

Are employer wellness programs under attack by the EEOC?

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Executive Summary

Many employers or their group health insurance plans offer wellness programs to promote healthier lifestyles for their employees. These employer wellness programs (EWPs) often involve medical questionnaires, health risk assessments (HRAs), and weight, cholesterol, glucose and blood pressure screenings. Some employer and group health insurance plans offer financial and other types of incentives to participating employees or to those who achieve certain targeted health outcomes.

Until 2014, it seems to have been clear sailing for employers on the EWP front as long as they complied with certain federal nondiscrimination provisions. In 2014, however, the U.S. Equal Employment Opportunity Commission (EEOC) starting filing lawsuits against employers alleging that their EWPs were not voluntary as required by Title I of the Americans with Disabilities Act (ADA). While the courts have uniformly ruled in favor of the employers in these cases, the EEOC, nevertheless, proceeded to propose new regulations under the ADA and Title II of the Genetic Information Discrimination Act (GINA) that imposed new standards and ignored an existing ADA “safe harbor” provision for bona fide employer benefit plans. Despite both Congressional concerns and numerous industry comments asking the EEOC to align its new ADA and GINA final rules with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) (P.L. 104-191) and the HIPAA privacy and security breach notification requirements, with which employers had worked so hard to comply, the final rules made no concessions to these concerns.

This Strategic Perspective first examines the federal law applicable to EWPs, the recent court challenges by the EEOC, the new ADA and GINA final rules, and the status of proposed legislation to void the rules. It closes by providing the results of a Q&A session with industry experts and advice on what employers should do to ensure that their EWPs pass muster with the new EEOC rules, both applicable on January 1, 2017.

Applicable Federal Laws and Regulations

Prior to the issuance of the new ADA and GINA final rules from EEOC, EWPs that were part of a group health plan or provided by a group health plan issuer were required to comply with the nondiscrimination provisions of HIPAA, as amended by section 1201 of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148); Title I of the ADA; Title II of GINA; and the HIPAA privacy and security breach notification requirements.

ADA. Title I of the ADA prohibits discrimination against individuals on the basis of disability in regard to employment compensation and other terms, conditions, and privileges of employment, including “fringe benefits available by virtue of employment, whether or not administered by

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the covered entity.” (42 U.S.C. §12112(a); 29 C.F.R. 1630.4(a)(1)(vi)). The ADA also restricts the medical information employers may obtain from employees by generally prohibiting them from making disability-related inquiries or “requiring” medical examinations; however, it provides an exception to this rule for voluntary employee health programs, which include many workplace EWPs (42 U.S.C. § 12112(d)(4)(A) and (d)(4)(B)).

In addition to the exception in 42 U.S.C. §12112(d)(4)(B), the ADA also contains a “safe harbor” provision that exempts certain insurance plans from the ADA’s general prohibitions, including the prohibition on “required” medical examinations and disability-related inquiries (42 U.S.C. §12201(c)(2)). The safe harbor provision states that the ADA “shall not be construed” as prohibiting a covered entity “from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.”

HIPAA. The nondiscrimination provisions of HIPAA, as amended by the ACA, generally prohibit group health plans and health insurance issuers providing group health insurance in connection with a group health plan from discriminating against participants and beneficiaries in premiums, benefits, or eligibility based on a health factor. An exception to this general rule allows premium discounts, or rebates or modification to otherwise applicable cost sharing (including copayments, deductibles, or coinsurance), in return for adherence to certain programs of health promotion and disease prevention.

GINA. Title II of GINA was enacted by Congress to protect job applicants, current and former employees, labor union members, and apprentices and trainees from employment discrimination based on their genetic information. GINA generally restricts the acquisition and disclosure of genetic information and prohibits the use of genetic information in making employment decisions. The EEOC issued regulations implementing these Title II requirements on November 9, 2010 (75 FR 68912; 29 C.F.R. part 1635).

Tri-departmental rules. The 2013 final tri-department regulations (from the Departments of Labor, Treasury, and HHS; Final rule, 78 FR 33157, June 3, 2013) to implement HIPAA’s nondiscrimination provisions discuss two types of wellness programs: “participatory” and “health contingent” (29 C.F.R. 2590.702(f); 26 C.F.R. 54.9802-1(f); 45 C.F.R. 146.121(f)).

Participatory wellness programs either do not provide a reward or do not include any condition for obtaining

a reward. Examples of participatory wellness programs include programs that ask employees only to complete a HRA or attend a smoking cessation program. The tri-department regulations do not impose any incentive limits on “participatory” wellness programs and state that they are permissible as long as they are made available to all similarly situated individuals.

Health-contingent wellness programs, which may be either activity-only or outcome-based, require individuals to satisfy a standard related to a health factor to obtain a reward. Examples include a program that requires employees to walk or do a certain amount of exercise weekly (an activity-based program) or reduce their blood pressure or cholesterol level (an outcome-based program) to earn an incentive. Incentives offered in connection with health-contingent wellness programs generally must not exceed 30 percent of the total cost of self-only health coverage when only an employee, not the employee’s dependents, is eligible for the wellness program.

Generally, health-contingent wellness programs must be available to all similarly situated individuals and must: (1) give eligible individuals an opportunity to qualify for a reward at least once per year; (2) limit the size of the reward to no more than 30 percent of the total cost of coverage (or 50 percent to the extent that the wellness program is designed to prevent or reduce tobacco use); (3) provide a reasonable alternative standard to qualify for a reward; (4) be reasonably designed to promote health or prevent disease and not be overly burdensome; and (5) disclose the availability of a reasonable alternative standard to qualify for the reward in plan materials that provide details regarding the wellness program.

For an analysis of what employers needed to know about their EWPs and HIPAA’s privacy and security rules before the EEOC issued its new ADA and GINA final rules, see *Wellness programs—What employers need to know when it comes to HIPAA privacy and security rules*, April 23, 2014.

ADA and GINA Final Rules

In 2015, the EEOC published two proposed rules (ADA Proposed rule, April 29, 2015, 80 FR 21659; GINA Proposed rule, October 30, 2015, 80 FR 66853) addressing whether the offering of an incentive for employees or their family members to provide health information as part of a EWP would render the program involuntary and, thereby, discriminatory under the ADA.

In response to the Proposed rules, disability rights and advocacy groups expressed concerns that the EEOC was abandoning its prior position that a voluntary wellness

program that includes disability-related inquiries and/or medical examinations cannot involve penalties, while employer and industry groups commented that the Proposed rule's limitation on incentives is inconsistent with the tri-department rules.

On May 17, 2016, the EEOC issued final rules describing how Title I of the ADA (the ADA rule, [81 FR 31125](#)) and Title II of GINA (the GINA rule, [81 FR 31143](#)) apply to EWP's that request health information from employees and their spouses. The EEOC also published a Q&A document on the ADA rule ([ADA Q&A](#)) and the GINA rule ([GINA Q&A](#)).

According to EEOC Chair Jenny R. Yang, "The Commission worked to harmonize HIPAA's goal of allowing incentives to encourage participation in [EWPs] with ADA and GINA provisions that require that participation in certain types of wellness programs is voluntary."

The ADA rule provides that EWP's that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The GINA rule provides that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children.

Both rules also seek to ensure that EWP's promote good health and are not just used to collect or sell sensitive medical information about employees and family members or impermissibly shift health insurance costs to them. As such, the ADA and GINA rules require EWP's to be reasonably designed to promote health and prevent disease.

The two rules also make clear that the ADA and GINA provide important protections for safeguarding health information. The rules state that information from EWP's may be disclosed to employers only in aggregate terms. The ADA rule requires that employers give participating employees a notice that tells them what information will be collected as part of the EWP, with whom it will be shared and for what purpose, the limits on disclosure, and the way information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange,

transfer, or other disclosure of their health information to participate in a EWP or to receive an incentive.

Recent Court Challenges

In 2014, prior to publishing its proposed ADA and GINA rules, the EEOC brought actions against two EWP's, alleging that the programs were not voluntary as required by the ADA. In *EEOC v. Honeywell International, Inc.*, November 6, 2014, (D. Minn.), the EEOC asked the court to enjoin Honeywell from imposing any penalties and costs against any employee who refused to undergo biomedical testing in conjunction with the company's EWP. The EEOC argued that the penalties made the program involuntary in violation of the ADA, and Honeywell violated GINA because it collected medical information about family members.

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Honeywell argued that its EWP was covered under the ADA's safe harbor provisions, and its testing was not considered a "genetic test" under GINA. The court decided that there was uncertainty in the law and this uncertainty prevented it from being able to determine whether one party was more likely to succeed on the merits (see *Wellness program with penalties for refusing biometric tests not enjoined*, November 7, 2014).

Likewise, in *EEOC v. Flambeau, Inc.*, December 30, 2015 (W.D. Wisc.), the district court found that an employer's requirement that employees who wanted to participate in its health insurance plan first complete a EWP (including a HRA and biometric test) did not violate the ADA because the requirement was a term of the plan; was used to enable

the employer to underwrite, classify, and administer its health insurance risks (the ADA's "safe harbor"); and was not used as a subterfuge to evade the purposes of the ADA (see *Wellness program was term of employer's insurance plan, assessed risk, so no ADA violation*, January 4, 2016).

In *Flambeau*, the employer cited *Seff v. Broward County, Florida*, 691 F3d 1221 (11th Cir., 2012), in which the Eleventh Circuit affirmed a Florida district court that found that a biometric health screening and health questionnaire required for an EWP provided to county employees was a term of a bona fide group health plan and, therefore, fell within the ADA's safe harbor provision (see *ADA's safe harbor provision applied; wellness initiative did not violate the Act*, August 20, 2012).

In the ADA final rule, the EEOC specifically noted its disagreement with the decisions in *Flambeau* and *Seff*, both of which applied the ADA safe harbor provision to exonerate the employers. According to the EEOC, the courts applied the safe harbor provision too expansively to support the employers' imposition of penalties on employees who do not answer disability-related questions or undergo medical examinations in connection with EWPs. The EEOC further noted that neither court ruled that the language of the ADA was ambiguous; hence, the EEOC had the authority and responsibility to provide its own considered analysis of the safe harbor provision.

Proposed Legislation

Because both Republicans and Democrats recognize the value of EWPs, Congress has sought to facilitate these programs as long as they comply with the nondiscrimination requirements of HIPAA. In the [view](#) of the GOP, however, the EEOC's pursuit of litigation and the new ADA and GINA regulations is premised on the false belief that employees are forced to participate in EWPs in violation of the ADA and GINA. The GOP pointed to litigation in which the EEOC argued that EWPs may be involuntary when employers offer substantial financial inducements to participating employees, and employers' collection of medical information from an employee's family member participating in a EWP may be unlawful, even though permissible under HIPAA.

The GOP argues that in enacting the ACA, Congress intended that employers would be permitted to implement health promotion and prevention programs that provide incentives, rewards, rebates, surcharges, penalties, or other inducements related to wellness programs, including rewards of up to 50 percent off of insurance premiums for employees participating in programs designed to encourage healthier lifestyle choices.

According to the GOP, the EEOC's new ADA and GINA rules "will discourage employers from establishing EWPs, resulting to harm to employees' health and their pocketbooks."

Companion Senate and House bills, entitled Preserving Employee Wellness Programs Act ([H.R. 1189](#) and [S. 620](#)), introduced in by the GOP in March 2015, would declare that a workplace wellness program, by offering a reward to participants, does not violate the ADA or GINA if the program complies with HIPAA requirements. In addition, the collection of information about a family member's manifested disease or disorder would not be considered an unlawful acquisition of genetic information with respect to another family member participating in a workplace wellness program.

Industry Perspective

In an interview with Wolters Kluwer, [Joanna C. Kerpen](#), J.D., a partner at [McDermott Will & Emery LLP](#), in Washington, D.C., and [Noelle Whitmire](#), an associate at [Jones Day](#) in Atlanta, Georgia, answered several questions regarding the effect of the new EEOC rules, recent litigation, and legislative proposals on the ability of employers to offer EWPs:

Do the new EEOC rules align with HIPAA requirements?

Whitmire: Unfortunately, the new EEOC rules do not exactly line up with the existing HIPAA requirements as modified by the Affordable Care Act. This means that employers will need to review their wellness programs to ensure that the design is permissible under each set of rules and that all required notices are provided to employees.

Kerpen: The rules regarding wellness program incentive limits in the EEOC's ADA rules differ in some respects from the HIPAA limits on wellness program incentives. The ADA rules extend the wellness program incentive limit to participatory wellness programs. The wellness incentive limit under HIPAA applies only to those wellness programs that are health-contingent wellness programs, whereas the incentive limit in the ADA rules applies to any wellness program that asks an employee to respond to disability-related inquiries and/or undergo medical examinations, regardless of whether the wellness program is health-contingent or participatory, or a combination of the two. Thus, employers offering participatory wellness programs should review the program

to determine whether it is subject to the ADA rules, and comply with the wellness incentive limit as applicable.

In addition, the wellness incentive limit in the ADA rules is applied based on the cost of self-only coverage and governs the incentive with respect to the employee only, even if the wellness program is available to the employee's spouse or other dependents, whereas in the same situation HIPAA applies the incentive limit to the total cost of coverage in which the employee and any dependents are enrolled. In the preamble to the ADA rules, the EEOC notes that because the ADA's prohibitions on discrimination apply only to applicants and employees (not spouses or dependents), the ADA rules do not address the incentives wellness programs may offer for dependent participation. Employers sponsoring wellness programs with dependent coverage that are subject to the ADA rules should ensure that the wellness incentive limit is satisfied with respect to the employee applying the lowest cost self-only coverage.

The ADA rules apply a 30 percent incentive limit for tobacco-related wellness programs, such as smoking cessation programs, whereas HIPAA imposes a 50 percent incentive limit for these programs. However, the ADA rules only apply to smoking cessation programs that include disability-related inquiries or medical examinations. Thus, an employer who maintains a smoking cessation program that includes disability-related inquiries or medical examinations (such as a biometric screening or other medical procedure that tests for the presence of nicotine or tobacco) is now subject to a 30 percent incentive limit instead of the 50 percent limit that applies under HIPAA. The ADA rules makes clear that merely asking an employee whether he uses tobacco (or ceased using tobacco upon completion of the smoking cessation program) is not a program that would be subject to the ADA rules.

Do the new EEOC rules affect the ADA safe harbor?

Whitmire: According to Whitmire, the answer to this question is addressed in question 6 of the EEOC's [ADA Q&A document](#), which states:

The ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating

some individuals with disabilities less favorably than individuals without those disabilities. Many of the insurance practices the safe harbor permitted at the time of the enactment of the ADA, such as denying health coverage for individuals with pre-existing conditions or charging some individuals in group health plans more than others because of their health conditions, are now unlawful under the Affordable Care Act.

The ADA safe harbor does not apply to wellness programs, even if the wellness program is part of an employer's health plan.

The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. The final rule adds a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan.

Kerpen: The ADA rules provide that the ADA safe harbor does not apply to wellness programs, even if the wellness program is part of an employer's health plan. The preamble to the ADA rules and related question and answer guidance released by the EEOC reassert the EEOC's position on this issue.

Have the EEOC legal challenges in Honeywell and Flambeau affected employers' ability to offer wellness programs?

Whitmire: I have not seen that the EEOC legal challenges have affected our clients' ability to offer wellness programs. However, the rewards that our clients typically offer participants are considerably less than the rewards at issue in these cases. For example, we frequently see rewards that range from a \$5 gift card for participating in a walking program to a \$500 health flexible spending account contribution for visiting the doctor for an annual

physical. The *Honeywell* and *Flambeau* cases involve much higher rewards/penalties, such as not being allowed to enroll in the employer's health coverage.

Kerpen: The legal challenges have not directly affected an employer's ability to offer wellness programs, but do show that the EEOC is looking closely at these sorts of programs, and likely factored into the EEOC's drafting of the new rules.

Have the new EEOC rules on the ADA (81 FR 31126) and GINA (81 FR 31142) affected employers ability to offer wellness programs?

Whitmire: The new EEOC wellness program rules have not affected our clients' ability to offer wellness programs. Our clients are accustomed to structuring their existing health and welfare plans to comply with the complex – and, at times, inconsistent – guidance set forth by the various federal agencies. Unfortunately, the federal agencies that are responsible for issuing guidance do not always coordinate their efforts.

Kerpen: The ADA and GINA rules impose additional requirements on certain types of wellness programs, including limits on wellness incentives and inducements. The ADA rules also impose a notice requirement, requiring written notice to employees explaining what medical information will be obtained by the wellness program and the specific purposes for which the information will be used, and describing the restrictions on the disclosure of the employee's medical information, who will receive the medical information, and the methods used to ensure that the medical information is not improperly disclosed.

The ADA rules apply to wellness programs that ask an employee to respond to disability-related inquiries and/or undergo a medical examination. The GINA rules apply to wellness programs that offer an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of completing a health risk assessment. The GINA rules make clear that no inducement may be offered for information about a child's manifestation of disease or disorder. Employers offering wellness programs subject to either set of rules may have to make changes to the wellness program design to comply. Of course, even if an employer's wellness program is not subject to the new ADA or GINA rules, the employer should ensure compliance with the HIPAA requirements for wellness programs as applicable.

What is your reaction to proposed legislation (HR 1189 and S.620) to void the EEOC rules (to the extent the courts do not)?

Kerpen: The proposed legislation, introduced prior to the release of the final EEOC rules, indicates an effort in Congress to push back on the EEOC regarding wellness programs; however, sponsors of wellness programs should comply with the ADA and GINA rules unless and until such proposed legislation is enacted.

Conclusion—Things to Do

Whitmire and Kerpen concluded by suggesting that employers should consider taking the following actions in light of the new EEOC rules.

Whitmire: If an employer's wellness program collects any health information, the employer should review the program to ensure that the design (for example, the value of incentives and the availability of reasonable accommodations) satisfies the applicable requirements under the EEOC's rules. If required, the employer should decide how to tailor the EEOC's sample notice (available at <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>) for its wellness program and plan to distribute it to employees as of the first day of the first plan year that begins on or after January 1, 2017.

Kerpen: Employers should first determine whether their wellness programs are subject to the ADA rules and/or GINA rules. As noted above, the ADA rules apply to wellness programs that ask an employee to respond to disability-related inquiries and/or undergo a medical examination, and the GINA rules apply to wellness programs that offer an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of completing a health risk assessment. If subject to either, employers should ensure that the wellness program is within the prescribed wellness incentive limit set forth in the ADA rules and/or the prescribed inducement limit set forth in the GINA rules. If subject to the ADA rules, employers should prepare to be compliant with the notice requirement. The notice requirement and incentive and inducement limits in the ADA rules and GINA rules are generally effective for the plan year beginning on or after January 1, 2017, based on the plan year of the health plan used to determine the level of incentives or inducement permitted under the ADA rules and GINA rules.

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