

## Publications

### *Labor and Employment Alert: EEOC Rules on Wellness Programs*

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Jennifer Bibart Dunsizer

Christine M. Poth

Elizabeth Howard

#### Related Services

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If your company sponsors a wellness program, you are undoubtedly familiar with IRS and DOL rules for participatory, activity, and outcomes-based wellness programs. You can find a summary of the IRS and DOL rules [here](#). Compliance with the IRS and DOL rules is necessary but not sufficient; you also need to consider compliance with the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Up until now, what constituted compliance with the ADA and GINA was subject to debate. The Equal Employment Opportunity Commission (EEOC) sought to end that debate with the publication of final wellness program regulations under the [ADA](#) and [GINA](#) on May 16, 2016.

### Under what circumstances do the ADA and/or GINA apply to a wellness program?

ADA

GINA

ADA applies to an employee's participation in a wellness program if the employee is asked to provide information on his or her past or current health status.

ADA does not apply to a spouse's participation in a wellness program.

GINA applies to a spouse's participation in a wellness program if the spouse is asked to provide information on his or her past or current health status.

GINA prohibits rewards or penalties for the provision of a child's health information.

If your wellness program is collecting health information about employees and/or spouses (e.g., through health risk assessments or biometric screenings), be prepared to show how that information is used for health promotion or disease prevention. The EEOC stated that health promotion and disease prevention are the only permissible

reasons for the collection of health information in connection with a wellness program.

The EEOC's rules on the confidentiality of health information collected in connection with a wellness program are consistent with the HIPAA privacy rules: an employer cannot receive an employee's individually identifiable health information that was collected in connection with the wellness program except as necessary to administer the wellness program and related group health benefits.

## How do the ADA and GINA limit the rewards/penalties for participation/non-participation in a wellness program?

The EEOC will not permit your wellness program to serve as a gatekeeper for your medical plan. You cannot base eligibility for a medical plan (or benefit package under a medical plan) on whether an employee or spouse chooses to participate in a wellness program. But, rewards or penalties for participation in a wellness program are permissible, subject to a cap.

ADA

GINA

Rewards/penalties for an employee's participation must be limited to 30% of the cost of single coverage. The cap applies to any combination of participatory and health-contingent wellness programs, plus any other workplace wellness programs which include inquiries as to the employee's health status.

Rewards/penalties for a spouse's participation must be limited to 30% of the cost of single coverage. The cap applies to any combination of participatory and health-contingent wellness programs, plus any other workplace wellness programs which include inquiries as to the spouse's health status.

If the wellness program is available to both the employee and spouse, each may be offered a separate reward/penalty of up to 30% of the cost of single coverage. The cost of family coverage is not a factor.

The GINA regulations include the following numerical example that illustrates the 30% cap:

*For example, if an employee is enrolled in health insurance through the employer at a total cost (taking into account both employer and employee contributions toward the cost of coverage) of \$14,000 for family coverage, that plan has a self-only option for \$6,000, and the employer provides the option of participating in a wellness program to the employee and spouse because they are enrolled in the plan, the employer may not offer more than \$1,800 to the employee and \$1,800 to the spouse.*

Wellness plans will not be required to accept a certification that an employee or spouse is in "active treatment" by a physician in lieu of a health risk assessment or biometric screening. The EEOC accepted the position advanced by employer groups that such a certification process would undermine the wellness program's effectiveness.

## How does the 30% cap on rewards/penalties work with rewards/penalties related to tobacco use?

ADA

GINA

ADA (and the 30% cap on rewards/penalties) applies if (and only if) the employee is tested for tobacco use. The ADA (and the 30% cap on rewards/penalties) does not apply if the employee simply self-reports tobacco use.

GINA does not apply to a spouse's tobacco use, regardless of whether the spouse is tested for tobacco use. Therefore, a spousal reward/penalty related to tobacco use would not count against the 30% cap (but of course would still need to comply with the IRS and DOL cap).

## What additional paperwork do the ADA and GINA require?

ADA

GINA

The employer does not need the employee's written authorization for the employee's participation in the wellness program. However, the employer must provide the employee a notice that:

1. Is written so that the employee is reasonably likely to understand it;
2. Describes the type of information that will be obtained and the specific purposes for which it will be used; and
3. Describes the restrictions on the disclosure of the information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including compliance with the HIPAA privacy regulations).

The EEOC stated it would post a model notice by mid-June.

The employer must obtain a spouse's "knowing, voluntary, and written authorization" prior to collecting health information from the spouse. (The spouse's authorization cannot be inferred from participation.) The employer must provide the spouse an authorization form that:

1. Is written so that the spouse is reasonably likely to understand it;
2. Describes the type of information that will be obtained and the general purposes for which it will be used; and
3. Describe the restrictions on disclosure of the information.

The EEOC has not promised a model authorization form.

## When are the EEOC rules effective?

The 30% cap on rewards and penalties under both the ADA and GINA and the new ADA notice apply in the first wellness program year starting on or after January 1, 2017. The EEOC considers other aspects of the rules to be clarifications of current law.