

Publications

EEOC Releases Much-Anticipated Proposed ADA and GINA Wellness Rules

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On January 7, 2021, the Equal Employment Opportunity Commission (“EEOC”) finally released proposed rules regarding wellness programs under Title I of the Americans with Disabilities Act (“ADA”) (“ADA Proposed Rule”) and Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) (“GINA Proposed Rule”). It has been more than three years since the DC District Court invalidated, and more than two years since the EEOC revoked, the incentive limit portions of the ADA and GINA wellness regulations. After the proposed rules are published in the Federal Register (as of the date of this alert, they still not have been), the public will have 60 days to submit comments.

The biggest change under the ADA is that incentives for participatory wellness programs would be subject to a “de minimis” limit, while incentives for health-contingent programs would be subject to the otherwise applicable HIPAA wellness rule limits. Both types would continue to be subject to the ADA’s “voluntary” requirement, although modified. And, both health-contingent and participatory wellness programs subject to GINA would be limited to de minimis incentives for health information requested from family members.

I. Background

The ADA generally prohibits an employer from making disability-related inquiries or requiring medical examinations with respect to employees. However, there are two relevant statutory exceptions: (1) for voluntary medical examinations and medical histories that are part of an employee health program (including wellness programs); and (2) under the “bona fide benefit plan” safe harbor.

GINA includes two titles. Title I applies to group health plans and is enforced by the Departments of Labor, Health and Human Services, and the Treasury. Title II applies to employers and is enforced by the EEOC. The proposed rules only apply to Title II. GINA Title II generally restricts employers from requesting, requiring, or purchasing genetic information, with certain limited exceptions. “Genetic information” includes information about the manifestation of a disease or disorder in family members

(including a spouse or other family member) of an individual. GINA Title II includes an exception for employers that offer health or genetic services, including those offered as part of wellness programs.

On May 17, 2016, the EEOC published final regulations on wellness programs under the ADA and GINA (the “2016 Regulations”). Our analysis of the 2016 regulations is available [here](#).

- The previously-issued ADA regulations addressed the extent to which employers could use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. The prior ADA regulations provided that the bona fide benefit plan safe harbor does not apply to wellness programs.
- The previously-issued GINA regulations addressed the extent to which employers could offer employees incentives for the employee’s spouse to provide information about the spouse’s manifestation of disease or disorder or health information.

Under both rules, an employer generally could provide an incentive of up to 30% of the cost of the employer’s lowest cost self-only coverage.

i. AARP v. EEOC

In October 2016, AARP brought a suit challenging the incentive limits in the 2016 Regulations. In August 2017, the district court ordered that the EEOC reconsider the 2016 Regulations, saying that the EEOC failed to offer any reasoned explanation for the 30% limit. *See AARP v. EEOC*, 267 F.Supp.3d 14 (D.D.C. 2017). Shortly thereafter, upon a motion to reconsider, the court vacated the incentive limit portions of the 2016 Regulations, effective January 1, 2019. *See AARP v. EEOC*, 292 F.Supp.3d 238 (D.D.C. 2017).

In response, in December 2018, the EEOC vacated the incentive portions of the 2016 Regulations. *See* 83 Fed. Reg. 65,296 (Dec. 20, 2018).

ii. EEOC Issues New Proposed Rule

On June 11, 2020, the three then members of the EEOC, led by then Chair and Commissioner, Janet Dhillon, held a public hearing during which the contours of a new ADA Proposed Rule were discussed. The two Republican members of the Commission, Chair Dhillon and Commissioner Victoria Lipnic, over the objections of Democrat Commissioner Burrows, voted to send the new ADA proposed Rule to OMB for publication in the Federal Register. Notwithstanding the decision of the Commission, several months passed and the Rule did not appear in the Federal Register. On January 7, 2021, in advance of the incoming Biden Administration, the EEOC issued a press release and uploaded onto its website advance copied of the new ADA Proposed Rule, with an indication that the new Rule would be published in the Federal Register shortly.

As of the date of this Alert, the new ADA Proposed Rule has not been published in the Federal Register. This has led some to ask whether the Rule may be delayed, perhaps as a result of the newly reconstituted Commission, which includes new Commissioners Keith Sonderling, Jocelyn Samuels, and Andrea Lucas, and which is now chaired by Democrat-nominated Commissioner Burrows. Adding to the intrigue is that on January 20, 2021, President Biden issued an Executive Memorandum placing a “freeze” on many regulatory actions not yet effective. While the scope of this Memorandum remains unclear, including in its application to semi-independent agencies, such as the EEOC, it is possible that the EEOC has interpreted the Memorandum to apply to the new ADA Proposed Wellness Rules.

So what is the current fate of the Rule? It remains unclear. It is quite possible we will see the Rule published in the Federal Register in the coming days, with an opportunity for stakeholders to provide written comment—and then the rule could move to being made final by the Commission. It’s also possible that either as a result of President Biden’s Memorandum or as a result of the new Chair’s actions, the Rule never makes it into the Federal Register. In that case, we would be effectively in the same place we were just months ago—waiting for another rule. It appears only time will tell.

II. ADA Proposed Rule

The ADA Proposed Rule retains many of the voluntary requirements from the 2016 Regulations—the most notable change is the change to the incentive limits. The ADA Proposed Rule also sets out rules under which a wellness program could fit within the bona fide benefit plan safe harbor.

The ADA Proposed Rule breaks wellness programs down into two types: (1) participatory and (2) health-contingent. Participatory programs would be subject to a de minimis limit, while health-contingent programs would fall under the bona fide benefit plan safe harbor and thus could have higher incentives.

i. Participatory Programs

- A participatory wellness program is one where none of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor (or a program where there is no reward). For example, providing a gift card to complete a health risk assessment (“HRA”) or undergo an annual physical would be a participatory program, because the incentive is not based on results.
- Under the proposed rules, an employer could not give more than a de minimis incentive for participatory programs. The regulations give examples of de minimis incentives as a water bottle or a gift card of modest value. Examples of incentives that are not de minimis are paying for an annual gym membership, airline tickets, or a \$50/month premium incentive.