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EEOC Provides Proposed Wellness Rules

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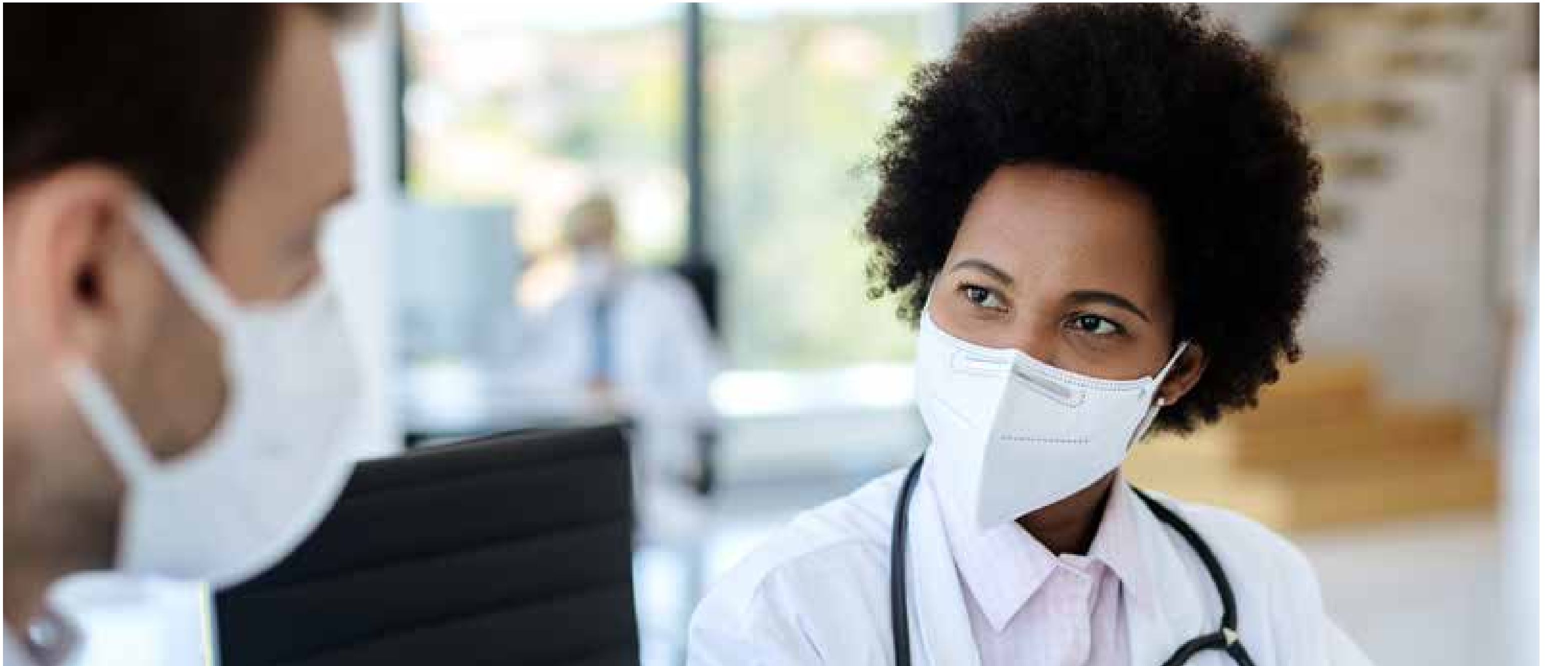

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On January 7, 2021, the Equal Employment Opportunity Commission ("EEOC") released two notices of proposed rulemaking ("Proposed Rules") on wellness programs under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). Briefly, if finalized in their current form, the Proposed Rules:

- generally align ADA rules to existing rules applicable to "health contingent" wellness programs under the Health Insurance Portability and Accountability Act ("HIPAA").
- restrict incentives tied to "participatory" wellness programs, such as those that provide incentives for individuals to disclose health information through health risk assessments or biometric screenings, to "de minimis" amounts. Examples of de minimis amounts are "a water bottle or gift card of modest value."
- under the GINA rules, apply restrictions to incentives related to a spouse's participation in health risk assessments.

Background

There are three sets of laws governing wellness programs and incentive limits currently in effect: HIPAA rules, ADA rules and GINA rules.

HIPAA

The HIPAA rules contain five requirements health contingent programs must satisfy, one of which involves incentives. When rewards are used in a group health plan to promote involvement in an activity (e.g., walking, diet, or exercise program) or to attain a certain outcome (e.g., not smoking or achieving certain results on biometric screenings), incentives cannot exceed 30% of the total cost of coverage under the group health plan (or up to 50% when the program is tobacco-related).

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ADA

A wellness program involving a medical test or disability-related inquiries of an employee must be "voluntary." EEOC regulations issued in 2016 had generally provided that incentives could not exceed 30% of the total cost of self-only coverage in the lowest cost plan option offered to an employee in order for the program to be considered voluntary. However, the incentive portion of the 2016 regulations was vacated by court order, effective January 1, 2019.

GINA

As with the ADA rules, a wellness program involving a medical test or disability-related inquiries of a spouse must be "voluntary." GINA regulations had generally provided that incentives could not exceed 30% of the total cost of self-only coverage in the lowest cost plan option offered to an employee in order for the program to be considered voluntary. Those too were partially vacated by court order, effective January 1, 2019.

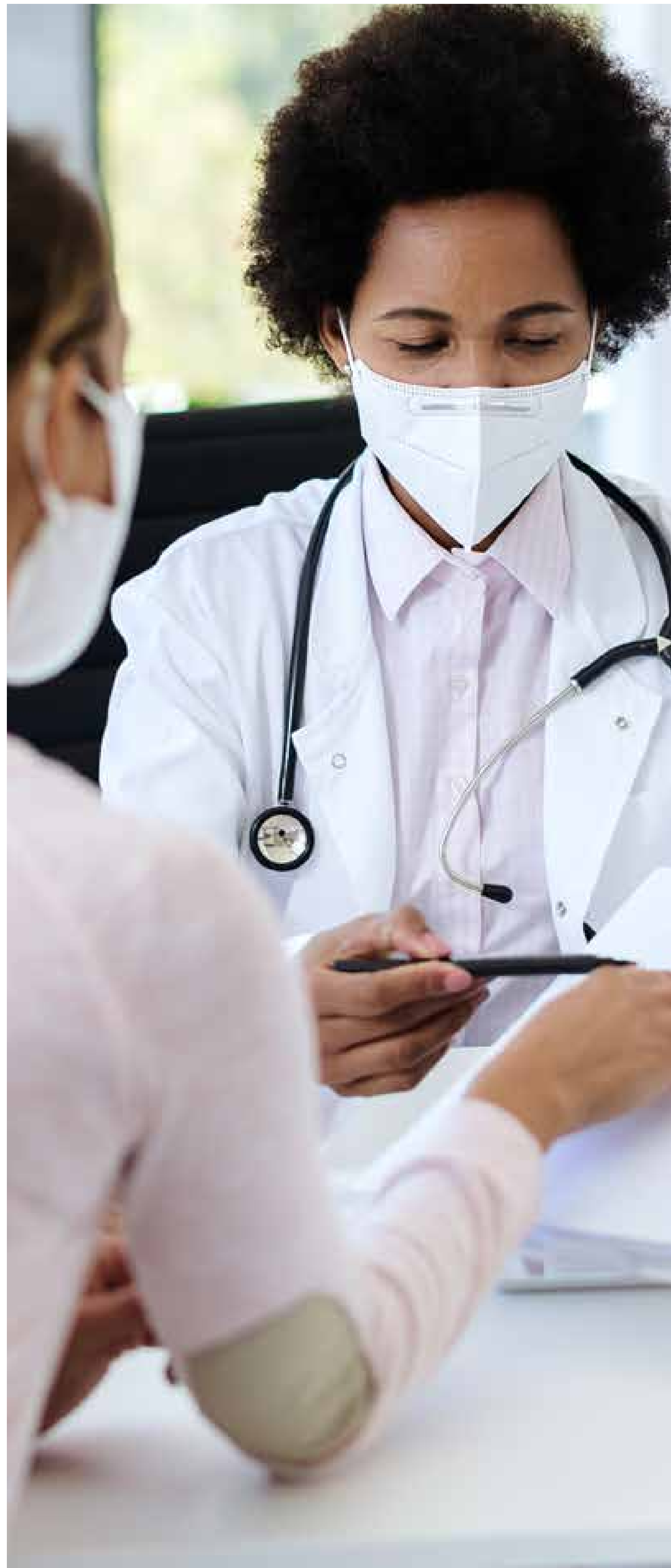
Proposed Rules

Health contingent programs continue viability under HIPAA requirements

For health contingent wellness programs (activity based or outcomes based), the Proposed Rules will permit incentives that align with the rules under HIPAA (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 the program is part of, or qualifies as, a group health plan and complies with the HIPAA five factor requirements for such plans.

For this purpose, the Proposed Rules set forth four factors that are helpful in determining when a wellness program is part of the group health plan:

- The program is offered only to employees who are enrolled in an employer-sponsored group health plan;
- Any incentives offered are tied to cost-sharing or premium reductions (or increases) under the group health plan;



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- The program is offered by a vendor that has contracted with the group health plan or insurer; and,

- The program is a term of coverage under the terms of a group health plan.

Participatory programs would be subject to severe limitations

For participatory programs, the Proposed Rules would sharply reduce the value of incentives many employers have historically utilized, such as a reduction in employee health insurance premiums for meeting wellness criteria. A participatory program is typically a wellness program that simply collects employee health information through health risk assessments or biometric screenings without tracking results and requiring employees to achieve certain health goals in order to earn an award or avoid a penalty. Under the ADA Proposed Rule, those programs are subject to a "de minimis" incentive standard. To be considered voluntary, a wellness program may offer no more than a de minimis incentive (such as a water bottle or gift card of modest value) in exchange for the employee participating in the wellness program.

According to the Proposed Rules, charging an employee $50 per month more for health insurance (or a total of $600 per year) for not completing a health risk assessment as part of a participatory wellness program would not be a de minimis incentive and would violate the ADA because the employee would be treated less favorably with respect to the cost of health insurance than employees who chose to provide their health information. This is much more stringent than the 2016 ADA regulations which would have allowed participatory programs that included medical exams or disability related inquiries to offer up to a 30% incentive based on the cost of self-only coverage in the lowest plan option.

GINA rules would subject participatory programs for spouses to severe limitations

Under the original rule, there was an exception to the general prohibition on providing incentives in return for genetic information that allowed limited incentives (up to 30%) to spouses who provide information (via risk assessment) about their manifestation of a disease or disorder to a wellness program. Under the Proposed Rule, wellness programs would be limited to de minimis incentives to all family members (not just spouses) in exchange for family members providing information about their manifestation a disease or disorder (which is considered the employee's genetic information). As described above, de minimis means very low value incentives such as a water bottle or gift card of modest value.

ADA Notice Not Required

The Proposed Rule would remove the unique ADA notice requirement that currently exists under the 2016 regulations.

Employer Action

At this time the above rules are simply proposed and employers are not required to rely on them or to comply with them. There will be a 60-day notice and comment period before the Proposed Rules are finalized and the finalized version may be different from what is included in the Proposed Rules. Typically, new regulations will apply prospectively starting at a future date (e.g., plan years starting in 2022). Further, the change to a new administration under President Biden may also have an impact. It is also possible that the rules may be challenged by others, such as the AARP, since they are so aggressive towards incentives. Additionally, the EEOC is seeking comments on the regulations. Employers should review their existing wellness programs in light of the EEOC's guidance. We will keep you apprised on new developments.

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