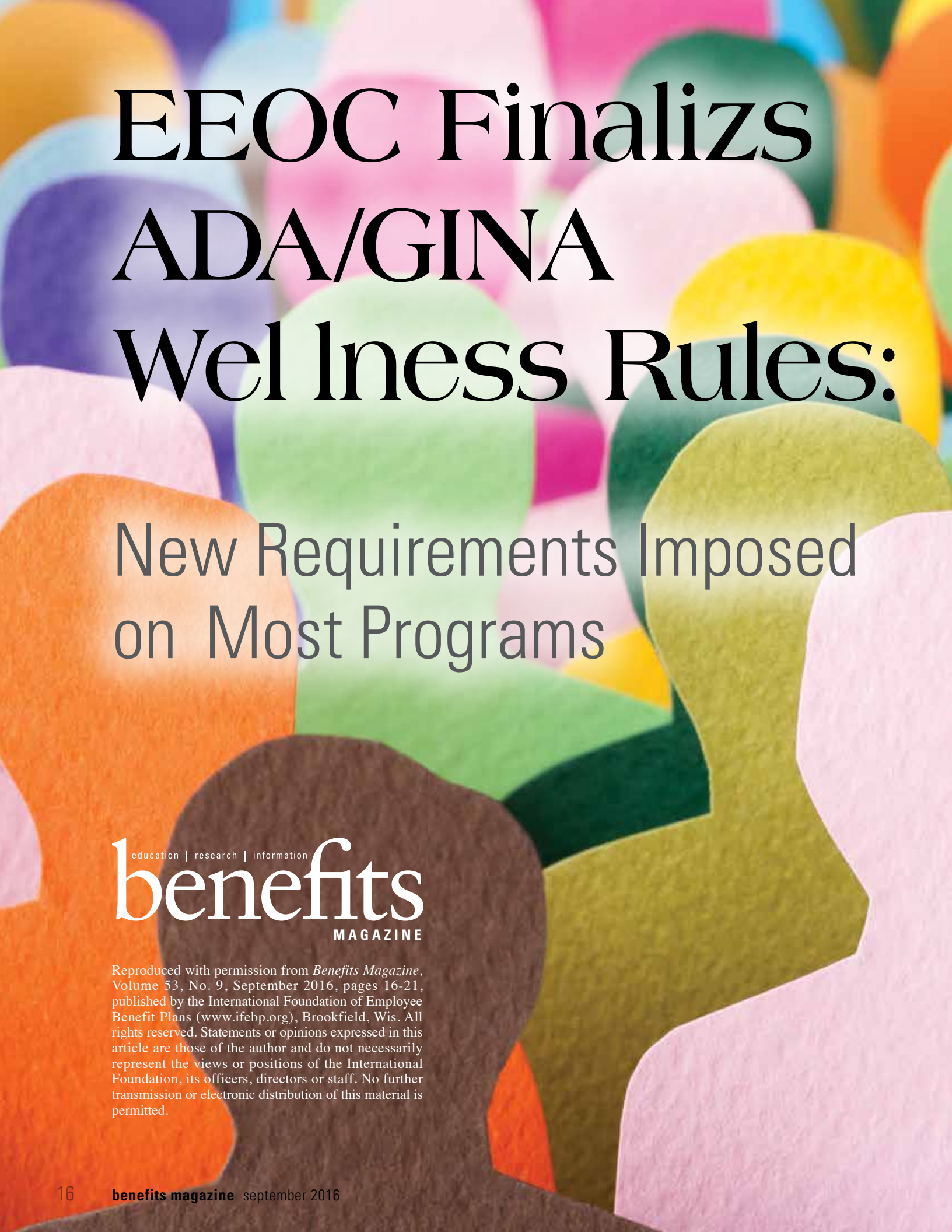

EEOC Finalizs ADA/GINA Wel lness Rules:

New Requirements Imposed on Most Programs

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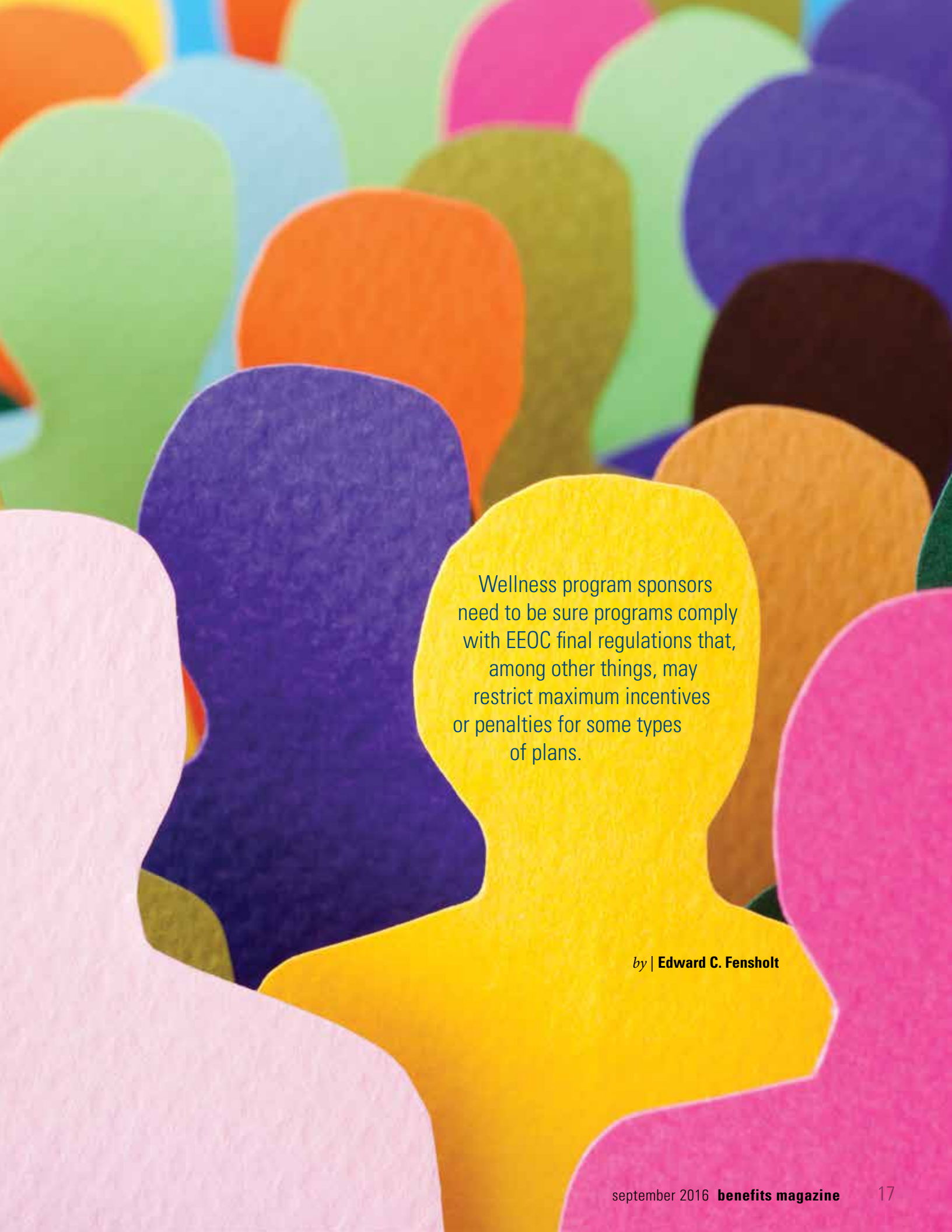

Wellness program sponsors need to be sure programs comply with EEOC final regulations that, among other things, may restrict maximum incentives or penalties for some types of plans.

by | **Edward C. Fensholt**

The Equal Employment Opportunity Commission (EEOC) made a belated but substantial leap into the workplace wellness program waters earlier this year, issuing two sets of final regulations—one under the Americans with Disabilities Act (ADA) and one under the Genetic Information Nondiscrimination Act (GINA).

While employers have become relatively familiar (and mostly comfortable) with the wellness program rules under the Affordable Care Act (ACA) and Health Insurance Portability and Accountability Act (HIPAA), the EEOC rules graft additional requirements onto the most common wellness arrangements. The EEOC rules apply to a broader swath of programs and, for some of them, constrict the maximum incentives or penalties the ACA/HIPAA rules would otherwise allow.

The effective date of the EEOC regulations for wellness programs offered under health plans is the first day of the plan year beginning on or after January 1, 2017. Where the program is not offered under a health plan, the rules' effective date is the first day of the plan year (beginning in 2017) of the health plan whose cost is used to determine the EEOC-imposed limit on incentives, as discussed below.

The EEOC's Wellness Program Universe

Unlike the ACA/HIPAA wellness program rules, which apply to wellness programs that either are themselves health plans or are offered as part of health plans, the final EEOC rules apply more broadly. The ADA-related rules apply to any wellness program that includes a medical examination or disability-related inquiry (ME/DRI), even if the program is offered to individuals not enrolled in the employer's health plan. The GINA-related rules apply to programs, essentially health risk assessments, under which employees are offered incentives for a spouse's participation.

The Final ADA Rules

Most employers know ADA imposes restrictions on the employer's ability to conduct ME/DRIs of employees. That theme is reflected in the ADA-related rules governing wellness programs.

Where a wellness program involves an ME/DRI, special requirements and restrictions apply. Because most wellness programs involve some sort of ME/DRI, such as a biometric screening or a health risk questionnaire whose questions could reveal an ADA-protected disability, most programs will have to satisfy the EEOC rules, even if they must also comply—and do comply—with the ACA/HIPAA rules. The key elements of the ADA rules are:

- A prohibition on requiring the employee to participate or denying coverage under a health plan (or under a coverage option under a plan) for an employee who chooses not to participate. The EEOC has lost a court case over this prohibition but in the regulations is standing by its view. The author notes that this prohibition appears to blow up health reimbursement arrangements under which the only benefit is an incentive offered in connection with an ME/DRI. For example, the EEOC would appear to have a problem with a health reimbursement arrangement providing a $250 benefit to employees who complete a biometric screening but no benefit for employees who do not.
- A notice requirement. Employees submitting to the ME/DRI must receive a notice describing the medical information that will be obtained and what it will be used for. The EEOC has supplied a model notice, available at www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm.
- Where the employer does not conduct the ME/DRI itself, health-related information developed under the wellness program about an employee may be shared with the employer only in aggregate, de-identified terms. However, the employer may receive information sufficient to allow it to administer the wellness program (e.g., the employer might need to know who qualified for an incentive so it can administer the incentive through payroll).
- Like other employee-related medical information falling under ADA's purview, medical information developed under the wellness program must, if it makes its way into the employer's hands, be maintained in the employee's separate medical file.
- A limit on incentives:
  —If the employer offers a single health plan, the total of all incentives or penalties related to the employee's participation in the wellness program cannot exceed, in the aggregate, 30% of the total cost (employer- and employee-paid portions) of employee-only coverage. *This limit applies whether the program*

is offered only to health plan enrollees or to enrollees and nonenrollees.

—If the employer offers multiple plans or options and nonenrollees may participate in the program, the limit related to the employee's participation is 30% of the total cost of employee-only coverage for the least expensive plan or option. But if only health plan enrollees may participate in the wellness program, the limit related to the employee's participation is 30% of the cost of employee-only coverage for the option in which the employee is enrolled.

—If an incentive is "in kind," as opposed to cash or an incentive described as cash value (such as a premium adjustment under a health plan), the employer must assign a reasonable value to the incentive.

Note that the ADA-related rules do not limit incentives that may be offered for a spouse's or other dependent's participation in a wellness program, even if it involves an ME/DRI of the spouse or dependent. But the GINA-related rules may impose limits or even outright bar the incentive.

Final GINA Rules

GINA restricts an employer from requesting genetic information—which includes family medical history—from employees and job applicants. Most relevantly, although an employer may *ask* an employee for his or her family medical history as part of a wellness program, the employer can't offer incentives to an employee in exchange for his or her provision of *genetic information*, which is defined by GINA to include family medical history.

Nor may the employer ask for the information prior to or in connection with the employee's health plan enrollment, even if no incentive is offered.

Following GINA's enactment, most wellness programs simply stopped asking employees for family medical history. Nevertheless, some programs continued to offer incentives to an employee in exchange for the *spouse's* participation in a health risk assessment. This created a potential problem because information about the spouse's health history or status is, by definition under GINA, *family medical history* with respect to the employee, even though the employee and spouse are not blood relatives.

Of course, employers could moot the issue by offering spouses a health risk assessment without an incentive. But under many health plans, employees' spouses are the most prolific consumers of health care. Employers want to obtain biometric data on the spouses and believe they get the biggest bang for their biometric buck by providing incentives for spouses to participate.

The EEOC's final GINA regulations permit employers to offer incentives to employees in exchange for a spouse's participation in a typical health risk assessment, such as one involving a questionnaire, a medical exam (e.g., a biometric screening) or both, as long as the employer meets specific requirements very similar to the conditions the EEOC imposes on wellness programs under its final ADA-related rules:

- The employer cannot require a spouse's participation in the health risk assessment nor deny coverage to the employee or the spouse or other dependent under a health plan—or even a coverage option under a plan—based on the spouse's refusal to participate.
- The employer can't offer an incentive in exchange for the spouse's disclosure of his or her own genetic information, such as his or her own family medical history, or about the diseases or disorders (or family medical history) of the employee's children. A spouse may supply this information voluntarily, just not in exchange for an incentive. (The GINA-related rules make clear that while an employer can offer wellness program participation to employees' children, the employer cannot offer inducements

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in exchange for information about the children's diseases that have been diagnosed or could reasonably be diagnosed. That information is genetic information, or family medical history, with respect to the employee. This seems to call into question an employer's ability to offer incentives to an employee, including "points" under a wellness program, for his or her children's participation in a typical health risk assessment that might reveal a disease.)

- The spouse must authorize the program's collection of information about his or her health condition. The authorization may be electronic, but it must describe the type of genetic information that will be obtained, the purposes for which it will be used and restrictions on the information's disclosure.
- The GINA-related rules limit the size of the incentives that may be offered in exchange for the spouse's participation in a health risk assessment. Where an employer offers employees and spouses the opportunity to participate in the wellness program, the maximum incentive for the employee is the same "30% of the total cost of employee-only coverage" described above in the discussion of the ADA-related rules. The maximum incentive for the spouse is an additional amount that is also capped at 30% of the total cost of employee-only coverage. (All of the same rules described above about how the 30% is determined where there are multiple plans or options, or where the employee and spouse are not enrolled in the employer's health plan, apply here too.)
- Genetic information obtained via the health risk assessment may be shared with the employer only in aggregate, de-identified terms. Identifiable genetic information may be shared only with the spouse and his or her medical providers.

takeaways

- EEOC wellness plan regulations take effect the first day of the plan year beginning in 2017.
- Limits on wellness incentives vary depending on the type of plan.
- Most wellness programs involve a medical exam or disability-related inquiry such as a biometric screening or a health risk questionnaire and so must satisfy the EEOC's final rules.
- GINA-related rules may impose limits on or bar an incentive offered for a spouse's or other dependent's participation in a wellness program.
- An employer can't deny health coverage to an employee or his or her spouse or other dependent based on the spouse's refusal to participate in a wellness initiative.
- An organization needs to be sure each component of its wellness program complies with sometimes-competing sets of rules.

What Does All This Mean for Contemporary Wellness Programs?

Wellness programs come with a variety of features, with some looking merely for employees' participation in activities like education programs and health screenings. Others encourage employees to join an activity like walking, running or biking. And some programs ask employees to achieve certain health-related outcomes. Some programs allow and even encourage spouses and other dependents to participate.

With the EEOC's final regulations, the workplace wellness universe now has multiple similar, overlapping, but not identical sets of rules regulating specific (and potentially different) aspects of these programs.

To analyze a workplace wellness program today, an organization must disassemble the program into its various components and analyze each component under the sometimes-competing sets of rules to ensure that no part runs afoul of any of the rules. Because of the breadth of these rules, it will be the rare, toothless, almost casual wellness program that doesn't have to comply with at least some of these new EEOC regulations.

For example, the new rules will clearly impact:

- **Programs that involve a variety of activities and standards and an array of awards** and that also include a medical examination or disability-related inquiry such as a health risk assessment. The employer must separately consider each of the program's components, applying the ACA/HIPAA rules to some and the EEOC rules to others and, likely, to at least some of the same components analyzed under the ACA/HIPAA rules.
- **Programs where incentives are expressed as points or other in-kind awards.** Where these points are redeemable for cash, cash equivalents (like gift cards) or prizes, the employer must ensure the value of these

points are considered when analyzing compliance with rules imposing limits on incentives.

- **Programs where points are redeemable for prizes and also applied to reduce employee contributions under a health care plan.** For example, some programs award points for participating in healthy activities or biometric screenings or for achieving certain health status outcomes. Once the points reach a certain level, the employee also qualifies for premium or cost-sharing reductions under the employer's health plan. For employees who reach the relevant thresholds, the points are pulling double duty, and their enhanced value must be taken into account in applying any applicable limit on incentives.
- **Incentives currently being earned and that will be awarded or applied in 2017.** Even though the incentives may be earned prior to the first day of the health plan's plan year beginning in 2017, the new rules' incentive limitations might apply to these incentives not later than the first day of that plan year. Clarification from the EEOC on this point would be helpful.
- **Programs offered to employees not eligible for or enrolled in the employer's health plan, particularly where the employer offers a very inexpensive coverage offering.** Maximum incentives under the wellness program will be severely constrained by the EEOC rules. Take the case, for example, of an employer that offers multiple plans or coverage options, including a bare-bones "minimum essential coverage" offering (e.g., a preventive-care-only plan where the total cost of employee-only coverage is, say, $1,200 per year). If the employer offers a wellness program involving an ME/DRI and offers the program to employees not enrolled in one of the employer's plans, the maximum aggregate incentive related to any employee's participation in the wellness program will be $360.

bio

Edward C. Fensholt, J.D., is senior vice president and director of compliance services for Lockton Companies. He has 28 years of experience as an attorney, 22 of them concentrating in the area of ERISA and other aspects of employee benefits law. He previously was a partner and director of compliance services at Palmer & Cay, a managing principal and in-house compliance attorney at DeFrain Mayer and a partner in the employee benefits group at Spencer Fane Britt & Browne. Fensholt earned a B.S. degree in journalism from the University of Kansas and a J.D. degree from the University of Kansas School of Law.