

Legislative Brief

WELLNESS - New Notice Requirement

December 2016

NEW ADA Notice Requirement for Wellness Programs

SUMMARY:

- The EEOC issued a [final rule](#) explaining how the Americans with Disabilities Act (ADA) applies to certain employer-sponsored wellness programs that ask questions about employees' health information (*e.g.*, via a health risk assessment or biometric screening).
- **As of the first day of the first plan year beginning on or after January 1, 2017**, employers subject to the ADA (generally employers with 15 or more employees) who offer wellness programs that collect health information must provide a new notice to employees explaining how medical information will be collected and used, who will receive it, and what will be done to keep it confidential.
- The EEOC issued a sample [notice](#), as well as [questions and answers \(Q&As\)](#), to assist employers with this new notice requirement. Employers subject to this new requirement should review the sample notice and Q&As, gather information needed to complete the bracketed language contained in the sample notice, prepare (or seek assistance preparing) the new notice and timely distribute it to eligible employees. This new notice requirement is in addition to existing wellness program notice requirements.

BACKGROUND

The Americans with Disabilities Act (ADA) restricts the medical information that employers may obtain from employees by generally prohibiting employers from making disability-related inquiries or requiring medical examinations (*i.e.*, employers may only make disability-related inquiries or require medical examinations after employment begins if it is job-related and consistent with business necessity). However, an employer is permitted to ask health-related questions, via a health risk assessment (HRA) or biometric screening, if the employer is providing health services as part of a **voluntary** wellness program.

In order for a wellness program to be considered "voluntary" under the ADA, the final rule provides that an employer:

- May not require participation;
- May not deny access to health insurance or benefits to an employee who does not participate;
- May not retaliate against, interfere with, coerce, intimidate or threaten any employee who does not participate or who fails to achieve certain health outcomes;
- Must provide a notice that explains the medical information that will be obtained, how it will be used, who will receive it and the restrictions on disclosure; and
- Must comply with the incentive limits described in the final rule.

NOTE: The new notice requirement does not apply to wellness programs that only require employees to engage in an activity (such as walking a certain amount every week) in order to earn an incentive. However, employers must still provide reasonable accommodations to allow employees with disabilities to earn the incentive.

NOTICE REQUIREMENT

As noted above, the final rule requires that employers subject to the ADA, who request employee health information as part of their employer-sponsored wellness programs, must provide employees notice explaining what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential.

The EEOC has provided a sample [notice](#) to help covered employers comply with this new ADA requirement. The EEOC also provided [questions and answers](#) about the notice requirement and use of the sample notice. Some of these Q&As are shared below.

If wellness program participants already get a notice under the Health Insurance Portability and Accountability Act (HIPAA), do they need to get a separate ADA notice?

Employers that already provide a notice that informs employees what information will be collected, who will receive it, how it will be used, and how it will be kept confidential, may not have to provide a separate notice under the ADA. However, if an existing notice does not provide all of this information, or if it is not easily understood by employees, then employers must provide a separate ADA notice that sets forth this information in a manner that is reasonably likely to be understood by employees.

HIPAA Notice: HIPAA includes a notice requirement for health-contingent wellness plans that are offered in connection with a group health plan. That notice must disclose the availability of a reasonable alternative standard (RAS) to qualify for the wellness plan's reward in all plan materials describing the terms of a health-contingent wellness program. For outcome-based wellness programs, the notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard.

Who must provide the notice?

An employer may have its wellness program provider give the notice, but the employer is still responsible for ensuring that employees receive it.

Does the notice have to include the exact words in the EEOC's sample notice?

No. 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.

When should employees get the notice?

The requirement to provide the notice takes effect as of the first day of the plan year that begins on or after Jan. 1, 2017, for the health plan an employer uses to calculate any incentives it offers as part of the wellness program. Once the notice requirement becomes effective, the EEOC's rule does not require that employees get the notice at a particular time (for example, within 10 days prior to collecting health information), but they generally 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 illegal.

Is an employee's signed authorization required?

No. The ADA rule only requires a notice, not signed authorization, though other laws, like HIPAA, 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.

In what format should the notice be provided?

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"). Employers should 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.

What notice must employers provide to spouses participating in an employer's wellness program?

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. Like the ADA notice, 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.

MORE INFORMATION

For more information regarding this new notice requirement, please contact your Kapnick Insurance Group representative.