

EEOC Offers Guidance On Employee Wellness Program Notices Required Under New Rules

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On the heels of at least two discrimination lawsuits over employer wellness programs, the Equal Employment Opportunity Commission (EEOC) issued two new rules on May 17, 2016 under the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA) offering parameters for how employers can offer limited incentives for wellness plans without running afoul of the two laws.

One such parameter is the requirement that employers ensure that employees receive notice concerning the purpose of, and limits on, the wellness program. The EEOC followed up late last week with a [sample](#) of what that notice should include, as well as additional guidance on what employers have to do in order to comply with the requirements of the new rules.

In sum, the notice must describe what information will be collected, who will receive it, how it will be used, and how it will be kept confidential. Employees must receive the notice before providing any health information and with enough time to decide whether to participate, the EEOC said. If the wellness program provides the notice, the employer is still obligated ensure that their employees receive it. The agency also indicated that these notices will be scrutinized, and may wind up being used in court, where an employee claims they were unaware that a particular test was part of a wellness program. Consequently, it would be a best practice for employers to obtain some kind of acknowledgment of receipt of the notice from employees.

Although the EEOC's new rules clarify and expand upon prior EEOC guidance on how a wellness program can safely dock in the safe harbor of the ADA's general prohibition against medical examinations and inquiries; in many instances, several other laws, such as HIPAA and the Affordable Care Act, seek to regulate the same behavior. The resulting interplay between these laws can be particularly complex, and the advice of counsel is indispensable when navigating the waters of implementing, and maintaining, a wellness plan.

At minimum, employers must ensure that their wellness programs are voluntary, reasonably designed to promote health and prevent disease, and that employee medical information is kept confidential. Limited financial or other incentives are permissible, but employers cannot require employees to participate (or coerce, threaten, intimidate or harass anyone into participating), deny or limit health insurance for non-participation, or retaliate against those who don't sign up. Permissible incentives under the rule are calculated based on a percentage of the cost of self-only health insurance coverage.

The obligation to provide the notice goes into effect on the first day of the plan year that begins on or after Jan. 1, 2017 for the plan that an employer uses to calculate the incentive limit.

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