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EEOC Sample Employee Notice Regarding Wellness Programs

The Equal Employment Opportunity Commission (EEOC) has released a [sample notice](#) to assist employers with meeting the notice requirement under the Americans with Disability Act (ADA) that now exists when employers seek to collect health information (such as through a health risk assessment (HRA) or biometric screenings) as part of a wellness program. Accompanying the sample notice, the EEOC also published a set of [Questions and Answers](#) (Q&As) intended to explain the notice and its usage. EEOC also issued a [press release](#) on the notice. This notice requirement only applies to wellness programs that ask health related questions and/or request that employees undergo medical examinations, such as programs requiring employees to complete health risk assessments (HRAs), physical examinations, or biometric screenings (e.g., for blood pressure, cholesterol, nicotine, etc.).

Background

In May of this year, the EEOC issued long awaited [final rules](#) on employer wellness programs under both the ADA and Title II of the Genetic Information Nondiscrimination Act (GINA), establishing and in many cases clarifying, the framework of how wellness programs must be structured to comply with ADA and GINA. The rules say that employer wellness programs that ask employees about their medical conditions or that ask employees to take medical examinations (such as tests to detect high blood pressure, high cholesterol or diabetes) must ensure that these programs are reasonably designed to promote health and prevent disease, that they are voluntary, and that employee medical information is kept confidential. Limited financial and other incentives are permitted. However, employers may not require employees to participate in a wellness program; may not deny or limit their health coverage for non-participation; may not retaliate against or interfere with any employee who does not want to participate; and may not coerce, threaten, intimidate or harass anyone into participating. Employees also must receive a notice describing what information will be collected as part of the wellness program, who will receive it, how it will be used, and how it will be kept confidential. For a detailed explanation of these rules, please see Conner Strong's legislative Update [New EEOC Rules - Implications for Wellness Programs](#).

ADA Notice Requirement

Under the final ADA regulations for wellness programs, programs that ask health related questions and/or request that employees undergo medical examinations must, among other requirements, be "voluntary." The notice requirement is one of many conditions that must be satisfied in order for these types of wellness programs to meet the "voluntary" standard. (See our Update referenced above for other requirements).

- The Q&A guidance provides that the details of the notice must explain the medical information that will be collected under the wellness program, how such information will be used, the parties that will receive the medical data, and the restrictions on disclosure adopted by the plan to protect the privacy of individuals' health information.
- The Q&As confirm that plans that already issue notices in compliance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule may not have to issue a separate notice if the notice already issued by the plan informs participants of how health information will be collected, used, shared and kept confidential. Most HIPAA notices do not inform employees of the required information outlined in the bullet above, so many employers will have to provide a separate notice satisfying the ADA notice requirements.
- The ADA notice requirement generally takes effect on the first day of the plan year that begins on or after January 1, 2017.
- Once the notice requirement becomes effective, the EEOC's rule does not require that employees get the notice at a particular time (e.g., within 10 days prior to collecting health information). But they must receive it *before* providing any health information, and with enough time to decide whether to participate in the program. Waiting until after an employee has completed an HRA or medical examination to provide the notice is not permitted.
- Distribution and format recommendations are also provided in the Q&As, and while the notice may be provided by paper or electronically, issuers are instructed to avoid providing the notice with "a lot of other unrelated wellness program information." Although an employer may have its wellness program provider furnish the notice, the employer is ultimately responsible for ensuring that employees receive the notice.
- Employers with special need employees may have to provide the notice in an alternative format to accommodate individual disabilities. For example, a notice in larger font may have to be provided to employees with vision impairments.
- The EEOC's sample notice language does not need to be used verbatim, provided that the notice reflects the regulatory content requirements and is written in language that employees can easily understand. The sample notice includes several provisions that need to be tailored to an employer's specific wellness program (for example, a paragraph that includes representations regarding who will receive an individual's personal health information).
- If an employee files a charge with the EEOC and claims to be unaware of a medical examination conducted as part of a wellness program, the EEOC will examine the notice content and all surrounding circumstances to determine whether the employer satisfied the notice requirement.

Authorization Requirements Under GINA

As was the case prior to the issuance of the rules in 2016, GINA requires that an employer that offers health or genetic services and requests current or past health status information of an employee's spouse obtain prior, knowing, written, and voluntary authorization from the spouse before the spouse completes a health risk assessment. Similar to the ADA notice, the GINA authorization should be written in a way that is reasonably understandable to the individual providing the genetic information. The GINA authorization/notice is required to describe protections and restrictions on the disclosure of genetic information and therefore must disclose how genetic information is being collected, used, and restricted.

Should you have questions about this update, please contact your Conner Strong & Buckelew

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