

Technical Assistance Guide on Making Employee Wellness Programs Accessible Under the ADA & ACA

A Corporate Partner Benefit of the
National Business & Disability Council (NBDC)
at The Viscardi Center

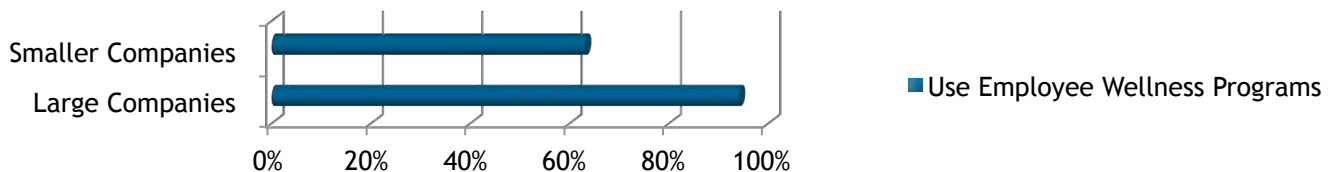
December 2015



National Business & Disability Council (NBDC) at The Viscardi Center: Making Employee Wellness Programs Accessible Under the ADA & ACA

The National Business & Disability Council (NBDC) at The Viscardi Center is pleased to share with its Corporate Partners the following technical assistance guide, **Making Employee Wellness Programs Accessible Under the ADA & ACA**. The technical assistance guide provides useful information about employee wellness programs, as well as pending changes on how they are regulated by the federal government. The U.S. Equal Employment Opportunity Commission (EEOC) states, *“These programs sometimes use health risk assessments and biometric screenings to determine an employee’s health risk factors, such as body weight and cholesterol, blood glucose, and blood pressure levels. Some of these programs offer financial and other incentives for employees who participate or achieve certain health outcomes.”*¹

Utilization of Employee Wellness Programs



According to the Kaiser Family Foundation,² employers offering employee wellness programs most commonly make available the following wellness programs:

- Weight loss programs
- Biometric screenings
- Gym membership discounts or on-site exercise facilities
- Smoking cessation program
- Lifestyle or behavioral coaching
- Classes in nutrition or healthy living
- Web-based resources for healthy living
- Flu shot or vaccinations
- Employee assistance program (EAP)
- Wellness newsletter

The technical assistance guide provides relevant facts and materials pertaining to employee wellness programs under the Americans with Disabilities Act, Affordable Care Act and the Health Insurance Portability and Accountability Act. It also provides useful strategies, resources and tools.

Disclaimer...

The technical assistance guide is not intended to provide legal advice to NBDC corporate partners, but rather to share relevant information, resources and tools. If you have further questions about telecommuting, you may call the Job Accommodation Network at 800-526-7234 or 877-781-9403 (TTY).

¹ U.S. Equal Employment Opportunity Commission, “EEOC Issues Proposed Rule on Application of the ADA to Employer Wellness Programs,” April 16, 2015; available from <http://www.eeoc.gov/eeoc/newsroom/release/4-16-15.cfm>.

² Kaiser Family Foundation, “2014 Employer Health Benefits Survey,” September 10, 2014; available from <http://kff.org/report-section/ehbs-2014-section-twelve-wellness-programs-and-health-risk-assessments/>

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What is an Employee Wellness Program?

Employee Wellness programs have traditionally been utilized by employers to promote better health among employees, in large part to manage health-related costs.³ They are designed to assist employees in monitoring their health through health-risk assessments and screenings for high blood pressure and cholesterol; behavior modification programs, such as tobacco cessation, weight management, and exercise; health education, including classes or referrals to online sites for health advice; and changes in the work environment or use of special benefits to encourage exercise and healthy food choices including memberships to health clubs.

An analysis of 36 peer-reviewed studies of wellness programs in large firms found that average employer medical costs fell \$3.27 for every dollar spent on wellness programs, and costs for days that employees were absent fell an average of \$2.73.⁴ However, as stipulated by the Equal Employment Opportunity Commission (EEOC), employers need to ensure that wellness programs allow access to medical information where employees voluntarily provide the information. Whereas, under the Affordable Care Act (ACA), wellness programs must ensure they do not offer incentives so large as to have the effect of denying coverage or creating too heavy a financial penalty for individuals who do not meet certain health standards. The EEOC has provided guidelines to wellness programs that coincide essentially with the regulations of the Americans with Disabilities Act (ADA), as well as the ACA. The premise behind this intersection is that wellness programs should have the capacity to accommodate and benefit individuals regardless of their health or medical condition.⁵



³ The ACA, The ADA, And Wellness Program Incentives (accessed September 23, 2015); available from <http://healthaffairs.org/blog/2015/05/13/the-aca-the-ada-and-wellness-program-incentives/>

⁴ Health Policy Briefs: Workplace Wellness Programs (Updated) (accessed September 23, 2015); available from http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=93

⁵ Federal Register: Amendments to Regulations under the ADA (accessed September 29, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act#footnote-23>

Wellness programs are usually contingent upon the participation of the employee, one of which results in the employee being rewarded, but not expected to meet a specific goal. The other, which has garnered the attention of the EEOC, is a health contingent program of which there are two different types. The first type is an activity-only program that rewards participating employees where no outcome is required. The second type includes outcome-based goals that result in rewarding the participant for achieving certain health results. The EEOC has indicated that health-contingent programs focusing on outcome-based goals, cannot be “overly-burdensome,” meaning health-contingent wellness programs must be reasonably designed to promote health or prevent disease—that is, the program must have a reasonable chance of improving health or preventing disease.⁶ The EEOC defines a “wellness program” as a program or activity typically offered through employer-provided health plans as a means to help employees improve health and reduce health care costs. In addition, the EEOC proposed regulation stipulates employee wellness programs must be voluntary.⁷

Employee Wellness Programs under the Affordable Care Act

The Patient Protection and Affordable Care Act (PPACA) - commonly called the ACA (Pub. L. 111-148, 124 Stat. 119 through 124 Stat. 1025) - has sparked new research into the effectiveness of employee wellness programs, as well as concern that financial rewards and penalties may shift health care costs from healthy employees to sick employees. In a 2013 report, “*Workplace Wellness Programs Study*,” sponsored by the U.S. Health and Human Services (HHS) and conducted by Rand Corporation, researchers found that employee wellness programs led to “meaningful improvements” in exercise rates, smoking and weight control, though not in cholesterol levels. Also, most employers said wellness programs reduce medical costs, though only about half had formally evaluated their wellness efforts.⁸ Employers are eager to see how wellness incentives will influence the healthcare system. Some of the changes under the ACA includes: raising the reward for participation in employee wellness programs and incorporating strategies that address individual behavior change but also look to change the broader environment.⁹

Employee Wellness Programs under the Americans with Disabilities Act

The ADA prevents an employer from requiring a medical examination of an employee unless it is job related. This statute ensures that employers do not engage in conducting unnecessary questioning or procedures that lead to disclosure of a disability.¹⁰ The statute, however, provides an exception to this rule by stating that wellness programs covered under the ADA can allow voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. Previous EEOC guidance indicated that an employee wellness program is ‘voluntary’ as long as an employer neither requires participation nor penalizes employees who do not participate.¹¹

⁶ Wellness Programs and the American with Disabilities Act: The EEOC weighs in (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>; New Guidance on Employer-Provided Wellness Programs (accessed September 23, 2015); available from <https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-new-guidance-employer-provided-wellness-programs.pdf>

⁷ Questions and Answers about EEOC’s Notice of Proposed Rulemaking on Employer Wellness Programs (accessed September 23, 2015); available from http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm

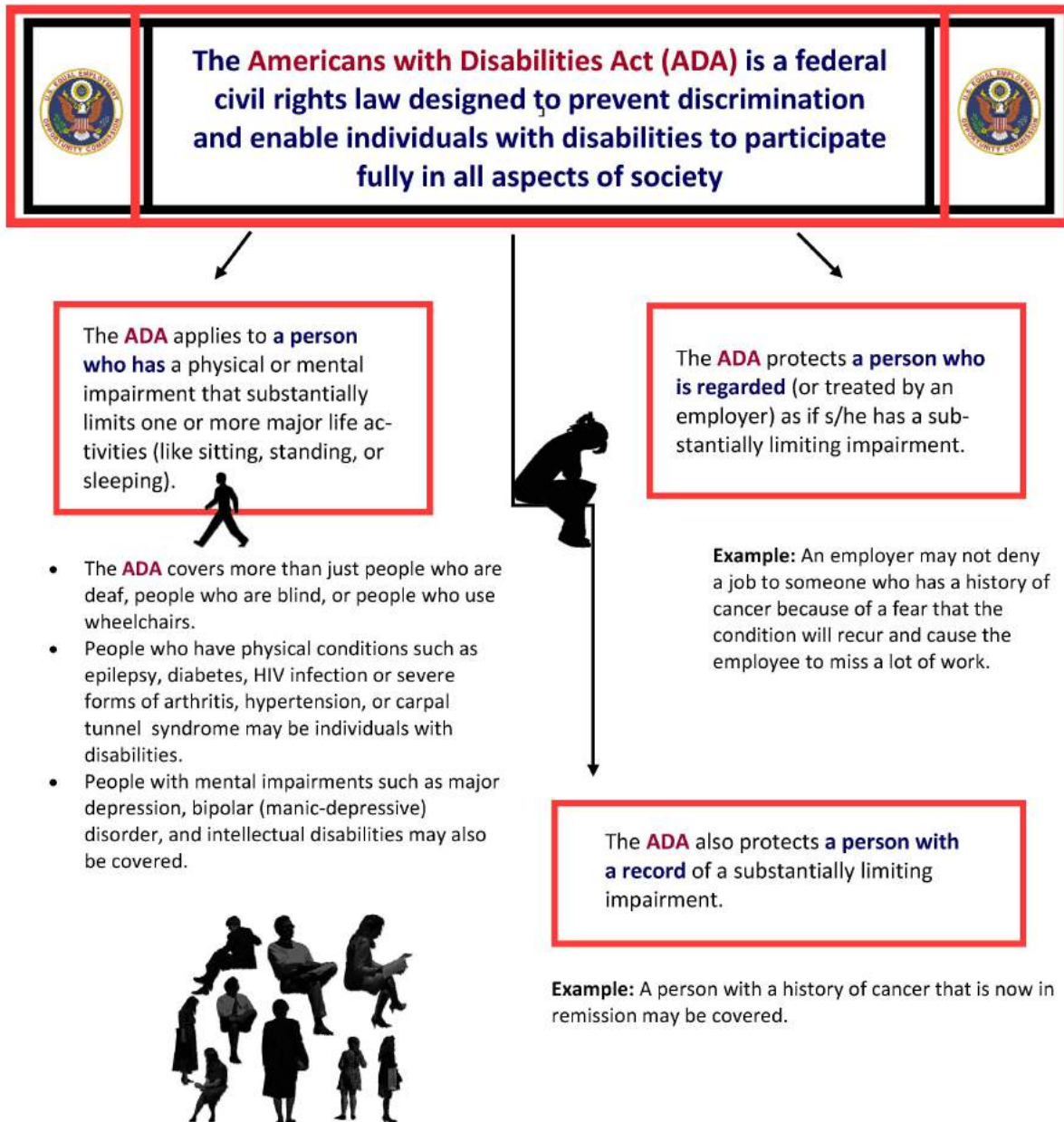
⁸ Workplace wellness programs a growing trend for employers: Affordable Care Act to play a role (accessed September 23, 2015); available from <http://thenationshealth.aphapublications.org/content/43/8/1.3.full>

⁹ Workplace wellness programs a growing trend for employers: Affordable Care Act to play a role (accessed September 23, 2015); available from <http://thenationshealth.aphapublications.org/content/43/8/1.3.full>

¹⁰ Wellness Programs and the Americans with Disabilities Act: The EEOC Weighs In (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>

¹¹ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

What is the ADA?



The Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. If you have any questions concerning EEOC or the ADA, please visit our web site at www.eeoc.gov or call 1-800-669-8000/1-800-669-6820



“... an employee wellness program is ‘voluntary’ as long as an employer neither requires participation nor penalizes employees who do not participate.”

EEOC Proposed ADA Regulations for Wellness Programs

The ADA prohibits employers from making disability-related inquiries or requiring medical examinations; however, employers may conduct “voluntary” medical examinations or obtain medical histories as part of an employee health program, including wellness programs. Previous EEOC guidance indicated that a wellness program is “voluntary” if an employer neither requires participation by employees nor penalizes employees who do not participate. However, no guidance addressed the extent to which incentives (or penalties) might affect the “voluntary” nature of a wellness program for ADA purposes. This lack of guidance created uncertainty regarding the application of the ADA to employee wellness programs, particularly in light of the EEOC’s pursuit of claims against employers asserting that certain employee wellness program designs violated the ADA.¹² For this reason, the EEOC issued proposed regulations on the application of the ADA on employee wellness programs to ensure that they are not to be used to discriminate based on disability. The EEOC has proposed the following:

- Employee wellness programs, including any disability-related inquiries and medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. In order to meet the standard, the program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome resulting in using criteria that violates the ADA.¹³
- For an employee's participation in a wellness program that is part of a group health plan to be deemed voluntary, a covered entity must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information.¹⁴
- For a wellness program to be considered voluntary, it should not deny coverage under any of its group health plans or particular benefits packages within a group health plan, or limit the extent of such coverage. The employer is not permitted to take any other adverse action against an employee who refuses to participate in an employee wellness program or fails to achieve certain health outcomes. Additionally, an employer may not retaliate or coerce an employee to participate in an employee wellness program or threaten to discipline an employee who does not participate.¹⁵

¹² Getting with the (Wellness) Program: EEOC Proposes New ADA Regulations for Wellness Programs (accessed September 23, 2015); available from <http://www.employmentlawmatters.net/2015/04/articles/ada/getting-with-the-wellness-program-eoc-proposes-new-ada-regulations-for-wellness-programs/>

¹³ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

¹⁴ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

¹⁵ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

- Limited incentives to participate in wellness programs can be offered however; the total allowable incentive available under all programs (both participatory programs and health-contingent programs) may not exceed 30% of the total cost of employee-only coverage, which generally is the maximum allowable incentive available under HIPAA and the Affordable Care Act for health-contingent wellness programs. In addition, including the proposed limit on incentives under the ADA does not relieve a covered entity of its obligation to comply with other employment nondiscrimination laws. For example, in addition to complying with incentive limits, employee wellness programs should not discriminate on the basis of race, sex, national origin, or age, or any other grounds prohibited by those statutes.¹⁶
- Lastly, it's important to note that employee wellness programs that do not include disability-related inquiries or medical examinations, such as those that provide employees with general health information and education programs are not subject to the incentive rules discussed under the EEOC's proposed regulations.¹⁷

Interaction between the ADA and HIPAA's Non-Discrimination Provisions

Employee wellness programs that are part of a group health plan administered by employers are subject to the **Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. 104-191, 110 Stat. 1936, enacted August 21, 1996)**, that provide safeguards to protect protected health information (PHI), as well as set limits and conditions on the use and disclosure of that information. PHI is information, including demographic data that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual (including, for example, address, birth date, or social security number), and that relates to an individual's past, present, or future physical or mental health or condition.¹⁸ It is important that employers keep these best practice tips in mind:

- Consistently review and strengthen your HIPAA privacy policies and practices to ensure employees' health information is protected.¹⁹
- Be sure your company's communication about your wellness program clearly outlines the program in detail and indicates that participation is voluntary; emphasize commitment and privacy to protecting any PHI obtained as part of the program.²⁰
- Ensure that your electronic security and filing systems used to store PHI are updated and secure.²¹
- Train staff accordingly with regard to handling medical information and complying with HIPAA regulations.²²

¹⁶ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

¹⁷ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

¹⁸ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

¹⁹ Wellness Programs and the Americans with Disabilities Act: The EEOC Weighs In (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>

²⁰ Wellness Programs and the Americans with Disabilities Act: The EEOC Weighs In (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>

²¹ Wellness Programs and the Americans with Disabilities Act: The EEOC Weighs In (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>

²² Wellness Programs and the Americans with Disabilities Act: The EEOC Weighs In (accessed September 23, 2015); available from <http://browndigital.bpc.com/publication/frame.php?i=266970&p=70&pn=&ver=flex>

Voluntary Standard



An employer may not require employees to participate in a wellness program, may not deny access to health coverage or limit coverage for non-participation, and may not take adverse action, retaliate or take similar action—such as intimidation or coercion—against employees.²³ A key component to making employee wellness programs voluntary is to ensure that costs of participation are minimal and accommodate employees with various health conditions and disabilities. This is why the incentives, disability-related inquiries and/or medical examinations should be limited. The EEOC wants to ensure that employee wellness programs remain affordable and beneficial for all those who wish to participate.²⁴

Health Promotion and Disease Prevention

Employee wellness programs allow workers to maintain their health and engage in activities and programs that will prevent disease or health complications. Incentive programs such as tobacco cessation programs can be implemented to encourage participation in employee wellness programs. Incentives can also include: financial and in-kind incentives, such as time-off awards, prizes, or other items of value.²⁵ The EEOC, however, wants to ensure wellness programs remain affordable and have proposed that it will only permit incentives of up to 30% of the total cost of the coverage in which the employee and any dependents are enrolled, but also provide that the limitation is applied with respect to health-contingent wellness programs which provides incentives based on reaching outcome related goals.²⁶ The primary purpose is to ensure that wellness programs do not become burdensome for individuals who do not meet certain health standards. The EEOC has also indicated that employee wellness programs that offer incentives to encourage employees to disclose medical information, must also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that he or she is under the care of a physician and that any medical risks identified by that physician are under active treatment.²⁷

“A key component to making employee wellness programs voluntary is to ensure that costs of participation are minimal and accommodate employees with various health conditions and disabilities.”

²³ Getting with the (Wellness) Program: EEOC Proposes New ADA Regulations for Wellness Programs (accessed September 23, 2015); available from <http://www.employmentlawmatters.net/2015/04/articles/ada/getting-with-the-wellness-program-eeoc-proposes-new-ada-regulations-for-wellness-programs/>

²⁴ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

²⁵ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

²⁶ Getting with the (Wellness) Program: EEOC Proposes New ADA Regulations for Wellness Programs (accessed September 23, 2015); available from <http://www.employmentlawmatters.net/2015/04/articles/ada/getting-with-the-wellness-program-eeoc-proposes-new-ada-regulations-for-wellness-programs/>

²⁷ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

Reasonable Accommodation

Under the ADA, regardless of the wellness program, reasonable accommodations should be provided as long as there is not undue hardship to enable employees with disabilities to earn whatever financial incentive an employer offers for participation in a wellness program. Providing a reasonable alternative standard and notice to the employee of the availability of a reasonable alternative under HIPAA and the Affordable Care Act as part of a health-contingent program, would likely fulfill a covered entity's obligation to provide a reasonable accommodation under the ADA. An example of an alternative standard would be: providing an alternative test or certification requirement so that an employee with a disability that makes drawing blood dangerous can participate and earn the incentive due to the inability to complete a biometric screening. In addition to providing an alternative standard toward earning financial incentives, an employer would also be obligated to provide a sign language interpreter so that an employee who is deaf and needs an interpreter to understand the information communicated in a nutrition class for example, could earn the incentive as long as providing the interpreter would not result in undue hardship to the employer. Similarly, an employer would, absent undue hardship, have to provide written materials that are part of a wellness program in an alternate format, such as in large print or braille format, for someone with vision impairment.²⁸

Disclosure & Confidentiality

Employers are required to provide employees notice explaining what medical information will be obtained regarding employee wellness programs, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information. More importantly, medical records developed during the course of participation in a wellness program, should be:

- Maintained in a confidential manner and must not be used for the purpose of limiting insurance eligibility.²⁹
- Provided in aggregate form and does not disclose, and is not reasonably likely to disclose, the identity of specific individuals of specific information regarding their disability or medical condition.³⁰
- Protected and employers, as well as sponsored health programs, are responsible for ensuring proper disclosure and confidentiality.³¹



²⁸ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

²⁹ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

³⁰ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

³¹ Federal Register: Amendments to Regulations Under the Americans With Disabilities Act (accessed September 23, 2015); available from <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>

Legal Ramifications

- *EEOC v. Ford Motor Company*

In the case of *Seff v. Broward County* which is one of the only reported cases involving the relationship between the ADA and employee wellness programs, a former employee who incurred surcharges for his refusal to participate in the company's wellness program claimed it violated the ADA by subjecting him to financial penalties as a result of not wanting to complete a health risk assessment and biometric screening designed to identify employees who had one of five conditions: asthma, hypertension, diabetes, congestive heart failure, or kidney disease. The U.S. District Court for the Southern District of Florida held that the program fell within the ADA's guidelines as the county demonstrated that the employee only faced a \$20 sanction for non-participation as opposed to being deemed ineligible for health coverage. The court held that the program was a term in Broward's group health plan; the court concluded that it did not need to address the "voluntariness" of the program and subsequently granted summary judgment to Broward. While Broward County's victory is encouraging to employers offering or contemplating offering mandatory wellness programs, it remains unclear whether the final ruling in this case is supported by the EEOC.³²

In conclusion, while employers are not required to comply with the proposed rules at this time, it would be wise to review wellness programs now in light of these proposed rules, particularly for wellness programs that use stricter standards or impose larger penalties on their prospective participants. In particular, employers should review the financial incentives currently provided under their wellness programs to see where they fall in relation to the 30% limitation of the new rules.³³

³² Do Penalties in Mandatory Wellness Programs Violate ADA's Title I? (accessed September 23, 2015); available from <http://www.bna.com/penalties-mandatory-wellness-n17179927121/>

³³ Getting with the (Wellness) Program: EEOC Proposes New ADA Regulations for Wellness Programs (accessed September 23, 2015); available from <http://www.employmentlawmatters.net/2015/04/articles/ada/getting-with-the-wellness-program-eeoc-proposes-new-ada-regulations-for-wellness-programs/>

Scenarios for Dealing with Employee Wellness Programs

The following scenarios reflect how employee wellness programs should be implemented.

Scenario 1: An employer of a manufacturing company offers employees a financial incentive to attend an exercise class. John, an employee of company who is deaf, would like to participate. The employer provides a sign language interpreter so that John can understand the information communicated in the class possibly earn the incentive.

Scenario 2: An employer of a social networking firm provides written materials that are part of a wellness program in an alternate format for Sue, who has a visual impairment. Materials were provided in audio and large print formats in order to allow her to take part in a health exercise class.

Scenario 3: Max works at a marketing firm and would like to take part in his employee wellness program. However, due to his disability, he is unable to complete the biometric screening process, which includes several blood draws. An alternative test was used to allow him to participate and earn the incentive.

Information and Resources on Employee Wellness Programs

- Notice of Proposed Rule Making (NPRM) by EEOC, <https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act>
- EEOC Small business fact sheet: NPRN regarding the ADA and employee wellness programs, http://www.eeoc.gov/laws/regulations/facts_nprm_wellness.cfm
- Five Best Practices for Workplace Wellness, <http://www.shrm.org/hrdisciplines/benefits/articles/pages/best-practices-wellness-guide.aspx>
- The ACA, The ADA, And Wellness Program Incentives, <http://healthaffairs.org/blog/2015/05/13/the-aca-the-ada-and-wellness-program-incentives/>
- Do Penalties in Mandatory Wellness Programs Violate ADA's Title I, <http://www.bna.com/penalties-mandatory-wellness-n17179927121/>
- Workplace Wellness and Disability, <http://askearn.org/exchange/workplace-wellness-and-disability/>