

Possible Major Changes Under the Proposed EEOC ADA Wellness Rules

January 2021

Yesterday, the EEOC released the soon to be published revised wellness rules for ADA and GINA compliance.

These are proposed rules and are not final. There will be a 60-day comment period starting when the proposed rule is officially published in the Federal Register. This analysis of the proposed rules will focus on the rules under the ADA as most wellness plans are now designed to avoid implicating GINA and its requirements.

The most important proposed change to the ADA wellness rules is the prohibition of incentives beyond de minimis incentives for any wellness plan that is not a health-contingent wellness program that is part of a group health plan or is itself a group health plan. **This means that participatory wellness programs could not offer more than a de minimis reward.** The proposed rule states that de minimis in this context means a reward like a water bottle or gift card of modest value and that a \$50 monthly premium incentive would not be de minimis.

Where a wellness plan is part of a group health plan or is itself a group health plan, the EEOC states that compliance with the HIPAA nondiscrimination rules for health-contingent wellness plans will constitute compliance with the ADA wellness plan requirements. This includes the calculation of the permissible reward, which uses HIPAA's cap of 30% of the total cost of coverage, or 50% if the program is designed to prevent or reduce tobacco use.

To reiterate, if these proposed rules are finalized, plan sponsors cannot provide more than a de minimis reward for participatory wellness programs. However, they can still

offer a reward of up to 30% of the total cost of coverage, or 50% if the program is designed to prevent or reduce tobacco use, for health-contingent wellness programs that comply with HIPAA's other requirements for wellness plans.

The proposed rules deviate from the stated intent discussed on June 11, 2020 where EEOC commissioners and their legal counsel outlined a distinction between wellness plans offered to employees covered by an employer's health plan and wellness plans offered to all employees regardless of whether the employees were covered by the employer's health plan. In fact, the distinction between plan participants and non-plan participants is barely addressed in the proposed rules.

Research and Compliance will continue to review the proposed rules and will provide further updates as they become available.

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