



# COMPLIANCE BULLETIN

## EEOC Issues Sample ADA Notice for Wellness Plans

### HIGHLIGHTS

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- Wellness programs that collect health information must comply with ADA requirements.
- Employers must provide a notice to employees explaining how medical information will be collected, used and kept confidential.
- The EEOC has provided a sample notice for employers to use.

### IMPORTANT DATES

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#### January 1, 2017

The EEOC's new notice requirement for wellness plans takes effect as of the **first day of the first plan year that begins on or after Jan. 1, 2017** (for the health plan used to determine the amount of incentive).

### OVERVIEW

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The Equal Employment Opportunity Commission (EEOC) recently issued a [sample notice](#) to help employers comply with new rules on workplace wellness programs.

On May 16, 2016, the EEOC issued a [final rule](#) that describes how the Americans with Disabilities Act (ADA) applies to employer-sponsored wellness programs that ask questions about employees' health or include medical examinations. The final rule includes a notice requirement for employers offering wellness programs that collect employee health information.

The EEOC's sample notice can be used by employers to comply with this notice requirement, which takes effect for health plan years beginning on or after **Jan. 1, 2017**.

### ACTION STEPS

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Employers that collect health information as part of their wellness programs will need to comply with the ADA's new notice requirement as early as Jan. 1, 2017 (for calendar year health plans).

To get ready for this new notice requirement, employers should review the EEOC's sample notice and prepare a new wellness plan notice or revise their current wellness plan notices to include the necessary information.

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## WELLNESS PROGRAMS – ADA COMPLIANCE

Many wellness programs ask employees to answer questions on a health risk assessment (HRA) or to undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a voluntary wellness program.

In order for 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.

The final ADA rule does not apply to wellness programs that do not obtain medical information but simply require employees to engage in an activity (such as walking a certain amount every week) in order to earn an incentive. However, employers must provide reasonable accommodations to allow employees with disabilities to earn the incentive.

## NOTICE REQUIREMENT

The final rule requires that employers give participating employees a notice that tells them 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 its sample notice to help employers comply with this ADA requirement. The EEOC also provided the following [questions and answers](#) about the notice requirement and use of the sample notice.

***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,

***Employers who offer wellness programs that collect employees' health information must provide a notice to employees explaining what information will be collected, how it will be used, who will receive it and what will be done to keep it confidential.***

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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. This notice must disclose the availability of a reasonable alternative standard 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, this 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 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 (for example, "Notice Concerning Employee Wellness Program"). 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.

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If an employee files a charge with the EEOC and claims that he or she was unaware of a particular medical examination conducted as part of a wellness program, the EEOC will examine the contents of the notice and all of the surrounding circumstances to determine whether the employee understood what information was being collected, how it was being used, who would receive it and how it would be kept confidential.

## ***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**

Contact your New England Employee Benefits Co., Inc. representative for more information on wellness program compliance issues.