



SPECIAL ALERT

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WELLNESS INCENTIVES – ADA AND GINA

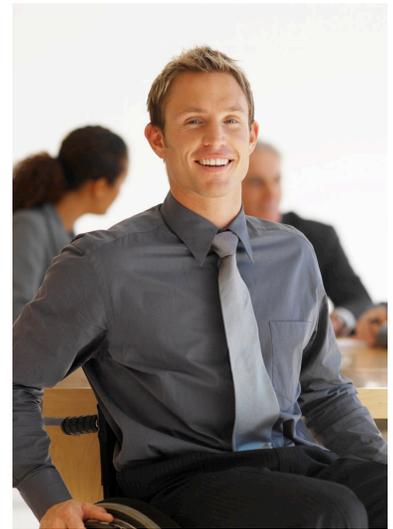
A court opinion released at the end of the year affects the final rules for the Americans with Disabilities Act (ADA) and the Genetic Information Non-discrimination Act (GINA). It may, therefore, affect your wellbeing plan incentives in 2019. These final rules were reviewed in our *Benefit Advisor* at <http://mcgraw-wentworth.com/wp-content/uploads/MMABA19-5.pdf>.

These ADA and GINA rules apply only to wellbeing plans that offer incentives to employees or spouses to complete medical exams, biometric screenings or health assessments. This new opinion derives from a case involving the American Association for Retired Persons (AARP) v. the Equal Employment Opportunity Commission (EEOC). AARP was challenging the EEOC on its method for determining that the 30 percent incentive permitted under the final rules is indeed a “voluntary” exam requirement. AARP believed the 30 percent incentive simply mirrors the Health Insurance Portability and Accountability Act (HIPAA) rules. It charged the EEOC did not separately consider the financial impact of the 30

percent incentives and filed suit against the EEOC in federal court in the District of Columbia.

Back in August, the court sided with AARP in its contention that the EEOC did not really analyze the 30 percent limit on incentives so that the exam requirements would be considered truly “voluntary.” At that time the court ordered the EEOC to reconsider and re-issue guidance on the incentives permitted for employees and spouses to complete a medical exam, biometric screening, or health assessment. But the court said it would **not** vacate the final rules.

In the fall, the EEOC issued a proposed timeline for revising regulations. Under that the timeline, the new regulations would go into effect in 2021. In response to this drawn-out timeline, the court decided to vacate the final ADA and GINA rules effective January 1, 2019.



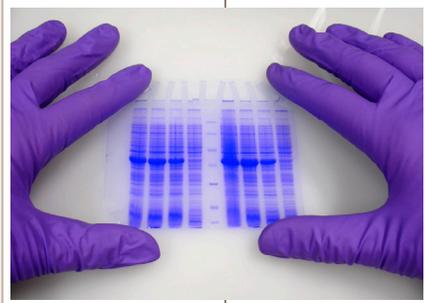
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What does this mean for employer wellbeing plans? Nothing will change for 2018. Employers should comply with all legislative wellbeing plan requirements. In 2019, compliance will depend

on whether the EEOC issues new rules for incentives. If it issues new rules in 2018, employers will likely need to comply with those rules. If the EEOC does not release

new guidance in 2018, it will be as if the final ADA and GINA rules were never issued. Employers will be left with the uncertainty of the former ADA regulations permitting incentives for exams if they are for bona fide group health plan activities or if the exam is voluntary--with no guidelines as to what is considered voluntary.



If the EEOC has not issued guidance by 2019, employers with particularly aggressive wellbeing incentives for employees or spouses to complete medical exams should consult their legal

counsel. Without new guidance, the ADA and GINA impact on wellbeing incentives will be vague.

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