

The DOL, Treasury and HHS jointly issued regulations related to employer wellness programs in 2006, and these regulations were updated in 2013 following the passage of the ACA (hereinafter referred to as "Department Regulations").

On April 20, 2015, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations on how the Americans with Disabilities Act (ADA) applies to employer-sponsored wellness programs. While the proposed regulations are fairly consistent with existing guidance on employer-sponsored wellness programs there are a few notable exceptions to be aware of.

## Background:

Department Regulations breakdown wellness programs into two distinct categories:

- **Participatory:** Programs which provide a reward without regard to an individual's health status (e.g. programs that: reimburse for the cost of membership in a fitness center; provide a reward to employees who attend a no-cost health education seminar; or provide a reward to employees who complete a health risk assessment without requiring them to take further action).

*Because participatory programs are not based on a health factor, they do not implicate HIPAA's nondiscrimination rule if they are available to all similarly situated individuals regardless of health status.*

- **Health-contingent:** Programs that generally require individuals to meet a specific standard related to their health to obtain a reward (e.g. programs that: provide a reward to those who do not use tobacco; or provide a reward to those who achieve a specified cholesterol level or weight).

*Because health-contingent programs require individuals to satisfy a standard related to a health factor in order to receive an award they must satisfy four requirements to be nondiscriminatory under ERISA:*

- *eligible individuals must be able to qualify once per year;*
- *the maximum incentive amount is 30% of the cost of health coverage (up to 50% for programs designed to prevent or reduce tobacco use);*
- *the program is reasonably designed to promote health or prevent disease; and*
- *the program is available to all similarly situated individuals.*

Since their release, the Department Regulations have provided important guidance for employers establishing wellness programs. However, in recent years the EEOC has initiated several enforcement actions against employer wellness programs in compliance with existing Department Regulations—alleging non-compliance with the Americans with Disabilities Act (ADA) and in certain cases the Genetic Information Nondiscrimination Act (GINA). The evident conflict between the EEOC’s position on wellness programs and the Department Regulations made clear that guidance regarding the interplay between the ADA and wellness programs was needed.

## EEOC’s Proposed Regulations:

- **Clarification:** The EEOC’s proposed regulations focus on application of the ADA’s exception to its general ban on disability-related inquiries or medical exams for “voluntary” wellness programs. Under the proposed regulations a wellness program will be considered voluntary if:
  - *It does not require employees to participate;*
  - *It does not condition coverage under a group health plan on participation in the program;*
  - *It does not penalize non-participation (except for the failure to receive the incentive); and*
  - *When it is part of a group health plan, employees receive a **notice** that describes what medical information will be collected, who will receive it, how the information will be used, and how it will be kept confidential.*
  
- **Contradiction:** The EEOC proposed regulations deviate from the Department Regulations in several important respects:
  - ***The proposed regulations would apply to all programs—both participatory and health-contingent programs—while the Department Regulations apply only to outcome –based programs (e.g. the EEOC seeks to extend the 30% maximum award to participatory wellness programs)***
  - ***EEOC proposed regulations set the maximum reward at 30% of the self-only cost of coverage (taking into account both the employee and employer share of the cost). Under Department Regulations, the 30% is based on the total cost of coverage of the employee and any of the employee’s dependents.***
  - ***The proposed regulations would limit the 50% incentive for programs designed to prevent or reduce tobacco use to programs that do not test for nicotine usage through a biometric screening or other medical exam but rather validates only by asking employees whether they use tobacco.***

The EEOC’s Notice of Proposed Rule Making (NPRM) on Wellness Programs is open for public comments until June 19, 2015. The NPRM is available at:

<https://www.federalregister.gov/articles/2015/04/20/2015-08827/regulations-under-the-americans-with-disabilities-act-amendments>.