Center for Health and Wellness Law, LLC

Special Update:
EEOC Removes Incentive Limits in ADA and GINA Rules:
Interpreting the Change
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In the December 20, 2018 Federal Register, the EEOC specifies which sections of the wellness rules under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) are vacated because of the court order in the AARP v. EEOC case. The EEOC has decided to strike section 29 CFR § 1630.14**(d)(3)** from the ADA (hereinafter "(d)(3)"), and section 29 CFR § 1635.8(b**)(2)(iii)** from GINA (hereinafter (2)(iii)).

ADA

Section (d)(3) states that incentives (whether financial or in-kind) in an employee wellness program, whether in the form of a reward or penalty, will not render the program involuntary if the maximum allowable incentive available (whether the program is a participatory program or a health-contingent program, or a combination of the two), does not exceed 30% of the total cost of self-only coverage. The section lays out how to calculate the 30% incentive depending on whether the employer offers health coverage, multiple plans, or no health coverage. As of January 1, 2019, that language disappears from the ADA wellness rule.

Importantly, the EEOC leaves the remaining sections of the ADA wellness rules intact. Thus, the following sections of the wellness rules are still in effect as of January 1, 2019:

- Section (d)(1): Wellness programs that collect employee health information must be reasonably designed to promote health or prevent disease.
- Section (d)(2): Wellness programs that collect employee health information are voluntary as long as the employer:
  - Does not require employees to participate;
  - Does not deny or limit coverage for employees who do not participate
  - Does not take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees; and
  - Provides employees with a written notice that meets certain requirements.
- Section (d)(4): Except as needed to administer the health plan, employers should not receive employee health information through a wellness program unless it is in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of an employee.
- Section (d)(5): Even if an employer complies with the ADA wellness rules, *including the limit of incentives under the ADA*, employers must still comply with other laws relating to employee wellness programs, such as Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and GINA.
- Section (d)(6): The ADA safe harbor provisions in § 1630.16(f) do not apply to wellness programs, even if such plans are part of an employer's health plan.

With regard to Section (d)(5), it is interesting that the EEOC did not delete the phrase "including the limit of incentives under the ADA," even though as of January 1, 2019, there are no limits of incentives under the ADA.

One must wonder whether the EEOC intended to leave that language in the rule, or whether failing to delete it was an oversight. If the former, it might suggest that the EEOC plans to recommend a different incentive limit at some point in the future. It also suggests that the EEOC employers to continue using incentives in wellness programs. If that is the case, then continued use of incentives (of 30% of the total cost of self-only coverage or less) may present less of a legal risk.

If, on the other hand, the EEOC's failure to delete all references to incentives in the ADA wellness rules was a mere oversight, then employer use of incentives may present more of a legal risk. But, the fact remains that the language referencing incentives will still be in Section (d)(5), giving employers some legal justification for using them even if the information collection must still meet the ADA voluntary requirement. Moreover, the Federal Register instruction states "remove and reserve" paragraph (d)(3), which is a hint that the EEOC plans to replace the 30% incentive rule with something else at some point.

GINA

Section (2)(iii) of GINA allows employers to offer an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment. This health risk assessment may include a medical questionnaire, a medical examination (e.g., to detect high blood pressure or high cholesterol), or both. The inducement may not exceed 30% of the total cost of self-only coverage. Section (2)(iii) offers different ways of calculating the 30% inducement depending on whether the employer offers its employees health coverage, offers multiple plans, or offers no coverage. As of January 1, 2019, the EEOC is deleting Section (2)(iii) from the GINA wellness rules. That means there will no longer be language in GINA referencing the allowance of an "inducement" to spouses to provide health information. However, like the ADA, the EEOC has instructed to "remove and reserve" paragraph (2)(iii), hinting once again that it likely plans to replace the 30% incentive maximum with something else.

Also like the ADA rules, the EEOC is not deleting the remaining sections of the GINA wellness rules. Those sections are:

- Section (2)(i): allows an employer to collect employee genetic information as part of an employee wellness program if the program is reasonably designed to promote health or prevent disease. This section specifies that a program is not reasonably designed to promote health or prevent disease if it imposes a penalty or disadvantage on an individual because a spouse's manifestation of disease or disorder prevents or inhibits the spouse from participating or from achieving a certain health outcome. As an example, an employer may not deny an employee an "*inducement for participation* of either the employee or the spouse in an employer-sponsored wellness program because the employee's spouse has blood pressure, a cholesterol level, or a blood glucose level that the employer considers too high." (Emphasis added.)
- Section (2)(ii): allows an employer to *offer an inducement* to employees for completing health risk assessments that include questions about family medical history or other genetic information, provided the employer makes clear that the inducement will be made available whether or not the participant answers questions regarding genetic information. (Emphasis added.)

- Section (2)(iv): prohibits an employer from conditioning participation in a wellness program or providing *any inducement* to an employee, spouse or other covered dependent in exchange for an agreement permitting the sale, exchange, sharing, transfer or other disclosure of genetic information. (Emphasis added.)
- Section (2)(v): prohibits an employer from denying access to health insurance to an employee, spouse or other covered dependent of the employee, or from retaliating against an employee, because a spouse refuses to provide information about his or her health to an employer-sponsored wellness program.
- Section (2)(vii): the GINA wellness rules do not limit the rights or protections of an individual under the ADA, HIPAA, or other civil rights rules. For example, if an employer offers an inducement for participation in disease management programs or other programs that promote healthy lifestyles and/or require individuals to meet particular health goals, the employer must make reasonable accommodations to the extent required by the ADA: that is, the employer must make modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other employees without disabilities.
- Section (c)(2): An employer does not violate GINA when it requests, requires or purchases genetic information of an individual who is receiving health or genetic services on a voluntary basis, as long as GINA requirements are met, including those concerning authorization and *inducements.* (Emphasis added.)

As one can see from the remaining GINA sections, there are multiple references to inducements being used as part of the wellness program. Again, as with the ADA, either the EEOC intentionally left those references intact, or it was an oversight. Because there are numerous references to inducements in both the ADA and GINA wellness rules, it is a stronger argument that the EEOC intentionally left those references in the rules. One could argue that the EEOC expects employers to continue using inducements in wellness programs. The question will be what amount of inducement will still meet both the ADA and GINA requirements that participation in the wellness program be voluntary. Conducting employee surveys or focus groups may provide insight as to what level of inducement an employer's employee population would view as keeping participation voluntary.

For further assistance in your workplace wellness compliance needs, please contact the Center for Health and Wellness Law, LLC at www.wellnesslaw.com.