

EEOC Proposed Wellness Rules Addressing Permitted Incentive Limits

February 1, 2021

QUICK FACTS

- The proposed ADA rules allow only offer de minimis incentives for participation in most employer-sponsored wellness programs.
- There is an exception to the incentive limit for health-contingent wellness programs that are part of a group health plan.
- The proposed GINA rules allow a de minimis incentive in exchange for family members (including spouses) responses to responding to inquiries about their own manifestation of diseases or disorders.
- The EEOC removed the requirement for participants to be provided with a specific confidentiality notice regarding the collecting of medical information.
- On January 20, 2021 the Biden Administration withdrew publication of the proposed rules from the Federal Register for review by the newly appointed EEOC chair.

The Equal Employment Opportunity Commission (EEOC) released long-awaited proposed rules addressing what type of incentive can be offered for participation in a wellness program without violating the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA). The rules propose that most wellness programs subject to the ADA or GINA are permitted to offer only a de minimis incentive, stating that *“allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty,”* but there is an exception allowing health-contingent programs that are part of a group health plan to instead follow HIPAA wellness program incentive limits.

On January 20, 2021, the Biden Administration withdrew publication of the proposed rules from the Federal Register for review and approval by the newly appointed EEOC chair. It is common for a new administration to hold and sometimes freeze proposed legislation that has not been published or is not yet active to give time for review by new and incoming leadership.

BACKGROUND

In 2016, the EEOC issued rules to clarify its position on how employer wellness programs could be offered in compliance with the ADA and GINA. For any programs requiring the employee to participate in medical examinations or disability-related inquiries (e.g., biometric screenings or health risk assessments), one

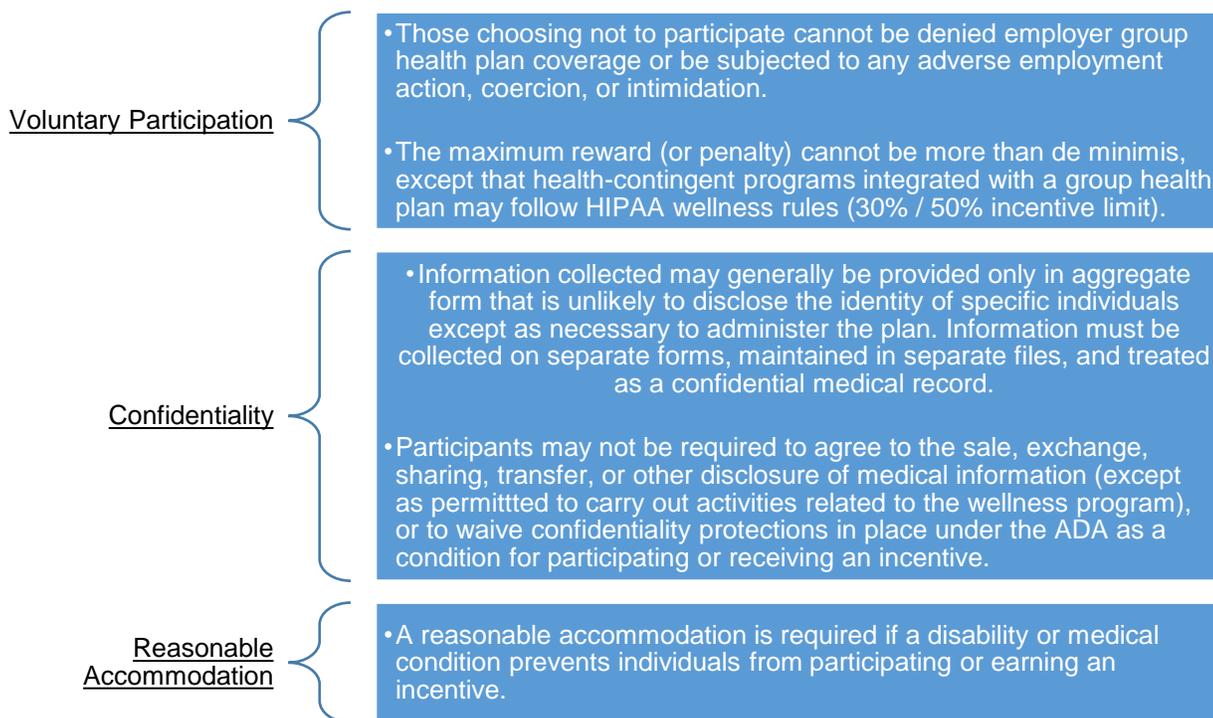
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requirement was that incentives not exceed 30% of the cost of single coverage. In addition, wellness programs could offer up to a 30% incentive for employees' spouses responding to inquiries about their manifestation of diseases or disorders.

Soon after the rules were released, the American Association of Retired Persons (AARP) sued the EEOC, arguing that the rules violated ADA and GINA. In particular, the AARP argued that the 30% incentive limit meant that the programs were not voluntary. The court ruled in favor of the AARP, and the EEOC's rules around incentive limits for wellness programs subject to the ADA or GINA were vacated effective January 1, 2019 without any further guidance as to permissible incentive limits.

PROPOSED ADA RULE

The proposed EEOC rule for wellness programs requiring employees to participate in medical examinations or disability-related inquiries to earn incentives is summarized below.



The proposed rule makes several changes to the final rules issued in 2016. Two previous requirements were removed completely. The 2016 rules require that a program must be reasonably designed to promote health or prevent disease and must not be overly burdensome or a subterfuge for violating discrimination laws. The EEOC removed this requirement arguing that with only a de minimis incentive permitted, employees will

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simply choose not to participate in programs that are unreasonably designed or overly burdensome. In addition, the EEOC removed the requirement for participants to be provided with a specific confidentiality notice regarding the collecting of medical information.

More importantly, the proposed rules significantly alter the previous rule regarding incentive limits, allowing only a de minimis incentive for many programs. The guidance indicates that a de minimis limit permits only nominal incentives such as a water bottle or gift card, while also stating that a \$50/month medical premium surcharge, reimbursement of annual gym membership fees, or free airline tickets would not be considered de minimis. It seems likely that further clarification on what will meet the definition of “de minimis” for these purposes will be provided in the final rule.

With only a de minimis incentive permitted, many wellness programs that offer incentives today may need to be redesigned to comply with the proposed framework if finalized. The incentive limit framework can be broken into two parts.

General Rule – De Minimis Incentive

- Wellness programs subject to the ADA can provide only a de minimis incentive (e.g. water bottle or gift card of modest value).
- Programs that are not tied to a group health plan, for example, gift card or prize drawings for participation in a health risk assessment or biometric screening, would be permitted to provide only a de minimis incentive.
- Participatory programs that are not activity-related or tied to a particular standard or outcome are also subject to the de minimis limit, even if they are tied to a group health plan.

Safe Harbor (Exception)

- Health-contingent wellness programs that are part of a group health plan are permitted to follow the guidelines for incentives under HIPAA wellness rules, which allow up to a 30% incentive (or 50% for a tobacco-related program).

For wellness programs that are merely participatory and therefore do not fall under the exception, this change in permitted incentives could really impact the program. Employers who previously rewarded employees for completing annual physicals, biometric screenings, or health risk assessments may not be able to provide anything more than a de minimis incentive for such activities. It is not clear whether a larger incentive might be permitted when there is a menu of activities that could be completed to earn the incentive, with only some of them involving medical examinations or disability-related inquiries.

For health-contingent programs integrated with a group health plan, the proposed rule would allow them to continue without any real change. However, it does have to be tied to a group health plan, and likely made

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available only to those employees enrolled in the employer's group health plan. The factors provided by the EEOC to help determine whether a health-contingent wellness program is part of, or qualifies as, a covered entity's group health plan for purposes of the ADA include whether the program – (i) is offered only to employees who are enrolled in an employer-sponsored group health plan; (ii) ties any incentive offered to cost-sharing or premium reductions (or increases) under the group health plan; (iii) is offered by a vendor that has contracted with the group health plan or insurer; and (iv) is a term of coverage under the terms of a group health plan.

PROPOSED GINA RULE

Wellness programs that inquire about the employee's genetic information, including asking family members about their manifestation of diseases or disorders (considered to be family medical history, and therefore genetic information about the employee), are subject to GINA.

If employers solicit genetic information about employees from employees or employees' family members, such information must be obtained only after prior, knowing, voluntary, and written authorization is obtained. Specifically, any authorization form must: (1) be written so that the individual from whom the genetic information is being obtained is reasonably likely to understand it; (2) describe the type of genetic information that will be obtained and the general purposes for which it will be used; and (3) describe the restrictions on disclosure of genetic information. In addition, participants may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of genetic information genetic, including information about the manifestation of disease or disorder of an employee's family member (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections in place under GINA as a condition for participating or for earning a de minimis incentive.

The proposed rule also continues to prohibit any incentive tied to employees answering questions about their own genetic information. However, there is a small exception allowing a de minimis incentive in exchange for family members (including spouses) responding to inquiries about their own manifestation of diseases or disorders. This is a change from the final rule issued in 2016, which permitted up to a 30% incentive for spouses providing such information.

While the proposed rule generally prohibits employers from incenting employees or their family members to provide genetic information, the proposed rule clarifies that an employer could offer incentives to encourage individuals who have voluntarily provided genetic information indicating an increased risk of acquiring a health condition in the future to participate in disease management programs or other programs that promote healthy lifestyles, or to meet particular health goals as part of a health or genetic service.

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SUMMARY

The EEOC rules request public comment in the 60 days following publication in the federal register. As of the date of publication of this article the proposed guidance has not been published in the Federal Register. It is common for a new administration to put a temporary hold on new legislation while it is approved by new leadership. Once the proposed rules are published, the EEOC will consider such comments and provide final rules that are likely to resemble what is set forth in the proposed rules, perhaps with some additional clarification. In the meantime, employers may want to familiarize themselves with these proposed changes to incentive limits to determine what type of wellness program and incentives will best promote good health for employees and comply with ADA and GINA requirements once finalized.

[EEOC Proposed Rule for ADA](#)

[EEOC Proposed Rule for GINA](#)

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