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## Health Care Reform Alert

**May 19, 2016**

### **Final Rules on Employer Wellness Programs Under the ADA and GINA**

On May 16, the Equal Employment Opportunity Commission (EEOC) issued final regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs. These rules provide guidance around employer-sponsored wellness and incentive programs as they pertain to employees with health restrictions and disabilities (ADA) and non-employee/spouse health information (GINA). The rules apply to programs that include disability-related inquiries, medical examinations, and/or inquiries on family health information.

Employers have been using wellness programs to promote better health among employees and help control health care costs for a number of years. The Affordable Care Act (ACA) wellness rules were finalized in 2013 and became effective for plan years beginning in 2014. These new final regulations provide important guidance as to how employer wellness programs can comply with the ADA and GINA, but there are areas where they do not align with the existing ACA rules. Because of these differences, employers should work with their legal counsel to ensure compliance with each set of regulations.

The final regulations include some changes and clarifications from the proposed rules\* that were issued April 20, 2015 (ADA) and October 30, 2015 (GINA). They apply to wellness programs for plan years beginning on or after January 1, 2017.

**Key highlights from the final ADA and GINA regulations include:**

#### **ADA**

##### ***Program design***

- The **definition of a wellness program** has been expanded to apply to all wellness programs that include disability-related inquiries or medical examinations regardless

of whether the program is:

- Included as part of the group health plan, or
- Offered as a "stand-alone" program without enrollment in a group health plan.
- There is now a **"reasonably designed" requirement** for wellness programs that is similar to the current GINA rules for wellness programs. This requirement applies to both participatory and health-contingent wellness programs.
- Programs must be **voluntary**. As part of the "voluntary" requirement, an employee **cannot be denied access to a group health plan** solely because he or she fails to:
  - Participate in a wellness program
  - Complete a health risk assessment (HRA) or biometrics screening. (*Note: mandatory HRAs to earn incentives are still allowed as long as all other regulatory requirements are met.*)
- **Nondiscrimination rules apply**. Specifically, under the ADA, reasonable accommodations must be provided if an employee is unable to complete part or all of a wellness program for disability reasons.
- Affirm the EEOC's position that the ADA **"bona fide benefit plan" safe harbor does not apply** to rewards and penalties offered in connection with an employer's wellness program that includes disability-related inquiries or medical examinations.

### **Incentives**

- The ADA **limits incentives** to 30% of the cost of self-only coverage (including both the employee's and employer's contribution) with respect to the *employee only*. It does not address the maximum incentive for an employee's spouse.
- The limit remains at 30% if **tobacco cessation programs** use clinical tests to determine the presence of nicotine and tobacco. (*Note: if only self-reporting methods are used, the 50% ACA limit for tobacco cessation programs will apply.*)
- Four situations explain **how to calculate the maximum incentive** depending on how employers offer participation.

<b>In this situation:</b>	<b>Calculate to this plan:</b>
Enrollment in the plan is a condition for participation in the wellness program	The group health plan in which the employee is enrolled
The employer offers a single health plan, but enrollment is not a condition for participation	The group health plan offered by the employer
The employer offers multiple health plans, but enrollment is not a condition for participation	The lowest cost self-only coverage under a major medical plan offered by the employer
The employer offers no group health coverage	The second lowest cost Silver Plan available on the Exchange for a 40-year-old non-smoker in the employer's principal place of business

- The **total allowable incentive includes both financial and in-kind rewards** (such as additional time off, employee recognition or other items of value). Employers have flexibility to determine the value of in-kind incentives as long as the method is reasonable. The final rules do not include an exception for "de minimis" incentives.

### ***Information protection***

- Final **standards for protecting information** prohibit personal health information from being made available for sale, exchange, transfer, or other disclosure as a condition of program participation or receiving incentives (previously only applied to genetic information in the GINA proposed regulations).
- **Notices describing the handling of medical information**, and procedures for safeguarding information privacy must be distributed to all wellness program participants, regardless of whether the wellness program is related to a group health plan. A sample notice will be released within 30 days.

## **GINA**

### ***Program design***

- GINA rules apply broadly to all employer-sponsored wellness programs **regardless of whether they are part of a group health plan**.
- Programs collecting health-related information must be **reasonably designed** based on the facts and circumstances of the program. They are not considered reasonably designed if they do not provide follow-up or advice regarding the collected information.
- An employee and his or her family members **cannot be denied access to a group health plan** or otherwise retaliated against solely because his or her spouse's failure to complete an HRA.
- Information related to **tobacco use is not considered genetic information**.

### ***Incentives***

- Incentives may be offered if an employee's **spouse provides personal health information** as part of an HRA, so long as all other regulatory requirements are met. Additionally, no incentives are permitted for the spouse's genetic information, which may include genetic tests.
- No incentives are permitted for genetic **information about an employee's child(ren)**, whether they are adult or minor age.
- The **maximum incentive** for the employee is 30% of the cost of self-only coverage; if the spouse participates, the same incentive is allowed, equaling two times 30% of self-only coverage.
- Four situations explain **how to calculate the maximum incentive** depending on how employers offer participation, as referenced above under "ADA incentives."

### ***Information protection***

- Employers **cannot require employees to waive confidentiality** relating to the disclosure of genetic information in order to receive an incentive.

While these final regulations were intended to better align the ADA and GINA rules with the ACA, there are still key differences in (i) the ways incentives are calculated and apply and (ii) with respect to providing reasonable alternatives in order to attain all types of wellness program rewards. Employers should be particularly aware of these differences when designing their wellness programs. For more information visit our [Wellness Programs and Incentives](#) web page.

### **Reference materials**

EEOC has established a web page with links to [their press release, fact sheets, and FAQs](#) on both ADA and GINA rules.

We encourage you to bookmark Cigna's health care reform website, [www.InformedonReform.com](http://www.InformedonReform.com), where we continuously update information as it becomes available.

*\*To learn more about the 2015 proposed regulations, you can read the alert on [ADA proposed regulations](#).*