

# Client Alert

Labor & Employment Practice Group

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## EEOC Issues Proposed Regulations On Wellness Programs

Last week, the U.S. Equal Employment Opportunity Commission (EEOC) officially published proposed regulations that provide employers guidance on implementing wellness programs that comply with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* Wellness programs are employee health programs and activities that are designed to promote healthy lifestyles and prevent disease. They generally fall into two categories: (1) participatory, or (2) health-contingent.

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- *Participatory programs* do not condition a reward based on an employee satisfying a particular health standard. Examples of participatory programs include fitness center reimbursements or rewards for participating in health risk assessments (“HRAs”) without requiring any further action by employees to address health issues identified in the HRAs.
- *Health-contingent programs* require that an employee satisfy a standard related to a particular health factor to obtain a reward. Programs may be activity-only, which require employees to perform or complete a certain activity, such as a diet or exercise program, prior to obtaining a reward. Alternatively, health-contingent programs may be outcome-based, which require that an employee attain or maintain a certain health standard to receive a reward, such as not smoking or attaining certain results on a biometric screening.

**The Proposed Regulations** The ADA generally prohibits employers from making disability-related inquiries or requiring medical exams. Although wellness programs often include these activities, they would be permissible under the EEOC’s proposed regulations if:

- The program is “voluntary.” Accordingly, an employer must not:
  - require employees to participate;
  - deny access to health coverage or generally limit coverage under its health plans for non-participation; or
  - take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline someone who does not participate or fails to achieve certain health outcomes).

- Employers provide sufficient notice regarding wellness programs.<sup>1</sup> The notice must:
  - be written such that participants are reasonably likely to understand it;
  - set forth the medical information that will be obtained from a wellness program, as well as how the information will be specifically used; and
  - explain who will receive the information obtained, the restrictions on the disclosure of such information, and the methods that will be used to ensure the information is not improperly disclosed.
- Medical information obtained through wellness programs is disclosed to an employer only in aggregate form, except as necessary to administer a health plan.
- Employers comply with all Health Insurance Portability and Accountability Act (“HIPAA”) requirements and ensure that all medical information obtained through wellness programs remains confidential.
- Any financial and in-kind incentives in the form of a reward or penalty offered as a method to promote participation in wellness programs total no more than 30% of the cost of employee-only coverage.<sup>2</sup>

In addition, the proposed regulations require that employers make reasonable accommodations to enable employees with disabilities to fully participate in employee health programs, including the ability to earn any reward or avoid any penalty offered as part of the programs. The proposed regulations also make clear that compliance with the proposed regulations and HIPAA nondiscrimination rules does not relieve employers of complying with all other employment nondiscrimination laws, such as those prohibiting discrimination on the basis of race, sex, national origin, or age.

Public comments may be made on the proposed regulations for 60 days, until June 19, 2015, and can be submitted at <http://www.regulations.gov>.

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<sup>1</sup> This requirement applies to a wellness program that is part of an employer-sponsored group health plan or a health plan offered by an insurer.

<sup>2</sup> These incentive limitations apply only to wellness programs that are part of an employer-sponsored group health plan or a health plan offered by an insurer, and they apply to both participatory and health-contingent programs. In contrast, incentives limitations under HIPAA regulations apply to only health-contingent programs.