)
	Wellness program is offered to all employees	Total cost of self-only coverage under least expensive benefit option offered by employer
Employer doesn't offer group health plan	Wellness program is offered to all employees	Total cost of self-only coverage for 40-year-old non-smoker under second-lowest-cost Exchange silver plan in employer's principal place of business

Treatment of Incentives for Spouses and Children

The GINA Final Regulations limit incentives for spouses to provide health information to a wellness program to 30% of the cost of self-only coverage under the applicable plan based on the table above. The rules also prohibit an employer from providing any incentives for an employee's children (juvenile or adult, natural or adopted) to provide information to a wellness program. The final rule confirms that employers are prohibited from providing incentives for spouses to undergo genetic testing – only information about a spouse's "manifestation of disease or disorder" may be obtained. For example, spouses may be induced to answer questions related to weight or blood pressure, or whether they have diabetes.

Tobacco Cessation Programs

The ADA Final Regulations confirm that tobacco cessation programs that do not request any medical information from employees are not covered by the ADA. For example, a wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program) is not a wellness program that asks disability-related questions. This program would generally be covered by the 50% limit established by the Departments under HIPAA for outcome-based wellness programs, if connected to a group health plan. However, if the program includes a medical exam or inquiry, such as biometric screening or cotinine testing, then it will be subject to the 30% limit described in the Final Regulations. The EEOC does not consider medical exams or inquiries related to a spouse's tobacco use to be a request for genetic information covered by GINA.

HRAs and Biometric Screening

There continues to be deep disconnect between the EEOC and the Departments when it comes to HRAs and biometric screening. Under the Departments' HIPAA rules, employers may require employees to complete an HRA and biometric screening in order to be eligible to

enroll in benefits in general or in a particular benefit option. However, the ADA and GINA Final Regulations specifically prohibit an employer from denying access to the plan or a particular benefit option if an employee or spouse declines to participate in a wellness program that includes a medical exam or inquiry. The EEOC continues to assert this position, although two district courts that have examined the issue have come to a different conclusion, as discussed below.

EEOC's Position on Recent Court Cases

Two district courts in Florida and Wisconsin have held that a certain provision in the ADA known as the "insurance safe harbor" applies to wellness programs in a way that allows employers to penalize employees who do not answer disability-related questions or undergo medical examinations in connection with wellness programs (e.g., employees who refuse to complete an HRA and/or biometric screening).

The EEOC believes both cases (*Seff v. Broward County* and *EEOC v. Flambeau*) were wrongly decided. The EEOC's position is that the safe harbor is a relic that was included in the ADA to allow health plans to engage in some practices that are no longer permitted, such as charging enrollees higher rates based on increased risks associated with their medical conditions. The ADA's safe harbor provision, the EEOC argues, was intended to protect this now unlawful practice, provided that any decision to treat people differently because of their medical conditions was based on risks and costs associated with those conditions.

The EEOC rejects the idea that the safe harbor could apply to employer wellness programs, since employers are not using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. The Final Regulations contain a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan.

Reasonably Designed

The Final Regulations affirm that a wellness program must be "reasonably designed to promote health or prevent disease" in order to offer incentives. A wellness program will not be "reasonably designed" if the employer collects health-related information without giving any feedback to the employees or spouses who provide it, or without using the information to design a program that addresses at least a subset of conditions identified. Nor will it be "reasonably designed" if it simply shifts health costs from the employer to the employee.

Employers must also provide employees with detailed information about what medical information will be obtained through the wellness program, how it will be used, who will receive it, and the restrictions on disclosure. An employer's existing wellness program materials may suffice, although an employer may need to revise its materials if its existing communications are not detailed enough. The EEOC intends to provide a sample notice on its website within the next 30 days that employers may use.

Lastly, an employer may only receive information collected by a wellness program in aggregate form. The format cannot be likely to disclose the identity of specific individuals except as necessary to administer a health plan.

Key ADA, GINA, and HIPAA Differences

In releasing the Final Regulations, the EEOC noted it worked to harmonize HIPAA's goal of encouraging participation in wellness programs with ACA and GINA provisions requiring that participation in certain programs is voluntary. However, there are still key differences between the ADA, GINA and HIPAA (as amended by ACA) regulations. Here's a brief review of the primary differences between the three sets of rules.

	HIPAA **(As Amended by ACA)**	**ADA**	**GINA**
Effective date	Plan years beginning in 2014	Plan years beginning in 2017	
Applicability to employer-sponsored wellness programs	Programs in group health plans that require satisfaction of an activity or outcome standard related to a health factor ("health-contingent" programs*)	Programs that condition incentives on employee's response to disability-related inquiries** or completion of medical exam*** (regardless of whether part of group health plan)	Programs that c incentives on sp response to hea inquiries or com medical exam* of whether part health plan)
Incentive limits addressed	Employee and spouse	Employee	Spouse
Incentive limit – participatory programs	No limit	Employee incentive limit is 30% of self-only premium. Spouse incentives are not addressed under these rules, as ADA applies only to employees. Questions regarding tobacco use are not disability-related (i.e., 50% HIPAA limit permissible for tobacco-related program if medical testing is not used).	Spouse incentiv of self-only prer be contingent u answering ques regarding mani disease or diso With regard to e incentives, GIN incentives perm ADA, but add th must be availab not an employe questions abou information.
Incentive limit – health-contingent programs	Employee incentive limit is 30% of self-only premium. Spouse incentive limit is 30% of difference between premium for coverage tier in which employee is enrolled and self-only premium. Limits for employee and spouse are 50% if program is tobacco-related.		
Incentive limit premium basis	Cost of employer health plan option in which employee is enrolled	Cost of employer health plan option in which e enrolled, if wellness program eligibility is limite enrollees Cost of lowest-cost employer health plan optio offers health coverage but all employees are e wellness program Cost of second-lowest-cost Exchange silver pl old non-smoker if employer doesn't offer healt	
Use as gateway to health plan enrollment	Access to health coverage or particular benefit option can be conditioned on completion of HRA and/or biometric testing	Access to health coverage or particular benefit be conditioned on provision of disability-relate information or medical exam (e.g., HRA or bio	

Other requirements	Individuals must have opportunity to qualify for reward at least once per year Employer must provide reasonable alternative standard (or waiver) to qualify for reward and must disclose availability in plan materials	Employer must provide notice of medical info that will be obtained, how it will be used, restrictions on disclosure, and measures used to protect it Employer may not take any adverse action or retaliate against an employee for not participating

* “Health-contingent” wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward, which may be performing an activity (e.g., a tobacco user undergoing a tobacco cessation program or an individual with high blood pressure meeting with a health coach) or may be attaining or maintaining a specific health outcome (e.g., not using tobacco or achieving specific results for blood pressure, cholesterol, BMI, etc.). By contrast, “participatory” wellness programs provide rewards for things such as completing an HRA or biometric testing or attending a health education seminar.

** ”Disability-related inquiry” is a question likely to elicit information about a disability, such as asking whether an individual has (or ever had) a disability, questions relating to an individual's genetic information (including family medical history), whether an individual is currently taking any medications, and broadly worded questions about an individual’s impairments. General questions regarding an individual’s general well-being, non-disability-related impairments, whether an individual has been drinking, or an individual’s current illegal use of drugs are not disability-related inquiries.

*** ”Medical exam” is a procedure or test that seeks information about an individual's physical or mental impairments or health. Whether a particular test or procedure is a medical examination will be determined based on several factors, but the EEOC has determined that certain tests, including blood pressure screenings and cholesterol tests, are medical examinations for purposes of the ADA.

What It Means To You

While the intentions of the governing agencies are good – to enable employers to “promote health and prevent disease” but also prevent programs from operating as subterfuge for discriminating against unhealthy individuals – the complex compliance requirements they’ve established will be challenging for employers. These separate but overlapping wellness regulations manage to be similar, yet simultaneously competing.

For employers with robust wellness program strategies involving an array of activities and incentives, determining the employer-specific impact of this regulatory triangle will require evaluating program elements piece-by-piece. Employers thus far shielded from incentive limit concerns as a result of tying incentives only to participatory wellness programs that involve completion of an HRA and/or biometric testing must carefully assess whether any aspects of those activities would fall under the umbrella of the new ADA and GINA regulations applicable to both participatory and health-contingent programs. Lastly, employers whose programs will be subject to the ADA and GINA regulations should review whether their program materials satisfy the additional participant notification requirements regarding information collection, disclosure and protection.

Your Trion Strategic Account Managers are here to answer any questions you might have as you prepare to comply with upcoming ACA requirements. If you are not currently a Trion client and would like assistance navigating the changes required by health care reform, please contact us today by emailing trionsales@trion-mma.com.

ACA Guidance Released in the Last Two Months

May 2016:	EEOC Issues Final ADA and GINA Rules on Wellness Programs and ADA FAQs ai
May 2016:	ACA FAQs 31 – Patient Bill of Rights Topics
Apr. 2016:	IRS Issues Rev. Proc. 2016-24 2017 Affordability Threshold & Marketplace Require Percentages
Apr. 2016:	Agencies Issue Revised SBC Template, Instructions, Uniform Glossary, and Other Documents

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