



# Limbo No More? EEOC May Soon Publish New Wellness Program Rules

Insights

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Pushing its deadline back for the second time, the Equal Employment Opportunity Commission (EEOC) recently announced that it plans to issue amended regulations related to incentivizing participation in employer-sponsored voluntary wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) by the end of this year. What should employers know about the May 22 announcement, and why might it be different from prior deadlines set by the EEOC?

## A Short Refresher On How We Got Here

As most employers recall, the EEOC finalized wellness program rules in May 2016, only to have a federal district court vacate portions of the rules in August 2017. The court required the EEOC to revise the incentive-limit portion of the rules (which stated that employers could use an incentive or penalty of up to 30 percent of the cost of self-only coverage to encourage participation in an employer-sponsored wellness program without rendering the program “involuntary” in violation of federal statutes) by January 1, 2018.

Right before the January 1 deadline was set to expire, the EEOC scrapped the portion of its final rules related to wellness program incentives. In its regulatory agenda published in Fall 2018, the EEOC said that it would publish new regulations by June 2019. However, with that deadline approaching, the agency once again pumped the brakes – but this time we might have greater insight into its actions.

## Is An End To The Limbo Finally In Sight?

Part of the EEOC’s holdup with issuing new rules on wellness program incentives was that the Commission – comprised of presidentially appointed members – was awaiting the confirmation of two members (including a chair) and a general counsel. However, within a matter of days following this month’s swearing-in of new EEOC Chair Janet Dhillon, the agency unveiled its spring regulatory agenda for 2019 that included an update on the wellness program rules.

The May 22 release noted that the agency is developing a notice of proposed rulemaking to address wellness programs under both the ADA and GINA in response to the court’s August 2017 ruling. The agenda also indicated that we should expect action by December 2019.

## What Might Employers Expect From Dhillon’s EEOC?

At this point, it is way too early to predict *exactly* what Dhillon might do with the forthcoming wellness program incentive regulations. However, two points may be telling in this regard. First, during her confirmation hearing, Dhillon testified that she would rewrite the regulations to comply with both congressional intent and the court's August 2017 opinion in *AARP v. EEOC*.

Second, the Chair of the Senate Committee on Health, Education, Labor, and Pensions –Senator Lamar Alexander (R-Tenn) – previously noted that offering incentives was one of the only components of the Affordable Care Act that shared bipartisan support in Congress. He agreed that incentives are one of the best ways for employers to encourage employees to lead healthier lifestyles and reduce health care costs. The senator reiterated these points to Dhillon during her confirmation hearing.

In light of these two points, we may likely see new regulations that go to great lengths to encourage participation in wellness programs – including possibly raising the 30 percent cap under the old rules – as well as provide greater clarity on where incentives stand with respect to ADA and GINA compliance.

### **What Should Employers Do Now?**

In the absence of guidance from the EEOC, most employers have set their current wellness program incentives based upon their appetite for risk – that is, they have retained the 30 percent cap for incentives under the old rules, reduced incentives to an amount small enough for participation to still be considered voluntary regardless of income, or eliminated incentives altogether. A summary of the various options available to employers while we remain in this limbo period [can be found here](#).

Going forward, however, there is hope that we could soon have movement from the EEOC on these rules. We will continue to monitor further developments and provide updates on these efforts, including strategies for developing or adapting compliant wellness programs, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

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