

EEOC Releases Much-Anticipated Proposed ADA and GINA Wellness Rules

PUBLISHED: January 29, 2021

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

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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

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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.

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GROOM INSIGHT. This means that a wellness program that involves a disability-related inquiry or medical exam, but does not base the incentive on achieving any certain result (e.g., completing an HRA or undergoing a biometric screening), would be limited to a de minimis incentive, even though under the HIPAA rules there is no incentive limit for participatory programs.

- The program must still comply with the other voluntary requirements explained below.

ii. Health-Contingent Programs

- A health-contingent wellness program is one that requires an individual to satisfy a standard related to a health factor to receive an incentive/avoid a penalty (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to receive the same incentive). Examples include programs that provide an incentive for walking or exercising (activity-only programs where there may be a health reason someone cannot engage) or programs that provide a reward to achieve a certain health status, such as a favorable BMI, cholesterol level, or glucose level (outcome-based programs). To trigger the ADA rules, the program also must involve a disability-related inquiry or medical examination.
 - These programs would be permitted to have higher incentives than participatory programs if they meet the bona fide benefit plan safe harbor (see below).
 - The HIPAA incentive limits would apply, which generally are up to 30% (or up to 50% for tobacco-related incentives), when combined with other incentives that trigger the HIPAA rules. Health-contingent programs also must satisfy the other requirements of the HIPAA wellness rules. Our analysis of the 2014 HIPAA wellness rules is available [here](#).
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GROOM INSIGHT. Unlike the 30% incentive limit under the 2016 Regulations, which in some cases was based on the lowest cost self-only coverage, the HIPAA incentive limits can be based on the self-only cost of coverage in which the employee is *enrolled*, or the cost of family coverage if other family members can also participate in the wellness program.

Also, under the ADA Proposed Rule, employers can give incentives of up to 50% for test-based tobacco programs (such as a saliva test). Because the test is a medical exam, under the 2016 Regulations, the incentive was limited to 30%.

- The program would need to satisfy certain “safe harbor” requirements, including that the program be a part of, or qualify as, a group health plan. The ADA Proposed Rule lists the

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following four factors that are “helpful” to determine whether a program is part of, or qualifies as, a group health plan:

- the program is only offered to employees who are enrolled in an employer-sponsored group health plan;
 - any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan;
 - the program is offered by a vendor that has contracted with the group health plan or issuer; and,
 - the program is a term of coverage under the group health plan.
- In addition, to satisfy the “safe harbor,” health-contingent programs would generally need to (1) be based on underwriting risks, classifying risks, or administering risks, and, (2) satisfy the HIPAA wellness rules. Both insured and self-insured plans can meet the bona fide benefit plan safe harbor.

GROOM INSIGHT. The preamble states that, to fit within the safe harbor, the program must use the aggregate data it obtains from the disability-related inquiries and/or medical examinations to help employees improve their health. For example, a program that includes a physical exam or a biometric screening can be beneficial in identifying key health indicators related to chronic disease that can be measured and traced over time. Employers then can take steps to help employees manage their specific risk factors and use the data to create future benefit plans. A program that relies on self-reporting (as opposed to a biometric screening, for example) may not provide the type of quantifiable data need to classify or administer risks.

- The program must still comply with the other voluntary requirements explained below.

iii. Revised “Voluntary” Requirements

The ADA Proposed Rule retains most of the voluntary requirements from 2016 Regulations, but removes some requirements.

- In addition to the incentive limits, the three voluntary requirements that still apply are:
 - Employees must not be required to participate in the wellness program;
 - Employees who do not participate in the wellness program may not be denied coverage under any of the employer’s group health plans or particular benefits packages within a group health plan or generally have their coverage limited;
 - The employer cannot take any adverse employment action or retaliation.
- The confidentiality provisions also would continue to apply. Under these rules, the wellness program may only disclose information to certain individuals and could only disclose

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information to the employer in aggregate terms. In addition, the program may only use the information for purposes permitted by the ADA and may not require an individual to consent to disclosure or to waive their confidentiality.

- The EEOC removed the following two requirements:
 - The ADA notice is no longer required;; and
 - The program is no longer required to be reasonably designed to prevent disease (but note this is a HIPAA requirement for health-contingent programs).

GROOM INSIGHT. The EEOC proposed to remove the requirement that a wellness program be reasonably designed because it believes the de minimis incentive standard will make it unlikely that an employee will opt to participate in the program unless the employee believes the program has some value in promoting health or preventing disease. And, health-contingent wellness programs are required to comply with the HIPAA requirements, which include a reasonable design requirement.

III. GINA Proposed Rule

The GINA Proposed Rule retains many of the requirements from the 2016 Regulations. The most notable change is the change to the incentive limits related to family members.

i. Incentives

- *De Minimis Incentive for Family Member's Health Information*—Under the GINA Proposed Rule, incentives in return for an employee's family member providing information about the family member's own health would be limited to a de minimis amount. The GINA Proposed Rules state that a water bottle or gift card of modest value for each participating family member would be "clearly" de minimis. The GINA Proposed Rule does not distinguish between participatory and health-contingent programs, so the de minimis incentive limit would apply to both.

GROOM INSIGHT. Under the 2016 Regulations, an HRA that asked about the spouse's current conditions or a biometric screening would trigger the GINA rules because this information would be considered genetic information of the employee. The 2016 Regulations generally imposed an incentive limit of 30% and did not allow any incentive in exchange for a child completing an HRA/taking a biometric screening. Under the GINA Proposed Rules, the incentive amount is lowered to de minimis (even though HIPAA

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allows up to 30% for health-contingent programs), but the plan is allowed to offer the incentive to both spouses and children.

- *Incentive Where Clear Genetic Information Not Required*—The Proposed GINA Rules would continue to allow an employer to provide incentives in exchanges for an HRA as long as the employer makes clear that any incentive is available regardless of whether the person answers the questions regarding genetic information. The incentive in this case would not be limited to a de minimis amount.
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GROOM INSIGHT. This is also permitted under the current, non-revoked GINA final regulations, but the GINA Proposed Rule makes clear this applies to both employees and their family members.

- *Incentive For Additional Health Programs Based on Information*—Incentives of more than a de minimis amount also would be permitted to encourage individuals who have provided genetic information (e.g., family medical history) in compliance with the GINA requirements (e.g., pursuant to no incentive or a de minimis incentive for the family member) that indicates that they are at an increased risk of acquiring a health condition in the future to participate in disease management or other programs that promote healthy lifestyles and/or meet particular health goals. The program must be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition.
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GROOM INSIGHT. This type of incentive is also permitted under the current, non-revoked GINA final regulations, but the preamble to the GINA Proposed Rule makes clear the rule extends to both employees and their family members.

It appears that a plan would be permitted to offer incentives up to the HIPAA limit for a family member achieving certain biometric screening results, as long as the incentive for the biometric screening itself is de minimis (or there was no incentive).

ii. Revised Requirements

As under the current GINA rules, the GINA Proposed Rule would not permit incentives in exchange for an individual's *own* family history or genetic information (whether the employee or family members).

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In addition, consistent with the current GINA rules, for questions about a family member’s *manifested* (or *own current or past*) health information:

- The family member must provide prior knowing, voluntary, and written authorization, and the authorization form must describe the confidentiality protections and restrictions on the disclosure of genetic information.
- Employers cannot require that family members provide information about their manifestation of disease or disorder or terminate or take other adverse action, retaliate against, or harass an employee because his/her family member refuses to provide information about the family member’s manifestation of diseases or disorders or because the information provided reveals that a family member failed to meet a wellness program health goal.
- The employer cannot deny coverage under a group health plan or particular benefits packages within a group health plan or limit the extent of benefits provided to the employee due to a family member’s refusal to provide information about the family member’s manifestation of diseases or disorders or because information about a family member’s manifestation of diseases or disorders shows that the family member failed to meet a health goal.

The GINA Proposed Rule removed the requirement that the program be reasonably designed to prevent disease (but note this is a HIPAA requirement for health-contingent programs).

ADA Proposed Rules: Incentive Limits Quick Reference Chart – Employees

Activity	Do ADA Rules Apply?	Do HIPAA Wellness Rules Apply?	Incentive Limit
Participatory program for employee that involves disability-related inquiry/medical exam	Yes	No	De minimis
Participatory program for employee that does not involve disability-related inquiry/medical exam	No	No	No limit
Health-contingent program for employee that involves disability-	Yes	Yes	See HIPAA Wellness Rules



<p>related inquiry/medical exam</p>			<ul style="list-style-type: none"> • If program only for employee - 30% of the cost of self-only coverage (50% for tobacco) • If program for family members too – 30% of the cost of family coverage in which enrolled (taking into account incentives for family members) (50% for tobacco)
<p>Health-contingent program for employee that does not involve disability-related inquiry/medical exam</p>	<p>No</p>	<p>Yes</p>	<p>See HIPAA Wellness Rules</p> <ul style="list-style-type: none"> • If program only for employee - 30% of the cost of self-only coverage (50% for tobacco) • If program for family members too – 30% of the cost of family coverage in which enrolled (taking into account incentives for family members) (50% for tobacco)



GINA Proposed Rules: Incentive Limits Quick Reference Chart – Family Members

Activity	Do GINA Rules Apply?	Do HIPAA Wellness Rules Apply?	Incentive Limit
Participatory program for family member that asks about family member’s own manifestation of disease or disorder	Yes	No	De minimis
Participatory program for family member that does not ask about family member’s own manifestation of disease or disorder	No	No	No limit
Health-contingent program for family member that asks about family member’s own manifestation of disease or disorder	Yes	Yes	<ul style="list-style-type: none"> • De minimis for collection of information • While not entirely clear, it appears that if plan uses that information for program that provides rewards based on achieving a health goals, then can incentive of 30% of the cost of family coverage in which enrolled (taking into account incentives)



			for employee and other family members).
Health-contingent program for family member that does not ask about family member's manifestation of disease or disorder	No	Yes	30% of the cost of family coverage in which enrolled (taking into account incentives for employee and other family members) (50% for tobacco)

