

insights

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EEOC issues guidance on new wellness notice mandated for 2017

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Effective as of the first day of the plan year that began on January 1, 2017, or after, employers maintaining wellness programs that collect employee health information must satisfy a new notice requirement. The EEOC has issued a [sample notice](#) as well as [guidance in the form of Q&As](#) to assist employers in complying with the new wellness notice requirement.

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) issued final regulations setting forth the requirements for wellness programs to comply the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Many wellness programs require employees to complete health risk assessments, biometric screenings or similar diagnostic tests in order to qualify for specified incentives. However, the ADA restricts an employer's ability to make disability-related medical inquiries and GINA prohibits an employer from discriminating against employees on the basis of genetic information. The final regulations clarify how "voluntary" wellness programs can be designed to comply with both the ADA and GINA.

The final regulations provide that a wellness program will be classified as "voluntary" if it meets four requirements. These requirements (discussed in more detail in the August 2016 column) include a new notice requirement. According to the regulations, an employer must provide a notice to employees that:

- Is written so that an employee from whom health information is being obtained is reasonably likely to understand it;
- Describes the type of health information that will be obtained and the specified purposes for which the health information will be used; and
- Describes the restrictions on the disclosure of the employee's health information, the employer representatives or other parties with whom the information will be shared, and the methods that the wellness program will use to ensure that the information is not improperly disclosed (including whether such methods comply with HIPAA).

How to provide notice

The Q&As clarify that an employer is not required to provide the new notice if the employer currently provides a notice that informs an employee what information will be collected via the wellness program, who will receive it, how it will be used, and how it will be kept confidential. However, if all of this information is not included in the existing notice or if the existing notice is not easily understood, the employer must provide the new wellness program notice.

The Q&As also note that, while a third party provider may provide the notice on behalf of any employer, it is the employer who is ultimately responsible for making sure that employees receive the new notice.

There is no requirement that the notice include the exact words in the sample notice. However, it is critical that any alternate language provide all of the information required by the regulations.

Although the notice is not required to be provided until January 1, 2017 (for calendar plans), employers may wish to provide the notice in connection with, or as a supplement to, the 2017 enrollment materials. There is no specific requirement that employees receive the notice within any particular time, however, it is critical that employees receive the notice before providing any health information and with enough time to decide whether to participate in

the wellness program. The Q&As emphasize that waiting until after an employee has completed a health risk assessment, biometric screening or medical examination is illegal. The Q&As note that an employee's authorization or certification of receipt is not required with respect to the notice.

The Q&As indicate that the notice can be provided as part of an email sent to all employees if the subject line clearly identifies the nature of the information being communicated, e.g., "Notice Concerning Employee Wellness Program." The Q&As do not impose the same requirements imposed by the Department of Labor with respect to the electronic distribution of plan documents such as summary plan descriptions.

However, the Q&As note that the notice may need to be provided in an alternative format for employee with disabilities. For example to adequately communicate the information, a large print version of the notice may be required for employees with certain visual impairments, a sign language interpreter may be required to communicate the information to deaf employees, or the notice may need to be read to blind employees. Also, if the notice is provided electronically, it should be formatted so that employees who use screen reading programs can read the notice.

With respect to spouses, the Q&As reiterate the existing GINA requirement that an employer requesting current or past health status information from a spouse must obtain prior knowing, written, and voluntary authorization from such spouse before the spouse completes a health risk assessment. Such notice must be written to be understood by the spouse.

Employers using the sample notice provided by the EEOC will be required to customize the new notice with information relating to the employer's wellness program. For example, the notice should be specific about the conditions for which blood will be tested. The notice should also describe the incentives provided under the wellness program and specify the criteria for earning each level of incentive. If additional incentives are provided for employees who will participate in health-related activities, the incentives, as well as a description of the health related activities, must be described. The employee must also be provided contact information for requesting a reasonable accommodation under the wellness program.

If the health information provided under the wellness program will also be used to offer additional services through the wellness program, the notice must specify such additional services.

The notice must be customized to describe the methods that will be used to prevent disclosure of health information. The sample notice states that health information will not be sold, exchanged, transferred or otherwise disclosed unless permitted by law. If applicable, the notice must disclose any individuals who will receive personally identifiable health information in order to provide the employee with services under the wellness program. Examples may include nurses, doctors or a health coach.

The sample notice specifies that health information provided through the wellness program will be maintained separately from an employee's personnel records, that any such information stored electronically will be encrypted and that no information provided will be used in making any employment decision. If the employer provides any additional confidentiality protections, such protections must be described in the notice.

The notice also indicates that, in the event of a data breach with respect to health information provided under the wellness program, the employer will notify the employee immediately. Finally, the employer must provide contact information in the event an employee has questions regarding the notice or about protections against discrimination and retaliation with respect to health information provided via the wellness program.

Although employers may be providing some or all of the information described above in existing notices, it is advisable to use the model EEOC notice to minimize the risk of a challenge of the sufficiency of the employer's communications with respect to its wellness program and/or the voluntary status of a wellness program in the event of an audit.

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