

## Employment Law

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### **New Changes for Employer Wellness Programs**

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Many employers adopt wellness programs with the goal of lowering health care costs, reducing absenteeism, achieving higher employee productivity, reducing workers' compensation and disability-related costs, reducing injuries, and improving employee morale. *See* Leonard L., Berry, Ann M. Mirabito & William B. Baun, *What's the Hard Return on Employee Wellness Programs?*, HARV. BUS. REV. (Dec. 2010), available at <https://hbr.org/2010/12/whats-the-hard-return-on-employee-wellness-programs>. Such programs must comply with Title II of the Genetic Information Nondiscrimination Act (GINA), Title I of the American with Disabilities Act (ADA), and other employment discrimination laws enforced by the Equal Employment Opportunity Commission (EEOC). Employer-sponsored wellness programs that are part of, or provided by, a group health plan, or that are provided by a health insurance issuer offering group health insurance in connection with a group health plan, must also comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) nondiscrimination provisions, as amended by the Affordable Care Act. *See* Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. 31126-01 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1630), available at <http://www.appwp.org/pub/5116cd50-0c5e-e882-410b-178527196f4f>. The EEOC issued a final rule on May 17, 2016 related to employer wellness programs and permitted inducements under the law. Genetic Information Non-Discrimination Act, 81 Fed. Reg. 31143 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1635). The final rule amended the regulations implementing Title II of GINA.

The rule "addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program." 81 Fed. Reg. 31143. On the same day, the EEOC issued the final rule to amend regulations for the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101-12213) at 29 C.F.R. § 1630.14(d), "Other Acceptable Examinations and Inquiries," and the Interpretive Guidance related to employer wellness programs. These rules apply prospectively to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under the rules. Thus, for example, if a plan used to calculate the level of inducements begins on February 1, 2017, then February 1, 2017 is the date on which the wellness program begins.

### **Employer Wellness Programs and GINA**

Title II of GINA prohibits employers from using genetic information when making employment decisions and restricts employers and other entities covered by GINA from requesting, requiring or purchasing genetic information, except in very limited circumstances. 81 Fed. Reg. 31143-01. One exception allows employers that offer voluntary wellness programs to request genetic information as part of the wellness program as long as certain specific requirements are met. *Id.* at 31144. The final rule now clarifies that an employer may, in certain circumstances, offer an employee

limited inducements (in the form of a reward or penalty) for the employee’s spouse to provide information about the spouse’s manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer’ sponsored wellness program, provided that GINA’s confidentiality requirements are observed and any information obtained is not used to discriminate against an employee. *Id.* For example, the employer may request that an employee’s spouse complete a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels. *Id.* at 31155.

Keep in mind that inducement limits and a requirement to provide a reasonable alternative standard may apply to some of these programs under HIPPA, as amended by the Affordable Care Act. *Final Rule on Employer Wellness Programs and the Genetic Information Nondiscrimination Act*, EEOC (May 17, 2016), at ¶ 9, available at <https://www1.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm>. The final rule applies to all wellness programs, not just those that are part of group health plans and even employers that do not offer a group health plan may still offer limited inducements for an employees’ spouse to participate in wellness programs that ask for current or past health information. *Id.* Employers may offer children the opportunity to participate in a wellness program, but employers may not offer children inducements in exchange for information about their current health status or about their genetic information. The final rule also prohibits employers from denying access to health insurance or any package of benefits to, or retaliating against, any employee whose spouse refuses to provide information about his or her current or past health status to an employer wellness program. *Id.*

### Employer Wellness Programs and the ADA

The final rule covering changes to employer wellness programs under Title I of the ADA similarly provides that employers may provide limited financial and other incentives in exchange for an employee answering disability-related questions or taking medical examinations as part of a wellness program, whether or not the program is part of a health plan. 81 Fed. Reg. 31126-01. Title I of the ADA prohibits employers from discriminating against individuals on the basis of disability and restricts employers from obtaining medical information from applicants and employees, but does allow such inquiries as part of a voluntary employee health program. *Id.* at 31127. The rule applies only to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. *Id.* at 31126. The term “incentives” in the final rule includes both financial and in-kind incentives, such as reductions in insurance premiums, cash, time-off awards, prizes, and other items of value—including trinket gifts. *Final Rule on Employer Wellness Programs*, EEOC, *supra*, at ¶ 18.

For those employers who offer employees wellness programs, it is essential that such employers review these new final rules and amend existing wellness programs as of January 1, 2017. Employers must also provide a notice to employees that clearly explains what medical information will be obtained, how it will be used, and that the limits on incentives apply prospectively only.

### About the Author

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