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## EEOC's New Stand on Wellness Programs

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On January 7, 2021, the Equal Employment Opportunity Commission unveiled two Notices of Proposed Rulemaking regarding what employers can do to encourage workers to participate in corporate wellness programs without violating the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The proposed rules mandate that employers “offer no more than de minimis incentives” to entice workers to take part in most wellness programs, but that employers can raise or lower workers’ insurance contributions by up to 30% (or 50% to the extent the wellness program is designed to prevent or reduce tobacco use), to encourage employees to take part in “a subset of wellness programs that are part of employer health plans.”

The proposed rules harmonize the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Patient Protection and Affordable Care Act, which allows employers to offer incentives up to 30% of the total cost of health insurance to encourage participation in certain types of wellness programs (or 50% to the extent the wellness program is designed to prevent or reduce tobacco use), with the ADA which requires that employee participation in a wellness program that includes medical questions and exams be “voluntary.” The rules also integrate the HIPAA regulations with GINA’s requirement that employers cannot request, require, or purchase genetic information from employees unless, as relevant here, the genetic information is part of a “voluntary” wellness program.

### Recent History of Wellness Regulations

If adopted, the proposed rules will help employers who have previously faced uncertainty over the definition of “voluntary.” In 2016, the EEOC had issued a final rule which stated that programs are voluntary as long as incentives or penalties do not top 30% of workers’ self-coverage insurance costs. The AARP challenged the rule in court, arguing that such high penalties effectively forced workers to divulge their health information. In 2017, a federal judge granted AARP’s motion for summary judgment, concluding that the EEOC did not adequately explain how such high incentives were voluntary.

### Key Components of Proposed Rules

Now, the proposed rules state that employers “may offer no more than de minimis incentives” to entice workers to take part in most programs that include “disability-related inquiries and/or medical examinations.” The EEOC asserts that a water bottle or “gift card of modest value” is considered de minimis, whereas a paid annual gym membership or plane ticket is not.

But, under the proposed rules, employers can still raise or lower workers' insurance contributions to encourage them to take part in "a subset of wellness programs that are part of employer health plans." Health-contingent wellness programs that are part of, or qualify as, group health plans to which the Departments of Health and Human Services, Labor, and Treasury wellness regulations apply are exempt from the de minimis standard. In other words, group health plans can offer the maximum allowed incentive under the HIPAA regulations (currently 30% of the total cost of coverage or 50% to the extent the wellness program is designed to prevent or reduce tobacco use), as long as they comply with HIPAA requirements for such plans.

The proposed rules retain past requirements that an employer may not require employees to participate; may not deny coverage under any of its group health plans or particular benefits packages within a group health plan; generally may not limit the extent of such coverage; and may not take any other adverse action against employees who decline to participate in an employee health program or fail to achieve certain health outcomes. Furthermore, the proposed rules reiterate that an employer may not retaliate against, interfere with, coerce, intimidate, or threaten an employee regarding the employee's decision to participate (or not) in a wellness plan.

### **What's Next**

The EEOC has forwarded the proposed rules to the Federal Register for publishing. After the Federal Register publishes the proposed rules, the public will have 60 calendar days to submit comments.

Though the proposed rules are not final or currently enforceable, employers who sponsor wellness programs are nonetheless cautioned to review the amount of offered incentives and be ready to make critical changes.