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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. Wellness programs can be offered to employees as part of an employer-sponsored health plan or separately as a benefit of employment. 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; 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 long-awaited final rules that address how the ADA's rules impact the design of wellness programs. In general, the final rules are effective for plan years beginning on or after Jan. 1, 2017.

LINKS AND RESOURCES

- EEOC's final ADA rule for wellness programs that include disability-related inquiries or medical exams
- EEOC's Q&As on employer wellness programs and the ADA
- Sample employee notice for wellness programs

HIGHLIGHTS

INCENTIVE LIMITS

- Wellness programs that involve medical exams or disability-related questions must comply with incentive limits.
- The reward for participating in these programs generally cannot exceed 30 percent of the cost of self-only coverage.

EMPLOYEE NOTICE

- Wellness programs that collect health information must comply with a notice requirement.
- Employers must provide a notice to employees explaining how medical information will be collected, used and kept confidential.
- The EEOC has provided a sample notice for employers to use.

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.**

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.

> ***UPDATE:*** On Aug. 22, 2017, a federal district court ruled against the EEOC in a lawsuit challenging its final wellness program rule. According to the court, the EEOC failed to provide a reasoned explanation for adopting the final rule's 30-percent incentive limit. Rather than vacating the final rule, the court sent the rule back to the EEOC for reconsideration. However, on Dec. 20, 2017, the court vacated the final rule's incentive limit, stating that the EEOC's unhurried approach for issuing new wellness rules is unacceptable. To avoid disruption to employers, the court stayed its ruling until **Jan. 1, 2019**. Due to these court rulings and the possibility for employee lawsuits, employers should carefully consider the level of incentives they use with their wellness programs.

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.

Wellness programs that include questions about employees' health or require medical examinations are subject to the final rule's requirements regarding incentive limits and employee notices. 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.

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:

RULE	DESCRIPTION
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/ reward limits	Employees may not be required to participate in a wellness program, may not be denied health insurance or given reduced health benefits if they do not participate, and may not be disciplined (or retaliated against) for not participating. Employers also may not interfere with the ADA rights of employees who do not want to participate in wellness programs, and may not coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes. 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.

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 and FAQs to help employers comply with this ADA requirement.

The provisions of the final rule related to the incentive limits and the notice requirement apply 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 requirement) are clarifications of existing obligations.

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 incentive limits and employee notice requirement 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 incentive limits and employee notice rules discussed above would apply to a wellness program that includes this type of screening.