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EEOC Issues Final ADA and GINA Wellness Program Regulations

By Eric Keller & Neal Mollen

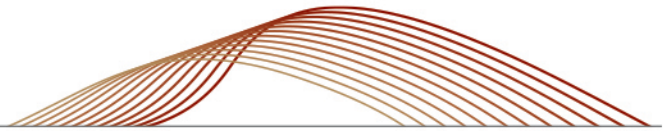
Last week, the Equal Employment Opportunity Commission ("EEOC") published its much anticipated final regulations explaining how employers may structure wellness programs without violating the Americans with Disabilities Act's ("ADA") limitations on disability related inquiries and medical examinations. Also, the EEOC issued final regulations addressing the Genetic Information Nondiscrimination Act's ("GINA") limitations on inquiring into the medical history of spouses. This Client Alert highlights the key requirements for employers related to each. Both regulations become applicable on January 1, 2017.

ADA Final Regulations

The final ADA regulations allow employers to offer incentives to encourage employees to respond to disability-related inquiries or undergo medical examinations[1] as part of a wellness program without violating the ADA, provided the requirements of the regulations are met.[2] The key provisions of the final regulations are:

No Safe Harbor.[3] The ADA's "bona fide benefit plan" safe harbor provides that an insurer or administrator of a benefit plan does not violate the ADA by "establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law."[4] Various courts have found that wellness programs offered as part of a benefit plan qualified for the safe harbor.[5] In the final regulations, the EEOC affirmed its view that the safe harbor is unavailable for wellness programs that include disability related inquiries or medical examinations. In so doing, the EEOC is taking the position that prospectively, its interpretation will be entitled to *Chevron* deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (courts required to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are unreasonable). Only time will tell if the courts agree.

Programs Subject to the Regulation. The final regulations apply to all wellness programs that solicit responses to disability-related inquiries and/or require employees to undergo medical examinations, regardless of whether they are offered as part of a group health plan or as a separate program. A smoking cessation program that merely asks employees whether or not they use tobacco (or, upon completion of the program, asks whether they ceased using tobacco) is not a wellness program that includes disability-related inquiries or medical examinations.



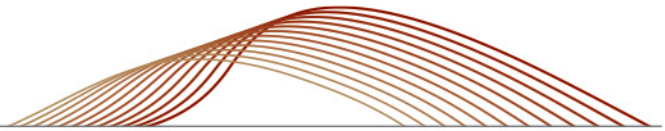
Reasonable Design. The program must be reasonably designed to promote health or prevent disease, evaluated in light of all the relevant facts and circumstances.[6] This requirement is met if the program has a reasonable chance of improving the health of, or preventing disease in, participating employees; is not overly burdensome; is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination; and is not "highly suspect" in the method chosen to promote health or disease. Conversely, a program is not reasonably designed (1) if health information is collected, measured, screened or tested without providing results, follow-up information or advice designed to improve the health of participating employees or used to design a program that addresses at least a subset of the conditions identified, or (2) if it exists mainly to shift costs from the covered entity to targeted employees based on their health or simply to give employers information to estimate future health costs.

Voluntary. The program is considered voluntary if employees are not required to participate and employees who do not participate are not denied coverage or limited in their benefits under the employer's health plans. In addition, employees must be provided with a written notice, reasonably likely to be understood, that describes the types of medical information that will be obtained and the specific purposes for which it will be used, the restrictions that will be imposed on the disclosure of the information, and the methods that the employer will use to avoid improperly sharing the information (including whether the measures comply with HIPAA's privacy standards), and that lists the employer representatives or other parties to whom the information will be provided. A program becomes involuntary if the employer takes any adverse employment action or retaliates against, interferes with, coerces, intimidates or threatens employees for failing to participate.[7] The EEOC will be posting a sample notice on its website within 30 days of the final rule's publication.

Incentives. The maximum financial and in-kind incentives offered under the program (whether expressed as a reward or a penalty) cannot exceed thirty percent of the total cost of self-only coverage (including both the employee and, if applicable, employer contribution) of:

- the group health plan in which the employee is enrolled, when participation is limited to employees enrolled in the plan,
- the employer's group health plan if the employer offers only one group health plan and participation in the wellness program is offered to all employees regardless of whether they are enrolled in the group health plan,
- a major medical group health plan if the employer offers more than one group health plan but participation is offered to all employees whether or not they are enrolled in a particular plan, and
- the second lowest cost Silver Plan for a 40-year-old non-smoker on the state or federal health care exchange in the location that the employer identifies as its principal place of business if the employer does not offer a group health plan or group health insurance coverage.[8]

It should be noted that the HIPAA wellness program regulations applicable to group health plans generally allow incentives up to thirty percent of the total cost of coverage for the employee and his or her dependents that are enrolled for such coverage. In addition, wellness programs tied to tobacco cessation may use a 50% threshold. By limiting incentives to self-only coverage and not incorporating



a higher threshold for tobacco cessation programs, the ADA regulations are narrower than the HIPAA regulations.

Confidentiality. Medical information collected may not be shared with the employer except in aggregate form that is not reasonably likely to disclose the identity of any employee, except as needed to administer the health plan. An employer cannot require an employee to agree to the sale, exchange or other disclosure of medical information (except for uses permitted by the regulation to carry out activities of the wellness program) or to waive any confidentiality protections of the regulation as a condition for participating in the wellness program or earning any incentive offered under the program.[9]

Nondiscrimination. Compliance with the regulation does not relieve an employer of its obligation to comply with all other employment non-discrimination laws, such as Title VII of the Civil Rights Act or the ADEA.[10] For example, the EEOC states that if an employee cannot earn a wellness program incentive because of his or her disability, the employer must provide a reasonable alternative that would allow the employee to earn the incentive.

GINA Final Regulations

GINA generally prohibits employers from requesting genetic information relating to an employee or an employee's family member. Genetic information includes information regarding family medical history. GINA regulations issued in 2009 prohibit wellness programs from offering an inducement for completing a health risk assessment that asks about family medical history. This rule created uncertainty regarding whether it was permissible for a wellness program to offer a financial incentive to the employee's spouse to complete a health risk assessment with respect to the spouse's own medical information.

The EEOC's final regulations allow the use of incentives for spouses to complete health risk assessments, provided that the requirements of the regulations are met. The final GINA regulations largely mirror the requirements of the final ADA regulations described above and are applicable January 1, 2017.

Employers should carefully review their wellness program design, use and documentation to determine whether any modifications are warranted in light of the final ADA and GINA regulations.

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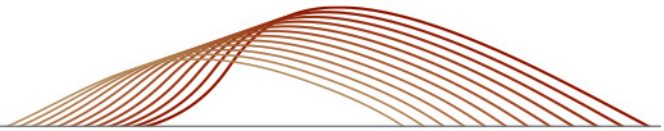

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[1] Examples include requiring employees to complete a health risk assessment (HRA) or undergo a biometric screening.

[2] 29 C.F.R. § 1630.14.

[3] 29 C.F.R. § 1630.14(d)(6).

[4] 42 U.S.C. § 12201(c)(2).

[5] *Seff v. Broward Cty.*, 691 F.3d 1221 (11th Cir. 2012); *EEOC v. Flambeau, Inc.*, No. 14-cv-638-bbc, 2015 WL 9593632 (W.D. Wis. 2015).

[6] 29 C.F.R. § 1630.14(d)(1).

[7] 29 C.F.R. § 1630.14(d)(2).

[8] 29 C.F.R. § 1630.14(d)(3).

[9] 29 C.F.R. § 1630.14(d)(4).

[10] 29 C.F.R. § 1630.14(d)(5).