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# HEALTH CARE REFORM ADVISORY

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January 2019

## **EEOC Wellness Rules**

### **INCENTIVE LIMITS REMOVED/VACATED**

In December, the EEOC issued a long anticipated final ruling related to wellness program incentive limits. The ruling impacts wellness programs that specifically involve medical testing or disability-related questions. The decision leaves employers *without* clear guidance on what level of wellness incentives, if any, are considered “voluntary” and compliant with ADA and GINA regulations.

While the EEOC is targeting a June 2019 update related to this issue, employers offering wellness incentives tied to medical testing or disability-related questions have a few options in the interim. Employers may choose to continue with their current structure until further guidance is issued, or they may modify their current programs by lowering incentives or providing alternatives for earning incentives that do not involve medical testing or disability-related questions.

As always, your Oswald Team is available to discuss the right strategy for your organization’s specific objectives and to work with your legal advisers in regard to potential risks involved.

#### **Background**

In 2016, the EEOC issued rules to clarify its position on how employer wellness programs could be offered in compliance with the ADA and GINA. For programs involving medical testing or disability-related questions (e.g. biometric screenings or health risk assessments), one requirement was that incentives not exceed 30% of total medical premium for single coverage.

Soon after the rules were released, the American Association of Retired Persons (AARP) sued the EEOC, arguing the rules violated ADA and GINA. In particular, the AARP argued the 30% incentive limit meant programs were not “voluntary,” as required by the ADA. The court ruled in favor of the AARP, and eventually vacated the incentive limit rule completely, effective January 1, 2019. The EEOC ruling simply complies with the Court’s directive.

#### **What Does This Mean for Incentive Limits?**

Until the EEOC provides an update on this issue, there is no guidance indicating whether incentives are prohibited or allowed, or to what extent. For now, if a wellness program provides incentives (or imposes penalties) related to participating in medical testing or answering disability-related questions, it is not clear whether such a program complies with the “voluntary” requirement of ADA or GINA regulations.

#### **What Is Not Changing**

This does not change any of the other wellness rules previously issued by the EEOC, including the requirement to provide a confidentiality notice prior to participation in medical testing or answering disability-related questions. HIPAA wellness rules also remain unchanged.

## Summary

What is the risk to employers? Until the EEOC issues guidance on this issue, it is unlikely there will be any enforcement actions brought against employers with wellness programs that continue to comply with the 30% incentive limit that was previously in place. However, there is a possibility employees could file private lawsuits against employers – a potential risk employers should review with legal counsel.

**Please contact your Oswald client team representative for any additional questions or to schedule a full review of your current wellness program's objectives, strategy and compliance.**

### [EEOC and Wellness Program Updates](#)

#### [EEOC Removal of Final ADA Wellness Rule Vacated by Court](#)

#### [EEOC Removal of Final GINA Wellness Rule Vacated by Court](#)

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Oswald Companies | Health Care Reform Implementation

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