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New rules published on May 17, 2016 under the Americans with Disabilities Act (“ADA”) provide a helpful roadmap to designing an incentive-based wellness program that will not run afoul of the ADA’s general rule that employers are prohibited from requiring medical exams or asking disability-related inquiries unless job-related and consistent with business necessity.

In order for such program to be “voluntary” under the ADA, the employer, in part, must provide a notice that clearly explains what medical information is obtained, who will receive it, how it will be used and the restrictions on disclosure (including whether the restrictions on disclosure comply with HIPAA Privacy Rule).

The EEOC recently published a model notice and FAQs regarding the notice that can be used by employers for purposes of complying with the ADA. The following summarize the highlights.

- **Effective date.** The requirement to provide the notice takes effect as of the first day of the plan year that begins on or after January 1, 2017 for the health plan an employer uses to calculate any incentives it offers as part of the wellness program.
- **Timing.** This notice must be provided to employees before providing any health information and with enough time to decide whether to participate in the program. Waiting until after an employee has completed a health risk assessment (“HRA”) or medical examination to provide the notice is illegal.
- **Format.** The notice can be given in any format that will be effective in reaching employees being offered an opportunity to participate in the wellness program. For example, it may be provided in hard copy or as part of an email sent to all employees with a subject line that clearly identifies what information is being communicated (e.g., “Notice Concerning Employee Wellness Program”). Avoid providing the notice along with a lot of information unrelated to the wellness program as this may cause employees to ignore or misunderstand the contents of the notice.
- **Responsibility to provide.** The employer is responsible for providing the notice, but may have its wellness program provider give the notice to employees. However the employer is ultimately responsible for ensuring employees receive it.

- **HIPAA and ADA notice interaction.** Generally, the current HIPAA notice applicable to health-contingent programs does not disclose the information required under the ADA. To the extent the employer's wellness program is health-contingent (meaning outcomes-based or activity-based and tied to a group health plan) and requires medical exams or disability-related inquiries, employers are required to comply with both the ADA and HIPAA notice obligations. It is not clear whether the ADA model notice (specifically, the third paragraph) is sufficient to meet the HIPAA disclosure rules for purposes of a health-contingent program. Additional guidance would be welcome. In the case of a program that is participatory or not part of a health plan, but requires medical exams or disability-related inquiries, only the ADA notice is required.
- **Model notice language can be adapted.** As long as the notice tells employees, in language they can understand, what information will be collected, how it will be used, who will receive it, and how it will be kept confidential, the notice is sufficient. Employers do not have to use the precise wording in the EEOC sample notice. The EEOC notice is written in a way that enables employers to tailor their notices to the specific features of their wellness programs.
- **No signed authorization requirement.** The ADA rule only requires a notice, not signed authorization, though other laws may require authorization. Title II of the Genetic Information Nondiscrimination Act ("GINA") requires prior, written, knowing, and voluntary authorization when a wellness program collects genetic information, including family medical history.
- **Spousal HRAs.** The ADA does not apply to HRAs for spouses. However, GINA is applicable. Under GINA, an employer that requests current or past health status information of an employee's spouse must obtain prior, knowing, written, and voluntary authorization from the spouse before the spouse completes a health risk assessment. The GINA authorization has to be written so that it is reasonably likely to be understood by the person providing the information. It also has to describe the genetic information being obtained, how it will be used, and any restrictions on its disclosure.



Employer Action

An employer that uses an HRA and/or medical exams (e.g., physicals, biometric screenings, etc.) as part of a wellness program will need to provide notice to employees effective for plan years that begin on or after January 1, 2017. Remember, this notice must be provided before an employee is asked to provide any health information or undergo a medical exam.

For the EEOC's sample notice, visit <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

For the FAQs, visit <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm>