

EEOC Proposed Rule on Incentive-Based Wellness Programs

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- Section 4303 of the Affordable Care Act (ACA) expressly authorized employer-sponsored incentive based wellness programs. The amendment received bipartisan support at the time of passage.
 - The ACA provision codified the existing HIPAA regulations regarding nondiscrimination and wellness provisions, released by the Departments of Labor, Health and Human Services and the Treasury in 2006.
- In 2013, the Departments of Labor, Health and Human Services and the Treasury released final regulations that implemented the ACA's nondiscrimination requirements for wellness programs.

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- The Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking (NPRM) on April 20, 2015. The comment period is open until June 19, 2015.
- EEOC asserts authority under the Americans with Disabilities Act (ADA).
- The NPRM was released concurrently with guidance from EEOC.
- Wellness programs are already regulated under a 2014 final rule from HHS, Labor and IRS/Department of Treasury.

EEOC Proposed Rule on Incentive-Based Wellness Programs – Initial Reaction

"The EEOC's proposed rules are a positive step," said Honeywell's director of communications, Bob Ferris, in a statement. "The proposed regulations recognize that Congress views wellness programs as having an important role to play in the health-care marketplace, both in terms of promoting employee health and helping to control health-care costs."

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- The EEOC's proposed rule is similar to wellness program regulations under HIPAA, as amended by the ACA, but have some differences and concerns will be raised.
- The rules set out the following differences from the ACA requirements:
 - Caps incentive based programs with medical testing at 30% of premium (self only). ACA permits discretion by the Secretary of HHS to increase to 50%.
 - Caps the incentive at 30% of premium overall (self only) and does not speak to family incentive programs.
 - Requires notices to each employee about certain issues relating to privacy.

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- The NPRM clarifies that health-contingent wellness programs involving health screening incentives are permissible as long as they:
 - Have a reward/penalty not to exceed 30% of the premium for participation and contingent based programs;
 - Have a reasonable chance of improving the health of, or preventing disease in, participating employees;
 - Are not overly burdensome;
 - Are not a subterfuge for violating the ADA or other laws prohibiting employment discrimination; and
 - Are not highly suspect in the method chosen to promote health or prevent disease.
- These requirements are similar to, but not exactly like, requirements in Affordable Care Act final rules.

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- The EEOC NPRM makes changes to allowable incentives from the Affordable Care Act final rules. These changes are highlighted in the chart that follows.

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ACA Regulations

- Capped incentive at 30% of premium for health-contingent programs
- Capped incentive at 50% of premium for smoking cessation programs
- No cap on incentives for participation only programs

EEOC Proposal

- Caps incentives for health contingent AND participation programs that including testing at 30% of premium
- Caps incentives at 30% of premium for programs involving nicotine testing; all smoking cessation 50% cap

Pro/Con

- EEOC deems 30% reward/penalty as meeting the voluntary requirements
- Concern with limits on growth of incentives going forward

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- The NPRM does not provide guidance related to the application of Title II of the Genetic Information Nondiscrimination Act (GINA) to wellness programs.
- In a footnote to the NPRM, the EEOC states that it will address the issue in future guidance.

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Feedback:

- **Concern with 30% incentive cap on both contingent and participatory programs.**
- **Concern with limiting the incentives for programs that include medical testing to 30%** (scales back nicotine testing).
- **Concern with limiting the incentive to 30% of self-only coverage** (question as to its impact on family coverage).
- **Concern with the cost and expense of the notice requirements.**
- **Concern with the questions that are raised for a response as they further erode the ACA requirements.**