

The EEOC Provides Welcome Guidance on Employment-Based Wellness Plans

Article By:

Patricia A. Moran

On April 16, 2015, the EEOC published setting forth its position on the use of physical examinations under employment-based wellness programs. This comes as welcome guidance to employers who have implemented, or who hope to implement, workplace wellness programs that include biometric tests or physical examinations as part of the process for providing financial rewards to employees.


It all began back in 1996 with the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). While we generally think of HIPAA as a medical privacy law, it also contains many rules and mandates impacting employer-provided group health plans. Among these rules is a rule prohibiting health plans from, among other things, varying medical plan premiums (or other penalties, awards and costs) among individuals based on a “health status-related factor” including health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. An exception to the general rule is provided for certain “wellness programs” that vary benefits and/or premiums based on a health factor.

Since 1996, the Departments of Labor, Treasury and Health and Human Services have issued a host of regulations and other guidance interpreting these rules and setting out a framework for compliance. The rules were amended and expanded by the Affordable Care Act. Under the current framework, as set forth in the issued by the Agencies in 2013, wellness plans are divided into three categories:



Participatory wellness programs must be available to all similarly situated individuals. Activity-only and outcome-based health contingent wellness programs must meet the following five factors:





The applicable federal agencies have been consistently frank about the fact that compliance with the HIPAA wellness rules does not mean an employer is necessarily in compliance with any other State or Federal law, including the Americans with Disabilities Act (ADA). (The 2006 final regulations (71 FR 75104, December 31, 2006), for example, provide that compliance with the wellness rules “is not determinative of compliance with any other provision of the Act (including the COBRA continuation provisions) or any other State or Federal law, such as the Americans with Disabilities Act.” See also, the Department of Labor’s FAQ about Affordable Care Act Implementation (Part XXV), April 16, 2015.) This compliance gap has proven challenging to employers.

In particular, many wellness programs require employees (and, sometimes, their spouses) to submit to biometric tests or physical examinations in order to prove that they have met the health standards required for an award. But the ADA prohibits medical examinations that are neither job-related, nor consistent with business necessity. Thus, while employers may be able to satisfy HIPAA requirements, they have struggled with how to avoid an ADA violation when administering these types of wellness programs.

More specifically, the ADA restricts employers from obtaining medical information from employees by generally prohibiting employers from making disability-related inquiries or requiring medical examinations. However, employers may “conduct medical examinations, including voluntary medical histories, which are part of an employee health program [(including a workplace wellness program)] available to employees at that work site.” The EEOC has that: “A wellness program is ‘voluntary’ as long as an employer neither requires participation nor penalizes employees who do not participate.”

But this begged the question: is a wellness plan “voluntary” if it places a substantial economic burden on those who would rather not participate? Depending on the employer and the wellness plan’s design, an employee who chooses not to submit to a physical exam or biometric blood draw could be required to pay a substantially higher medical insurance premium (up to 30% higher, or 50% higher for tobacco-based programs) than his or her co-worker down the hall. Depending on the employer’s premium costs, this could cost the non-participating employee hundreds of dollars per year more than the co-worker for health coverage. Does this create an “involuntary” situation for the non-participating employee?

Employers looked back to the EEOC to answer that question. But rather than issue regulations or other guidance, the EEOC used its guidance as a way of signaling its views on this issue. Employer protests only grew louder though, and thankfully, the EEOC ultimately understood the need for additional guidance and released proposed regulations last week.

In general, the EEOC’s proposed regulations create a framework where physical exams can be used as part of a workplace wellness program within certain limitations. Overall, employers can view these

proposed regulations with optimism. Here are some of the specifics:

- . The proposed rule clarifies that an employer may offer limited incentives up to maximum of 30 percent of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations, as long as participation is voluntary. The 30% limit applies to all wellness programs the employer offers, whether participatory or health-contingent.

: although the HIPAA wellness rules permit a premium differential of up to 50% for tobacco-based wellness programs, the EEOC advises that its 30% limit would apply if the tobacco-based program involved a biometric screening or medical examination, and has asked for comments on the issue.

the EEOC's incentive is limited to 30% of the total cost employee-only coverage. However, the HIPAA wellness rules provide that the award must be limited to 30% (or 50% for tobacco) of cost of whatever level of coverage in which the employee is enrolled (i.e. single, couple, family). Does the EEOC intend to disregard elections into other than single-family coverage? Additional guidance would be welcome.

The 30% limit applies to both health contingent wellness programs. Under the HIPAA rules, participatory programs are not subject to a percentage cap.

- . "Voluntary" means that:
 - Employees are not required to participate in the program;
 - Employees may not be denied coverage under any of the employer's group health plans or denied particular benefit packages within a group health plan, and employers may not limit the extent of such coverage for the employee, if the employee chooses not to participate in the program; and
 - The employer may not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who refuse to participate in the program.
- . In order for a program to be considered "voluntary", the employer entity must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the employer uses to prevent improper disclosure of medical information.

-
- . The disclosure of medical information obtained by wellness programs may be provided to employers only in aggregate form, except as needed to administer the health plan.
 - . A wellness program must be reasonably designed to promote health or prevent disease. Specifically, the program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, 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.
 - . The EEOC makes clear that compliance with the new framework does not relieve employers from their obligation to comply with other employment nondiscrimination laws, such as laws that prohibit discrimination on the basis of race, sex, national origin, or age.

In the proposed regulations, the EEOC asks stakeholders to comment on a number of issues pertaining to wellness programs that ask employees to respond to disability-related inquiries and/or undergo medical examinations, including:

- Must entities that offer incentives to encourage employees to disclose medical information also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the employee is under the care of a physician and that any medical risks identified by that physician are under active treatment?
- Whether incentives provided in a wellness program that asks employees to respond to disability-related inquiries and/or undergo medical examinations are coercive to the extent they render health insurance coverage unaffordable under the Affordable Care Act.

Coverage is affordable if the employee premium for self-only coverage does not exceed 9.5% of an employee's household income. The IRS' current position is: if a plan charges different premiums based on achievement of a wellness standard, "affordability" is determined based on the higher premiums (i.e., the employer must assume that no employee will meet the standard). An exception applies if the wellness standard is tobacco-based, in which case the employer may use the lower premium. We explain these standards in our a previous .

- Whether there are any methods by which the EEOC can effectuate the intent of both the "voluntary" requirement in the ADA and the provisions in the Affordable Care Act intended to encourage workplace health promotion and disease prevention.
- Should participating employees provide prior, written, and knowing confirmation that their participation is voluntary? If so, what form should such an authorization take?

-
- Should the proposed notice requirement apply only to wellness programs that offer more than rewards or penalties to employees who participate (or decline to participate) in these wellness programs? If so, how should the EEOC define “”?
 - Which best practices ensure that wellness programs are designed to promote health and do not operate to shift costs to employees with health impairments or stigmatized conditions?
 - Whether employers offer (or are likely to offer in the future) wellness programs outside of a group health plan or group health insurance coverage that use incentives to promote participation in such programs or to encourage employees to achieve certain health outcomes, and the extent to which the ADA regulations should limit incentives provided as part of such programs.
 - What will be the practical effect of adopting the specific incentive limit set forth in the proposed rule? Specifically, what, if any, will be the impact of the proposed rule’s 30% limit on incentives offered with respect to wellness programs intended to prevent or reduce tobacco?

The Genetic Information Nondiscrimination Act of 2008 (GINA) generally prohibits employers from discriminating based on, or collecting, genetic information. Genetic information includes an individual’s family medical history.

So what happens if an employer’s wellness program requires that an employee and the employee’s spouse each meet certain health standards in order for the employee to obtain a reward? For example, a plan may offer a 10% premium discount if an employee meets certain standards and an additional 10% if the employee’s spouse also meets the standards. The EEOC seems to be leaning towards the (somewhat puzzling) position that collection of the spouse’s health medical history constitutes the collection of an employee’s “family medical history” – a GINA violation. Additional guidance on this issue would be most welcome.

These proposed rules provide welcome guidance to employers who want to offer wellness plans that include physical examinations and biometric testing. We eagerly await more guidance from the EEOC on these matters.

©1994-2025 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

National Law Review, Volume V, Number 112

Source URL: <https://natlawreview.com/article/eeoc-provides-welcome-guidance-employment-based-wellness-plans>

