



EEOC Removes Wellness Program Incentive Limits from Regulations

Issue Date: February 2019

Quick Facts:

- The Equal Employment Opportunity Commission (EEOC) officially removed its wellness program incentive limits effective January 1, 2019.
- The EEOC removed these limits in response to a 2018 court ruling that vacated the limits the EEOC had made effective January 1, 2017.
- EEOC has indicated that it will publish new proposed regulations on employer-sponsored wellness programs – presumably with new incentive limits – in 2019.
- In the meantime, employers should carefully consider how to structure incentive limits for wellness programs.

The Equal Employment Opportunity Commission (EEOC) recently removed its permitted incentive limits from its final wellness plan rules that became effective in 2017. As of January 1, 2019, the incentive limits under those rules no longer apply.

Litigation

The American Association of Retired Persons (AARP) had challenged the EEOC's wellness program incentive limits by arguing the EEOC had failed to justify why it had determined that a 30% limit – as opposed to its longstanding position that no incentive would satisfy certain discrimination prohibitions under the Americans with Disabilities Act (ADA) – should be permissible. A Texas court ultimately agreed with the AARP and struck down the EEOC's incentive limit for employer-sponsored wellness plans. In response, the EEOC recently removed the limits from its regulations effective January 1, 2019.

Wellness program sponsors should be aware, however, that the remaining EEOC wellness rules remain intact, including certain notice requirements and that any wellness program providing incentives must be “voluntary” as defined under the EEOC rules.

Background

The EEOC enforces the ADA and the Genetic Information Nondiscrimination Act (GINA), both of which affect wellness program design.

- The [final ADA rules](#) provided that incentives offered to an employee who answers disability-related questions or undergoes medical examinations as part of a wellness program may not exceed 30% of the total cost for self-only health plan coverage.
- The [final GINA rules](#) clarified that an employer may offer an incentive of up to 30% of the total cost of self-only coverage to an employee whose spouse provides information about his or her current or past health status as part of the employer's wellness program.

For historical background on the rules and litigation involving wellness incentives, refer to the EPIC Compliance Alert [Think Again: Court Directs EEOC to Reconsider Wellness Regulations](#). Our wellness team recently covered this topic on our FrenkelySpeaking blog at the end of January – [catch it here](#).

Next Steps for Wellness Program Sponsors

The EEOC has indicated that it will publish new proposed regulations on employer-sponsored voluntary wellness programs during 2019. In the meantime, employers should carefully consider how to structure incentives for wellness programs that ask disability or health status-related questions or involve medical exams because issues and potential challenges under ADA and GINA could still arise.

Options could include:

- offer incentives or impose penalties below the previous 30% EEOC limit;
- redesign plans to eliminate incentives; or
- revert to wellness program designs pre-dating the EEOC regulations which follow the incentive limits allowed under HIPAA and ACA rules.

Additionally, employers should continue to ensure their wellness programs meet other regulatory guidelines and are not designed to discriminate on the basis of any ADA-protected disabilities or GINA-protected genetic information.

Frenkel will continue to monitor regulatory developments and provide updates and action steps for voluntary wellness program sponsors.

Please be aware that this does not represent legal or tax advice and is only Frenkel's interpretation of the laws, regulations and statutes. It is highly recommended that you seek the advice of your legal and tax professional as to the applicability of this information to your particular situation.