

Overview of ADA and GINA Final Rules on Wellness Programs

On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) released final rules dealing with wellness programs under Title I of the Americans with Disabilities Act (ADA) and under Title II of the Genetic Information Nondiscrimination Act (GINA). Highlights of these rules are provided below, along with links to additional resources related to these rules.

Highlights of the ADA Final Rule

- **Purpose:** Provides guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries (such as health risk screening assessments) and/or undergo medical examinations (such as biometric tests).
- **Effective Date:** Applies to all wellness programs that include questions related to disabilities and/or medical examinations as of plan years beginning on or after January 1, 2017.
- **Incentive Limits:** Incentives must not exceed 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan or the second lowest cost Silver Plan for a 40-year-old non-smoker on the Marketplace in the location of the group's principal place of business if they do not offer group health insurance coverage.
- **Tobacco Incentive Limits:** Inquiries as to whether an employee uses tobacco or ceased using tobacco are not considered disability-related or medical examinations and can qualify for the higher incentives (up to 50 percent) for tobacco cessation. Any biometric screening or other medical procedure that tests for the presence of nicotine or tobacco is a medical examination under the ADA and would be limited to the 30 percent incentive threshold.
- **Definition of "Voluntary":** The definition of a "voluntary" wellness program is clarified to prohibit the denial of coverage or limitation of access to benefit packages (except for the permitted ADA incentive of 30 percent of self-only coverage) for employees who do not participate. In addition, employers cannot take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees to force them to participate in a wellness program. As a result, the use of "gatekeeping" plan designs that base eligibility for a particular health plan or benefits package on completing an HRA or undergoing biometric screenings is now prohibited.
- **Program Must Be "Reasonably Designed":** In order to be reasonably designed to promote health or prevent disease, wellness programs must:
 - Provide results, follow-up information, or advice designed to improve the health of participating employees (or at least use information to design a program that addresses a subset of conditions identified).
 - Not impose an overly burdensome amount of time for participation, require unreasonably intrusive procedures, or place significant costs related to medical examinations on employees in order to obtain a reward.
 - Not impose a penalty solely due to an employee's failure to achieve a particular health outcome (such as failing to attain a certain weight or cholesterol level).
- **Required Notice:** Employers offering wellness programs that collect employee medical information are required to provide a notice to employees informing them what medical information will be collected, how it will be used, who will receive it, and what will be done to keep it confidential. The EEOC has published a sample notice and related questions and answers:
 - Sample Notice: <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>
 - Q&As: <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm>

For More Information

- The EEOC has published a series of questions and answers on the final ADA wellness rules at <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm>
- The complete version of the final ADA wellness rules can be found at <https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>

Overview of ADA and GINA Final Rules on Wellness Programs

Highlights of the GINA Final Rule

- **Purpose:** Addresses how an employer may offer incentives to an employee for the employee's spouse to provide information about their manifestation of disease or disorder (such as current or past health status, family health history) as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program.
- **Effective Date:** Applies to all employer-sponsored wellness programs that request genetic information (such as genetic test results, current or past health status) from employees and family members as of plan years beginning on or after January 1, 2017.
- **Incentive Limits:** Incentives must not exceed 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan or the second lowest cost Silver Plan for a 40-year-old non-smoker on the Marketplace in the location of the group's principal place of business if they don't offer group health insurance coverage. The total incentives offered for the provision of health information of a spouse cannot exceed 30 percent of the total annual cost of self-only plan coverage. As a result, the maximum incentive that an employer can offer for the provision of information by both an employee and spouse is twice the cost of 30 percent of self-only coverage.
- **Tobacco Incentive Limits:** Tobacco cessation programs generally qualify for the higher limits on incentives (up to 50 percent) since limits only to health and genetic services that request genetic information. An employer sponsored wellness program does not request genetic information when it asks the spouse of an employee whether he or she uses tobacco or ceased using tobacco upon completion of a wellness program or when it requires a spouse to take a blood test to determine nicotine levels, as these are not requests for information about the spouse's manifestation of disease or disorder.
- **Definition of "Voluntary":** Wellness program participation must be voluntary. A covered entity may not deny access to health insurance or any package of health insurance benefits to an employee, or the spouse or other covered dependent of the employee, or retaliate against an employee, due to a spouse's refusal to provide information about his or her manifestation of disease or disorder to a wellness program.
- **Prohibition on Incentives for Children:** Incentives are not permitted in return for the current or past health status information or the genetic information of employees' children. This prohibition applies to all children – there is no distinction between adult and minor children or whether they are biological or adopted children.

For More Information

- The EEOC has published a series of questions and answers on the final GINA wellness rules at <https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm>
- The complete version of the final GINA wellness rules can be found at <https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>

IRS Guidance on Tax Treatment of Wellness Program Benefits

The Internal Revenue Service ("IRS") issued Chief Counsel Advice on the tax treatment of wellness program benefits. In general, the guidance provides that an employer cannot exclude from an employee's gross income payments of cash rewards for participating in a wellness program or reimbursements of premiums for participating in a wellness program if the premiums for the wellness program were originally made by salary reduction through an Internal Revenue Code Section 125 cafeteria plan. This guidance confirms the approach the IRS takes to the income taxation of wellness program benefits.

The full text of this guidance can be found at <https://www.irs.gov/pub/irs-wd/201622031.pdf>