Americans with Disabilities Act (ADA)—Wellness Program Rules

Many employers offer workplace wellness programs as a way to help control health care costs, encourage healthier lifestyles and prevent disease. There a number of federal laws that impact the design of employer-sponsored wellness programs, including the Americans with Disabilities Act (ADA). Under the ADA:

- Wellness programs cannot discriminate against individuals with disabilities;
- Medical information obtained as part of a wellness program must be kept confidential; and
- Wellness programs that involve medical examinations or disability-related questions must satisfy certain additional requirements.

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) issued a long-awaited final rule to address how the ADA impacts wellness program design. The final rule generally took effect for plan years beginning on or after Jan. 1, 2017. However, the EEOC removed the incentive limits from the final rule, effective **Jan. 1, 2019**, in order to implement a court ruling that vacated that portion of the final rule.

LINKS AND RESOURCES

- EEOC's final ADA rule for wellness programs that include disability-related inquiries or medical exams
- Sample employee notice for wellness programs

General Rules

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**.

Many wellness programs ask employees to answer questions on a health risk assessment (HRA) or 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.

On May 17, 2016, the EEOC released a final rule that describes how the ADA applies to wellness programs that include questions about employees' health or require medical examinations. The final rule addresses how these wellness programs must be structured to be considered "voluntary" by the EEOC. These requirements are effective for plan years beginning on or after **Jan. 1, 2017**. Wellness programs that do not collect health information, however, are not subject to these requirements.

Additionally, the ADA requires employers to make all wellness programs, even those that do not collect health information, available to all employees, to provide reasonable accommodations (adjustments or modifications) to employees with disabilities and to keep all medical information confidential.

Incentive Limits for Wellness Programs

The EEOC's final rule addressed the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries or undergo medical examinations. The final rule provided that a wellness program could be considered voluntary under the ADA if the program's incentives did not exceed **30%** of the total cost of self-only health plan coverage. However, a federal court ruled that this 30% limit was not well-reasoned by the EEOC and vacated the incentive limit, effective Jan. 1, 2019. Consistent with the court's ruling, the EEOC removed the incentive limit from its final rule, effective Jan. 1, 2019.

On Jan. 7, 2021, the EEOC issued a new proposed rule to amend the incentive limit, which adopted the view 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 and, therefore, stated that most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than **de minimis incentives** to encourage employees to participate. This rule proposed that, under the ADA's safe harbor provision, health-contingent wellness programs that are part of, or qualify as, group health plans to which the wellness regulations apply are an exception to the de minimis standard. Therefore, the proposed rule interprets the safe harbor as permitting health-contingent wellness programs that are part of, or qualify as, group health plans to offer the maximum allowed incentive under existing HIPAA regulations (currently, 30% of the total cost of coverage, or 50% to the extent that the wellness program is designed to prevent or reduce tobacco use), as long as they comply with HIPAA requirements for those plans.

However, **this proposed rule was** withdrawn on Feb. 12, 2021, due to a White House memorandum requiring all agencies to immediately withdraw any proposed rules that had not been published as of President Joe Biden's inauguration date. As a result, the next steps for these proposed rules are currently under consideration by the EEOC.

Availability and Reasonable Accommodations

As a general rule, to comply with the ADA, covered employers should structure their wellness plans to ensure that qualified individuals with disabilities:

- Have equal access to the program's benefits; and
- Are not required to complete additional requirements in order to obtain equal benefits under the wellness program.

Employers must provide **reasonable accommodations** that enable employees with disabilities to fully participate in employee health programs and to earn any rewards or avoid any penalties offered as part of those programs. For example:

- An employer that offers an incentive for employees to attend a nutrition class must, absent undue hardship, provide a sign language interpreter for a deaf employee who needs one to participate in the class.
- An employer also may need to provide materials related to a wellness program in alternate format, such as large print or on a computer disk, for someone with vision impairment.
- An employer may need to provide an alternative to a blood test if an employee's disability would make drawing blood dangerous.

Confidentiality

Medical information obtained as part of a wellness program must be kept confidential. Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees. Also, employers cannot require employees 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.

Additional Rules for Voluntary Wellness Programs

The EEOC's final rule imposes the following additional requirements on wellness programs that make disability-related inquiries or require medical exams:

- Reasonable Design
  - The wellness program must be "reasonably designed to promote health or prevent disease," which means the program must meet all of the following requirements:
    - Has a reasonable chance of improving the health of, or preventing disease in, participating employees;
    - Must not require an overly burdensome amount of time for participation or involve unreasonably intrusive procedures;
    - Does not require employees to incur significant costs for medical examinations; and
    - Is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination or highly suspect in the method chosen to promote health or prevent disease.
  - A program that collects information on an HRA to provide feedback to employees about their health risks or that uses aggregate information from HRAs to design programs aimed at particular medical conditions is reasonably designed. A program that collects information without providing feedback to employees or without using the information to design specific health programs is not reasonably designed.
- Voluntary

    - Employees' participation in a wellness program must be voluntary to comply with the ADA. This means that:
        - Employees cannot be required to participate in the program;
        - Employers cannot deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program; and
        - Employers cannot take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer disability-related questions or undergo medical exams.
    - A 2021 EEOC proposed rule provides that, in order to comply with the ADA's voluntary requirement, the incentives for participating in a wellness program cannot be so substantial as to be coercive. The rule also establishes a de minimis limit on permissible incentives. Employers should carefully consider the level of incentives they use with their wellness programs.
- Employee Notice
    - Employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.
    - The EEOC does not require that employees receive the notice at a particular time (for example, within 10 days prior to collecting health information), but they must receive it before providing any health information, and with enough time to decide whether to participate in the program. Waiting until after an employee has completed an HRA or medical examination to provide the notice is illegal.
    - The notice can be given in any format that will be effective in reaching employees being offered an opportunity to participate in the wellness program. For example, it may be provided in hard copy or as part of an email sent to all employees with a subject line that clearly identifies what information is being communicated (for example, "Notice Concerning Employee Wellness Program"). Employers should avoid providing the notice along with a lot of information unrelated to the wellness program as this may cause employees to ignore or misunderstand the contents of the notice.
    - The EEOC has provided a sample notice to help employers comply with this ADA requirement.

Smoking Cessation Programs

According to the EEOC, a smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program) is not a wellness program that includes disability-related inquiries or medical examinations. Thus, the ADA's voluntary requirement and employee notice rules described above would not apply to this type of program. The ADA's general requirements, such as the need to provide reasonable accommodations that provide employees with disabilities equal access to benefits, would still apply.

By contrast, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical examination. The ADA's voluntary requirement and employee notice rules discussed above would apply to a wellness program that includes this type of screening.
