



Provided by BB&T Insurance Services, Inc., McGriff, Seibels & Williams, Inc., BB&T Insurance Services of California, Inc., and Precept Insurance Solutions, LLC

EEOC Finalizes Wellness Rules under ADA and GINA

Legislative Alert 10-2016 May 18, 2016

Highlights:	<ul style="list-style-type: none">▪ The final ADA rule provides that wellness programs that ask questions about employee health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage.▪ The final GINA rule also allows an employer to provide limited incentives for an employee's spouse to provide information about his or her health status as part of a voluntary wellness program.	Important Dates:	<ul style="list-style-type: none">▪ Jan. 1, 2017 The final rules' notice requirement and incentive limits apply as of the first day of the first plan year that begins on or after Jan. 1, 2017 (for the health plan used to determine the amount of incentive).
--------------------	---	-------------------------	--

Overview

On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) issued final rules that describe how the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) apply to employer-sponsored wellness programs.

- The [final ADA rule](#) provides guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions or to undergo medical examinations.
- The [final GINA rule](#) clarifies that an employer may offer a limited incentive to an employee whose spouse provides information about his or her current or past health status as part of the employer's wellness program.

Action Steps

The final rules provide long-awaited guidance on how to structure wellness programs without violating the ADA or GINA. Employers that sponsor wellness programs should work with their advisors to determine what changes, if any, should be made to their wellness programs' design to comply with the EEOC's final rules.

Wellness Programs

Design Options

Many employers offer workplace wellness programs as a way to help control health care costs, encourage healthier lifestyles and prevent disease. Wellness programs can be offered to employees as part of an employer-sponsored health plan or separately as a benefit of employment.

According to the EEOC, the final rules provide guidance to employers on how their wellness programs can be designed to comply with the ADA and GINA in a way that is consistent with HIPAA's rules for wellness programs.

Many of these programs ask employees to answer questions on a health risk assessment (HRA) or to undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, on-site exercise facilities or coaching to help employees meet health goals.

Wellness program incentives can be framed as rewards or penalties and often take the form of prizes, cash, or a reduction or increase in health care premiums or cost-sharing.

Legal Concerns

Employee wellness programs must be carefully designed to comply with the ADA, GINA and other federal laws that prohibit discrimination based on race, color, sex (including pregnancy), national origin, religion, compensation or age.

Additionally, wellness programs that are part of group health plans must be designed to comply with HIPAA's nondiscrimination requirements, as amended by the Affordable Care Act (ACA). Under HIPAA, health-contingent wellness programs are required to follow certain standards related to nondiscrimination, including a standard that limits the amount of incentives that can be offered. The maximum reward under HIPAA for health-contingent wellness programs is **30 percent of the cost of health coverage (or 50 percent for programs designed to prevent or reduce tobacco use)**.

ADA	The ADA prohibits employers with 15 or more employees from discriminating against individuals with disabilities. Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a voluntary wellness program .
	Additionally, the ADA requires employers to make all wellness programs, even those that do not obtain medical information, available to all employees, to provide reasonable accommodations (adjustments or modifications) to employees with disabilities, and to keep all medical information confidential .
GINA	GINA prohibits employers with 15 or more employees from using genetic information when making decisions about employment, and it restricts covered employers from disclosing genetic information. It also restricts employers from requesting, requiring or purchasing genetic information, unless one or more of six narrow exceptions applies. One of those narrow exceptions applies when an employee voluntarily accepts health or genetic services offered by an employer, including services offered as part of a wellness program.

Final Rules

The final rules provide much needed guidance for employers on how to structure employee wellness programs without violating the ADA and GINA. Most importantly, the final ADA rule provides guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions or undergo medical examinations.

The final ADA rule does not apply to wellness programs that do not obtain medical information but simply require employees to engage in an activity (such as walking a certain amount every week) in order to earn an incentive. However, employers must provide reasonable accommodations to allow employees with disabilities to earn the incentive.

Also, the final GINA rule clarifies that an employer may offer a limited incentive for an employee's spouse to provide information about the spouse's current or past health status as part of a voluntary wellness program.

Incentives

The final ADA rule provides that incentives offered to an employee who answers disability-related questions or undergoes medical examinations as part of a wellness program are limited to the following:

- When the wellness program is available only to employees who are enrolled in a specific group health plan, the incentive may not exceed **30 percent** of the total cost for self-only coverage of the health plan in which the employee is enrolled.
- When an employer offers only one group health plan, and does not require employees to be enrolled in the health plan in order to participate in the wellness program, the incentive may not exceed **30 percent** of the total cost for self-only coverage under the health plan.
- When an employer offers more than one group health plan, and does not require employees to be enrolled in a health plan in order to participate in the wellness program, the incentive may not exceed **30 percent** of the total cost of the lowest cost self-only coverage under a major medical group health plan offered by the employer.

- When an employer does not offer a group health plan, and offers a wellness program that is open to employees, the incentive may not exceed **30 percent** of the total cost to a 40-year-old nonsmoker purchasing self-only coverage under the second lowest cost Silver Plan available on the state or federal Exchange in the location that the employer identifies as its principal place of business.
- In addition, the final GINA rule provides that the value of the maximum incentive attributable to a spouse's participation may not exceed **30 percent** of the total cost of self-only coverage, which is the same incentive allowed for the employee. Employers may offer children the opportunity to participate in wellness programs, but may not offer inducements in exchange for current or past health status information about children. Inducements in exchange for genetic information about spouses and children (such as a spouse's or child's family medical history) are also prohibited.

Voluntary Programs

In order for participation to be considered voluntary under the ADA, an employer:

- May not require participation;
- May not deny access to health insurance or benefits to an employee who does not participate;
- May not retaliate against, interfere with, coerce, intimidate or threaten any employee who does not participate or who fails to achieve certain health outcomes;
- Must provide a **notice** that explains the medical information that will be obtained, how it will be used, who will receive it and the restrictions on disclosure; and
- Must comply with the incentive limits described in the final rule.

Program Design

The ADA and GINA rules seek to ensure that wellness programs actually promote good health and are not just used to collect or sell sensitive medical information about employees and family members or to impermissibly shift health insurance costs to them. Both rules require wellness programs to be reasonably designed to promote health and prevent disease.

Confidentiality

Both rules state that information from wellness programs may be disclosed to employers only in **aggregate terms**.

- The ADA rule requires that employers give participating employees a notice that tells them what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential.
- GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information in order to participate in a wellness program or to receive an incentive.

Applicability Date

The provisions of the final rules related to the incentive limits and the ADA notice requirement will apply only prospectively to employer-sponsored wellness programs as of the first day of the **first plan year that begins on or after Jan. 1, 2017**, for the health plan used to determine the level of inducement. According to the EEOC, other wellness program provisions (such as the reasonable design and confidentiality requirements) are clarifications of existing obligations.

Source: Equal Employment Opportunity Commission