CLIENT ALERT: EEOC Issues Final Rules Permitting Some Employee Incentives For Participating In Employer Wellness Programs

On May 16, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") issued final rules that describe how Title I of the Americans with Disabilities Act ("ADA") and Title II of the Genetic Information Nondiscrimination Act ("GINA") apply to wellness programs offered by employers. The rules provide guidance on the extent to which employers may use incentives to encourage employees and their spouses to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations.

Many employers offer workplace wellness programs in order to encourage their employees to live healthier lifestyles. The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss programs, smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals.

The ADA and GINA generally prohibit employers from obtaining and using information about the health conditions of employees (as well as their family members and spouses). Under both laws, however, exceptions exist that allow employers to ask health-related questions and conduct medical examinations—e.g., screenings to determine risk factors—if the employer is providing health or genetic services as part of a voluntary wellness program.

Before the final rules were issued, the EEOC's ADA regulations did not define the term "voluntary" or explain what constitutes a "health program." The regulations also did not indicate whether the ADA allows employers to offer incentives to encourage employees to participate in such programs. Thus, the EEOC sought to provide guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions and/or undergo medical examinations.

The final ADA rule provides that wellness programs that are part of a group health plan and seek information about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The final GINA rule provides that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage — the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children. In addition, the final rules apply to all workplace wellness programs, including those in which employees or their family members may participate without also enrolling in a particular health plan.

The rules also clarify that the ADA and GINA provide safeguards for sensitive health information. The ADA regulation requires that employers provide notice explaining to employees what information will be collected as part of the wellness program. Employers must also disclose who the information will be shared with, the purpose for sharing the information, the limits on the disclosure and the way in which the information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members. As expressed in the

interpretive guidance published along with the final rules, some best practices for ensuring confidentiality pursuant to the rules include: adopting and communicating clear policies pertaining to confidentiality; properly training employees who handle confidential information; encrypting health information; and providing prompt notification to employees and their family members if breaches occur.

The new provisions contained in the final rules apply prospectively to wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of incentives permitted under this rule. For example, if the health plan that is used to calculate the permissible incentive limit begins on January 1, 2017, that is the date on which the rules on incentives and the notice requirements apply. If the plan begins July 1, 2017, the provisions on incentives and notice requirements will apply to the wellness program as of that date. The remaining provisions—which simply clarify existing obligations—apply both before and after publication of the final rule.

Ryan Jaziri is an attorney at Morgan, Brown & Joy, LLP, and practices extensively before the EEOC and state and local anti-discrimination agencies. He may be reached at 617-523-6666 or at rjaziri@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was originally published on May 24, 2016.