



January 12, 2021

## **EEOC Issues Proposed Rules for Employer Participatory Wellness Programs**

On January 7, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register proposed rules on participatory wellness programs. The proposed rules address incentives employers may offer to promote employee participation in employer participatory wellness programs, which require disclosure of medical information. The purpose of the proposed rules is to inform employers of what incentives they may offer without violating the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), both of which are implicated by employer wellness programs.

### **Background**

Employer wellness programs are divided into two categories: participatory and health-contingent programs. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) governs health-contingent wellness programs. Health-contingent wellness programs are offered in connection with a group health plan and may offer an incentive to employees in the form of a 20 percent to 30 percent reduction in the cost of coverage. The maximum permissible incentive is increased to 50 percent for health contingent wellness programs designed to prevent or reduce tobacco use. Participatory wellness programs are those not directly offered as part of a health insurance plan and include: a program that reimburses for all or part of the cost of membership in a fitness center; a diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes; and a program that provides a reward to employees for attending a monthly, no-cost health education seminar.

The proposed rules address participatory wellness programs, and come as a response to a decision by the U.S District Court for the District of Columbia in *AARP v. EEOC* (D.D.C. 1:16-cv-02113), where the AARP argued that the EEOC's previous wellness program rules were coercive and put workers at risk of facing discrimination. Under the ADA and GINA, employee participation in wellness programs must be voluntary, but neither statute defines the term "voluntary." The Court sided with the AARP, finding that by allowing plans and insurers to offer 30% of the cost of coverage as an incentive for joining participatory wellness programs, it was not clear that participation in such programs was sufficiently voluntary. The Court found that the EEOC had not provided sufficient justification for the 30% threshold.

Under the new proposed rules, employers may offer only a "de minimis incentive" to encourage participation in wellness programs. The EEOC has not clarified what incentives may qualify as "de minimis" at this time. The proposed rules are currently subject to a 60-day comment period during which the public may put forth questions.

## **Takeaway**

The proposed rules demonstrate the EEOC's commitment to encouraging employee participation in employer participatory wellness programs, but also recognize that participation in such programs cannot be coercive or discriminatory. Employers with existing participatory wellness programs should be aware that offering substantial incentives to encourage employer participation may place them in violation of both the ADA and GINA. Employers should also take note that the proposed rules do not effect health-contingent wellness programs.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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