

LEGAL UPDATES

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# New Proposed EEOC Regulations Pose Potential Hurdles on Common Wellness Incentives

## Update:

The Alert below discusses wellness rules proposed by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. Those proposed rules have been formally withdrawn. While the EEOC's next steps are unclear at this time, employers should keep apprised of future guidance from the EEOC and continue to comply with other applicable laws regarding wellness programs.

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On January 7, the Equal Employment Opportunity Commission (EEOC) issued **proposed** wellness program rules. If the proposed rules become effective, they will significantly restrict the ability of employers to provide incentives to participate in wellness programs. While the proposed rules may change before they are finalized – the Biden administration recently withdrew the proposed rules from publication in the Federal Register under a regulatory freeze pending review – employers maintaining wellness programs should continue to pay close attention and be prepared to redesign their wellness strategies.

## Background

The Americans with Disabilities Act (ADA) broadly prohibits employers from: requiring employees to undergo medical examinations, or asking employees disability-related inquiries.

Importantly, however, an exception is available for “voluntary” wellness programs. Relying on this exception, employers commonly offer wellness benefits that reward employees for receiving an annual physical or completing a health risk assessment.

Initially, the EEOC did not provide any guidelines regarding the level of reward that would result in some employees feeling coerced to participate in the wellness program and thereby cause the program to fall outside the ADA's voluntary exception. Then, in 2016, the EEOC finalized regulations permitting an incentive of up to 30% of the cost of self-only coverage under the employer's health plan. However, a federal court struck down the 2016 regulations, holding that the EEOC had not justified its conclusion that a 30% incentive level was a reasonable interpretation of the term “voluntary” within the meaning of the ADA statute.

## The proposed rules

In January, the EEOC issued new proposed rules addressing the ADA's voluntary requirements. The proposed rules distinguish between two types of wellness programs:

**1. Health-contingent programs.** A health-contingent program is a wellness program that requires a participant to satisfy a standard related to health factor in order to earn a reward. Notably, health-contingent programs must comply with the Health Insurance Portability and Accountability Act (HIPAA). Health-contingent programs can be either activity-only or outcome-based:

An activity-only wellness program requires an individual to perform or complete an activity related to a health factor in order to obtain a reward – e.g., walking, diet, or exercise programs.

An outcome-based health-contingent wellness program is one that requires an individual to attain or maintain a specific health outcome – e.g., not using tobacco or attaining specified results on biometric tests.

The proposed rules generally allow a health-contingent wellness program to offer incentives of up to 30% of the cost of self-only coverage under the employer's health plan, provided such program is a component of, or qualifies as, a group health plan. The health-contingent wellness program must also be compliant with HIPAA.

**2. Participation-only programs.** A participation-only program is a wellness program that either does not provide a reward or does not include any condition for obtaining a reward that is based on an individual satisfying a health standard – e.g., a program that rewards employees for receiving an annual physical or completing a health risk assessment.

Contrary to the EEOC's 2016 guidance, the proposed rules provide that participation-only wellness programs may only offer "de minimis" incentives such as a water bottle or a gift card of modest value. In contrast, annual gym memberships, airline tickets or a \$50 reduction in the employee's required monthly health insurance premium contribution would **not** be de minimis.

### **GINA**

The EEOC's proposed rules would also affect wellness program rules under Title II of the Genetic Information Nondiscrimination Act (GINA). GINA prohibits employers from requesting or using genetic information – including family medical history – unless the information is provided "voluntarily." The proposed rules permit an employer wellness program to offer only a de minimis incentive to an employee or the employee's family member in return for the family member providing medical or genetic information.

Note, the proposed GINA regulations apply to both participation-only and health-contingent wellness programs. Thus, under the proposed rules, incentives that are more than de minimis may not be conditioned on an employee or an employee's family member providing family medical or other genetic information.

### **Key takeaway**

To summarize, under the proposed rules, employers would be unable to offer more than de minimis incentives for (1) completing a health risk assessment or receiving a physical, or (2) providing information about family medical history. However, employers would be able to offer more significant incentives to an employee who completes walking, dieting or exercise goals, or meets certain health standards – e.g., quitting tobacco or achieving a target BMI – provided the wellness program is a HIPAA-compliant group health plan.

Employers commonly sponsor participation-only wellness programs that offer incentives much larger than the de minimis threshold permitted under the proposed regulations. If the proposed rules are finalized in their current form, employers would need to consider either reducing the incentives offered or turning any participation-only wellness programs into health-contingent wellness programs.

Given the Biden administration's regulatory freeze, the proposals may undergo substantial revisions before they are finalized. However, the proposed rules provide insight into the EEOC's current thinking regarding incentive sizes in order to preserve voluntariness. Employers committed to improving the health and well-being of their workforce should closely monitor the proposed rules and how they may affect the employer's wellness programs.

## Contact us

For more information on wellness program rules and how they impact your business, contact Molly Hobbs, Craig Kovarik or your Husch Blackwell attorney.