



COMPLIANCE BULLETIN

HIGHLIGHTS

- Effective Jan. 1, 2019, the EEOC removed the incentive limits from its final wellness plan rules.
- The EEOC took this step in order to implement a court ruling that vacated that portion of the final rules.
- Employers should be careful about structuring incentives for wellness programs that ask for health information or involve medical exams.

IMPORTANT DATES

January 1, 2017

The EEOC's final wellness rules under the ADA and GINA became effective.

January 1, 2019

District court's ruling to vacate incentive limits under the EEOC's final wellness rules takes effect.

EEOC Removes Incentive Limits from Final Wellness Plan Rules

OVERVIEW

On Dec. 20, 2018, the Equal Employment Opportunity Commission (EEOC) removed the incentive limits from its final wellness plan rules. The rules allowed employers to offer wellness incentives of **up to 30 percent** of the cost of health plan coverage.

The AARP successfully challenged the EEOC's incentive limit by arguing that it was too high to be consistent with federal laws that require "voluntary" employee participation in wellness programs. The court [vacated](#) the EEOC's incentive limit for employer-sponsored wellness plans, effective Jan. 1, 2019.

Consistent with the court's decision, the EEOC has removed the incentive limit portion of its final wellness plan rules.

ACTION STEPS

Beginning Jan. 1, 2019, the final rules' guidance on permissible incentive limits for voluntary wellness programs no longer applies. Due to this new legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs. Employers should also monitor any developments related to the EEOC's rules.

Provided By:

National Insurance Services,
Inc.

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Final Wellness Rules

Federal laws affect the design of wellness programs, including two laws enforced by the EEOC—the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

- Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted even if not job-related and consistent with business necessity if they are part of a **voluntary wellness program**.
- Under GINA, employers cannot request, require or purchase genetic information. This includes information about an employee’s genetic tests, the genetic tests of family members and the manifestation of a disease or disorder of a family member. Like the ADA, GINA includes an exception that permits employers to collect this information as part of a wellness program, as long as the provision of information is **voluntary**.

Employers may continue to offer incentives to employees who participate in wellness programs. However, employers should carefully consider the amount of incentives for wellness programs that ask for health information or involve medical exams.

Neither the ADA nor GINA define the term “voluntary” in the context of wellness programs. For many years, the EEOC did not definitively address whether incentives to participate in wellness programs are permissible under the ADA and, if so, in what amount. On May 17, 2016, the EEOC issued final rules that describe how the ADA and GINA apply to employer-sponsored wellness programs. These rules became effective on **Jan. 1, 2017**.

- ✓ The [final ADA rule](#) 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 percent** of the total cost for self-only health plan coverage.
- ✓ The [final GINA rule](#) clarified that an employer may offer an incentive of up to **30 percent** 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.

Incentive Limits Removed From Final Rules

Effective Jan. 1, 2019, the EEOC removed the incentive limits from its final wellness plan rules under the [ADA](#) and [GINA](#) to implement a court’s order that vacated that portion of the final rules. This court ruling is summarized below.

Court Ruling

First Decision – Incentive Limit is Arbitrary

On Aug. 22, 2017, the U.S. District Court for the District of Columbia [ruled](#) against the EEOC and remanded the final wellness rules back to the agency for reconsideration. In this case, the AARP argued that the 30 percent incentive limit is inconsistent with the voluntary requirements of the ADA and GINA, and that employees who cannot afford to pay a 30 percent increase in premiums will be forced to disclose their protected information when they would otherwise choose not to do so.

The court concluded that the EEOC's basis for establishing this incentive level was not well reasoned and not entitled to deference from the court. Rather than vacating the rules altogether and risking potential disruption for employers, however, the court remanded them to the EEOC for reconsideration.

Second Decision – EEOC's Rules are Vacated on Jan. 1, 2019

On Dec. 20, 2017, the court stated that the EEOC's unhurried approach for reconsidering its final wellness rule is not what the court envisioned when it remanded the rules. The EEOC indicated that it would issue a new final wellness rule in October 2019 that would be applicable, at the earliest, in 2021. This lengthy timeline, according to the court, was unacceptable.

Thus, the court [vacated](#) the EEOC's limits on wellness incentives, but stayed its ruling until Jan. 1, 2019, to avoid disruption for employer-sponsored wellness plans. According to the court, this extended deadline provided employers with the time they needed to structure their wellness plans for 2019. The court also encouraged the EEOC to speed up its timeline for issuing new rules on wellness program incentives.

New EEOC Regulations

The EEOC has indicated that it will publish new proposed regulations on employer-sponsored wellness programs in the future. It is not clear, however, when these proposed regulations will be released. The EEOC, which is a bipartisan commission that is comprised of presidentially appointed members, is still waiting for the confirmation of two members (including a commission chair) and a general counsel. The EEOC has indicated that it may wait until mid-2019 to release new wellness regulations.