HEALTH & WELFARE PLAN LUNCH GROUP

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1. EEOC's Final ADA Regulations Regarding Wellness Programs

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TO: Health and Welfare Lunch Group

FROM: Alston & Bird, LLP

DATE: June 1, 2016

RE: EEOC's Final ADA Regulations Regarding Wellness Programs

The following is an overview of the final regulations issued on May 16, 2016 by the EEOC with respect to the application of the ADA to employee wellness programs ("final ADA regulations").

Overview

The final ADA regulations issued by the EEOC apply the ADA's requirements to wellness programs offered by employers to employees. The ADA generally prohibits post-hire disability related inquiries or medical exams that are not job related except as part of a *voluntary employee health program.* These final ADA regulations define when a wellness program that makes a "disability related inquiry" or requires a "medical exam" is considered to be "voluntary". The regulations also address the manner in which other ADA requirements, such as confidentiality and reasonable accommodations, apply to all wellness programs without regard to whether the program makes a disability related inquiry or requires a medical exam.

Practice Pointer: The final ADA regulations attempt to align the ADA's wellness program rules with HIPAA's wellness program rules; however, there are differences, which will make compliance with applicable law even more challenging for employers. For example, the final ADA regulations apply to a broader scope of wellness programs. A more detailed comparison of the HIPAA wellness rules and the ADA's wellness rules is provided below.

The new rules applicable to wellness programs that include disability related inquiries or require medical exams are effective for plan years beginning on or after January 1, 2017. If the employer does not otherwise offer a group health plan, the new rules will be effective January 1, 2017. The other rules are considered mere clarifications of existing rules and apply prior to the issuance of the final ADA regulations.

The EEOC also issued final GINA regulations that address wellness programs offered to dependents of employees. We are preparing a separate memo on those rules; however, we reference the final GINA regulations throughout this memo where relevant.

Highlights of the ADA Final Regulations

The final ADA regulations follow the proposed ADA regulations issued by the EEOC in the summer of 2015. The proposed regulations left a number of questions unanswered—most (but not all) of which were answered in the final regulations—and gave indications that the final regulations might be much more administratively onerous than they actually are. The final ADA regulations are, for the most part, more beneficial to employers than the proposed regulations.

In general, the final ADA regulations:

- Retain the requirement from the proposed rules to provide notice to employees regarding the scope and use of medical information collected as part of a wellness program that includes disability related inquiries or requires medical exams but expanded the rule to apply to such programs without regard to whether eligibility for the wellness program is limited to those that participate in the employer's major medical plan. Moreover, the final ADA regulations indicate a model notice is forthcoming from the EEOC.
- Retain the 30% limitation from the proposed rules on incentives tied to wellness programs that make disability related inquiries and/or require medical exams; however, the rules make the following clarifications:
    - The final ADA regulations indicate the rule applies to such wellness programs without regard to whether eligibility for the wellness program is limited to participants in the employer's major medical plan. In fact, the limitation applies even if the employer offers no other major medical health plan coverage.
    - The EEOC provides different "benchmarks" for calculating the total coverage of self only coverage depending on whether eligibility for the wellness is limited to those participating in the employer's major medical plan or if the employer offers no health coverage.
- Retain the requirement for all wellness programs to be reasonably designed to promote health and prevent disease and to satisfy the ADA's confidentiality provisions.
- Retain the rule that merely asking about tobacco use is NOT a disability related inquiry but that screening for tobacco use through a "medical exam" would trigger application of the ADAs requirements to wellness programs that require a medical exam.

The following is a more detailed summary of the final ADA regulations. The goal of this summary is to help you better analyze the impact of these final rules on your current or proposed wellness programs.

Which wellness programs are subject to these regulations?

The final ADA regulations address virtually all wellness programs sponsored and maintained by employers who are otherwise subject to the ADA. As discussed above, the final ADA regulations prescribe new rules for wellness programs that include *disability related inquiries or require medical exams* and they clarify existing rules for all wellness programs without regard to whether such programs make disability related inquires or require medical exams. **Consequently, employers subject to the ADA who currently maintain a wellness program or who are considering a wellness program *of any type* should pay close attention to these rules.**

Types of programs that qualify as wellness programs that are potentially subject to this rule in some form or fashion include but are not limited to:

- Programs designed to increase physical activity
- Smoking/tobacco cessation classes
- Weight reduction classes
- Health risk assessments
- Screenings (including but not limited to biometric screenings

Practice Pointer: The rules apply without regard to whether the wellness program is limited to employees enrolled in the employer's group health plan. Consequently the new rules apply to wellness programs offered to all employees — even those not enrolled in the employer's group health plan and programs offered by employers that do not offer any health coverage.

Which employers are subject to the ADA?

Employers with 15 or more employees (full or part-time) are subject to the ADA.

What are the general requirements imposed by the final ADA regulations?

The final ADA regulations identify specific requirements for all wellness programs and also requirements applicable to those programs that include disability related inquiries and/or require medical exams. Below is a chart that identifies the general requirements imposed by the final regulations the types of programs to which they apply:

ADA-related requirements **Program must. . . .**	**All wellness programs, including but not limited to those that make disability related inquiries or require a medical exam**	**Programs that include disability Related inquiries/require Medical exam**
Be designed to reasonably promote health and prevent disease	•	
Comply with ADA's confidentiality requirements	•	
Make reasonable accommodations for employees with disabilities	•	
Be "voluntary". Voluntary requirements prescribed by the final ADA regulations are effective for plan years beginning on or after January 1, 2017.		•

Since the primary focus of the final regulations is on the new rules applicable to wellness programs that make disability related inquiries or require medical exams, we will begin our substantive analysis with such programs.

What is a disability related inquiry?

To determine whether your wellness program is subject to the new rules, you must first determine whether it includes a disability related inquiry or requires a medical exam. According to EEOC guidance, a "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. Disability-related inquiries may include the following:

- Asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
- Asking an employee to provide his or her medical history;
- Asking about an employee's genetic information,
- Asking about an employee's prior workers' compensation history, and
- Asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (e.g., what impairments do you have?)

> **Practice Pointer:** The final ADA regulations clarify that simply asking an employee to certify his or her tobacco use is NOT a disability related inquiry. This is good news for employers with tobacco cessation programs because they will not have to satisfy the ADA's "voluntary" requirements described below

What is a "medical examination"?

According to EEOC guidance, a "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. The EEOC further indicates that the following factors that should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used.

When is a program that makes a disability related inquiry or requires a medical exam considered to be voluntary?

A wellness program that makes disability related inquiries or requires a medical exam is considered voluntary if it satisfies each of the following requirements:

- Employees are not required to participate. For example, an employee's employment is not terminated if they refuse to participate;
- Employees who choose not to participate are not denied eligibility in any group health plan or group health plan option offered by the employer;
- The employer takes no adverse employment action or retaliates against those who choose not to participate;
- The employee receives a notice, written in a manner that is likely to be understand by the employee, that provides the following information:
    - The types of medical information that will be obtained;
    - How the medical information will be used;
    - The restrictions on disclosure of such information;
    - The employer representatives or other parties, if any, with whom the information will be shared;
    - The methods used by the employer to protect the information.

- Any incentives (including the absence of surcharges) provided in connection with the program are limited in accordance with the final ADA regulations.

The notice and incentive requirements are discussed in more detail below.

Practice Pointer: Two recent court decisions have applied the ADA's bona fide benefit plan safe harbor exception to an employer's wellness program that made disability related inquiries or required medical exams—essentially by-passing the ADA's voluntary requirement.[1] The EEOC clarifies in these final regulations that the EEOC does not believe that the ADA's bona fide benefit plan safe harbor applies to wellness programs. According to the EEOC, a wellness program will comply with the ADA's wellness program requirement only to the extent that the program is "voluntary" (as defined by these regulations) and meets the other ADA requirements (e.g. such as confidentiality).

What are the applicable notice requirements?

If a wellness program includes a disability related inquiry or requires a medical exam, the employer must provide notice to the employee containing the information described above. The preamble to the final ADA regulations indicates that an employer's existing wellness program materials will suffice if the materials satisfy the notice requirements. If the materials do not satisfy the notice requirements, the employer must either revise the existing wellness program materials to include the required elements of the notice or create a new notice. The EEOC further notes that it will make a sample notice available on its website within 30 days of the final rule's publication. The final ADA regulations do not, however, specify the manner (paper or electronically) in which the employer can provide the notice (e.g. electronically).

Practice Pointer: Is a HIPAA privacy notice sufficient to comply with the final ADA regulation's notice requirements? If the wellness program is not itself a group health or is not offered in connection with a group health plan, HIPAA's privacy rules may not apply. Consequently, the HIPAA privacy notice might be too broad. If HIPAA privacy does apply to the wellness program, the permitted uses for group health plan information and wellness program information might differ, which would require revisions to the notice. See below for more discussion on the ADA's confidentiality requirements.

What are the limitations on incentives offered in conjunction with a wellness program that includes a disability related inquiry or requires a medical exam?

If a program that makes a disability related inquiry or requires a medical exam offers incentives to participate (including the absence of a surcharge for those that do participate), the incentive cannot exceed 30% of the total cost of self only, major medical coverage. The final ADA regulations provide a formula for calculating the incentive limitation, which varies depending on whether participation in the wellness program is conditioned on participation in the employer's major

[1] *Seff v. Broward County*, 691 F.3rd 1221 (11th Cir. 2012) and *EEOC v. Flambeau, Inc.,* No. 14-cv-638-bbc (WD Wis. 2014).

medical group health plan coverage, if any. The chart below identifies the various situations that might apply and the corresponding formula:

Situation	***Formula***
Employee must be enrolled in employer's major medical group health plan to participate in wellness program	30% of the total cost of self only coverage for the option in which the employee is actually enrolled.
Employee is NOT required to be enrolled in the employer's group health plan to participate in the wellness program AND the employer only offers 1 group health plan option	30% of the total cost of self only coverage for the group health plan maintained by the employer
Employee is not required to be enrolled in the employer's group health plan to participate in the wellness program AND the employer offers multiple group health plan options	30% of the total cost of self only coverage for the lowest cost group health plan option offered by the employer.
Employer does not offer ANY group health plan benefits	30% of the total cost of self only coverage for the second lowest cost silver plan for a 40 year old non-smoker in the state or federal health care exchange in the state of the employer's principal place of business.

The final ADA regulations do NOT prescribe a method for calculating the "total cost" of self only coverage. Presumably, employers may follow the rules for calculating the applicable premium under COBRA; however, the regulations do not foreclose the use of alternative methods. Employers will be wise to at least follow a method prescribed under analogous law. For example, the proposed regulations for the "Cadillac tax" under Code Section 4980I have identified possible alternative methods for calculating the total cost of health coverage for purposes of the Cadillac Tax and those methods, once finalized, might be sufficient.

Practice Pointer: If you also wish to give incentives for spouses to provide their medical information as part of a wellness program (such as a health risk assessment or screening), you must satisfy the requirements of GINA, which impose a separate limitation on the incentive attributable to the spouse's participation that is equal to 30% of the total cost of employee only coverage using a similar formula.

Also, the final ADA regulations clarify that the 30% rule applies to any financial or in-kind incentive provided in connection with the wellness program.

The remaining portion of this memo discusses the requirements applicable to all wellness programs, even those that do not make disability related inquiries or require medical exams.

<u>How do I design a program to reasonably promote health and prevent disease?</u>

A wellness program must be reasonably designed to promote health and prevent disease. The preamble to the final ADA regulations indicates that satisfaction of this requirement depends on the relevant facts and circumstances. Generally, the program must have a reasonable chance of

improving health or preventing disease, must not be overly burdensome or time consuming, and must not be a subterfuge for violating the ADA or any other federal law.

Examples of programs that do not satisfy this standard include, but are not limited to, the following:

- A program that requires a significant amount of time to obtain a reward;
- A program that imposes unreasonably intrusive procedures;
- A program that imposes significant costs related to medical examinations;
- A program that exists mainly to shift costs to targeted employees;
- A program that exists simply to collect information for the employer to estimate future health care costs.

In addition, wellness programs that collect medical information through a measurement, screening or test without follow up information, advice designed to improve health would not be reasonably designed to promote health or prevent disease UNLESS the collected information is actually used to design a wellness program that addresses at least a subset of the conditions identified through the program.

> **Practice Pointer**: In other words, if you are collecting medical information and not giving it back to the participants in the form of a diagnostic report or using it to design a new wellness program, your program will not satisfy this requirement.

What are the confidentiality requirements?

The ADA contains confidentiality requirements that are separate from, but will overlap to some extent HIPAA's privacy requirements. Under the ADA's confidentiality provisions, employers may not with respect to any wellness program:

- Disclose identifiable medical information to the employer except as is necessary for the employer to administer the health plan; and
- Require employees to waive confidentiality protections or agree to the sale or exchange of medical information as a condition of participating in the program.

> **Practice Pointer**: Employers who sponsor wellness programs that are not limited to health plan participants arguably will not be able to obtain any identifiable medical information obtained through the wellness program.

Under what circumstances would an employer have to make a reasonable accommodation?

If an employee is unable to participate in the wellness program due to a disability, the employer must provide an alternative in accordance with the ADA's rules. For example, if the employer provides a reward for employees who walk or exercise a specified amount of time each week, the employer would be obligated to provide a reasonable alternative to an employee who is unable to satisfy the requirements due to a disability.

<u>How do the final ADA regulations and HIPAA's rules interact with one another?</u>

HIPAA imposes certain requirements on wellness programs that provide a reward conditioned on satisfaction of an activity (such as exercise, walking or nutrition) or achievement of a health standard. A wellness program that provides a reward conditioned on mere participation would not be subject to HIPAA's wellness program rules to the extent that all similarly situated individuals are eligible to participate. In general, HIPAA imposes the following requirements on programs that provide a reward conditioned on completion of an activity or satisfaction of a health standard:

- Program must be available to all similarly situated individuals;
- Reward must be available for the entire year;
- Program must be designed to reasonably promote health and prevent disease;
- Reward for other than tobacco cessation programs cannot exceed 30% of the total cost of employee only coverage of the plan in which the employee is enrolled (or the total cost of family coverage if dependents are allowed to participate). If a program includes tobacco cessation, the total reward may go as high as 50%;
- If the program conditions the reward on completion of an activity, a reasonably tailored alternative must be provided upon request to participants who are unable due to a medical condition to complete the activity; and
- If the program conditions the reward on achieving a health standard, a reasonably tailored alternative must be provided upon request to any participants who do not achieve the standard.

Practice Pointer: The final GINA regulations will limit incentives provided in exchange for a spouse providing his or her medical information will be limited to 30% of the total cost of self only coverage. Thus, the amount *for an employee* under both the ADA and HIPAA (if applicable) cannot exceed 30% of the total cost of self only coverage and the amount attributable to the spouse providing his or her medical information cannot exceed 30% of self only coverage. For example, if 30% of the total cost of self only coverage is $500, the amount you may provide in exchange for the employee's information is $500 and the amount you may provide for the spouse's information is also $500.

The EEOC intended to align the final ADA regulations as much as it could with HIPAA's rules—and in many ways they are similar; however, the final ADA regulations apply to a broader scope of programs than HIPAA. In some cases only the ADA will apply. In others, both the ADA and HIPAA will apply. The chart below is intended to help you determine which sets of rules apply.

Type of Program	***ADA's confidentiality reasonable accommodation rules***	***ADA's voluntary and incentive requirements (applicable to programs that make a disability related inquiry or require a medical exam)***	***HIPAA's wellness program requirements***	***Comments/discussion***
Activity program (exercise, walking, nutrition) — no reward	✓			Such programs likely do not make a disability related inquiry or require a medical exam (as defined above) so the other ADA' rules do not apply. Moreover, there is no reward offered in connection with the program; therefore, there HIPAA's rules do not apply.
Activity Program with a reward — not group health plan participation required	✓		Unclear	Since such programs do not make a disability related inquiry or require a medical exam, the ADA's notice and voluntary requirements do not apply; however, the ADA's confidentiality/reasonable accommodation rules would apply. Since the program is not tied to participation in a health plan, it is unclear whether HIPAA's rules would apply.

Activity Program with a reward — eligibility tied to group health plan participation	✓		✓	Such programs likely do not make a disability related inquiry or require a medical exam (as defined above) so the other ADA' rules do not apply; however, HIPAA's rules do apply. Thus, the total reward cannot exceed 30% of self only coverage. If a dependent is also allowed to participate, the reward cannot exceed 30% of the total cost of family coverage in which the employee and dependents are enrolled. NOTE: It does not appear that GINA would apply here since the program does not ask for a dependent's medical history; however, if it did, then a reward could ONLY be provided for a spouse's medical history and the reward provided for the spouse's information would be limited to 30% of the total cost of self only.
Complete a health risk assessment — reward	✓	✓		Although the ADA's rules apply, HIPAAs do not since the reward is not conditioned on completion of an activity or achievement of a health standard.
Employee must conduct a biometric screening — a reward is provided to those that meet certain benchmarks	✓	✓	✓	The total combined reward cannot exceed 30% of the total cost of employee only coverage.

Employee must certify tobacco use-reward provided to those who are tobacco free	✓		✓	The EEOC does not consider a request regarding tobacco use to be a disability related inquiry; however, it would be subject to HIPAA's wellness program rules. Under HIIPAA the maximum reward for any program that includes tobacco cessation cannot exceed 50% of the total cost of the self only coverage in which the employee is enrolled (or family coverage if family members are allowed to participate). NOTE: Requesting information regarding a spouse's tobacco use is not subject to GINA's rules.
Employer screens for tobacco use — reward provided to those who are tobacco free	✓	✓	✓	Although asking the employee to certify tobacco use is not a disability related inquiry subject to the ADA's voluntary requirements, screening for tobacco use likely is subject to the ADA's voluntary requirements. In addition, HIPAA's requirements likely apply as well.

What are the next steps?

Employers who currently maintain a wellness program of any type should first analyze the program to determine if it is a wellness program that includes a disability related inquiry or requires a medical exam. If it does, then it should begin to evaluate the program materials to determine if the notice requirements prescribed by the final ADA regulations are satisfied and if not, the best to way to satisfy that requirement. If incentives are offered, the employer must determine whether the limitations on incentives are satisfied, taking into account the HIPAA wellness program rules as well. If the program is not one that makes a disability related inquiry or requires a medical exam,

then it should ensure that it is currently complying with the confidentiality and reasonable accommodation requirements as well as HIPAA's wellness program rules.

If you have any questions or need additional assistance, do not hesitate to contact me at ashley.gillihan@alston.com or 404-881-7390.

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