



LEHR MIDDLEBROOKS
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**EEOC PROPOSED WELLNESS PROGRAM REGULATIONS: WILL THEY COME TO
FRUITION? WHAT WOULD BE THE EFFECT ON VACCINATION INCENTIVE
PROGRAMS?**

On January 7, 2021, the EEOC announced that it had sent Notices of Proposed Rulemaking (NPRMs) on wellness programs under the ADA and GINA to the Office of Management and Budget to publish in the Federal Register. As of the date of this writing, these notices have not yet been published in the Federal Register. If they are, the public will have 60 days to comment. Until they're officially published (if they're officially published), you may access the current drafts [here \(ADA\)](#) and [here \(GINA\)](#). To the immediate relevant point of incentivized vaccination programs as a participation-only wellness program, the draft proposals would limit the incentives to *de minimis* rewards like water bottles or gift cards of "modest value." Incentives that would not be *de minimis* would include airline tickets, an annual gym membership, or a \$50/month discount on health insurance premiums.

As you may have inferred by the date of the activity, the NPRMs were drafted by the Trump administration. As such, they're the subject of a regulatory freeze (a common procedure for new presidents). They won't be published as cited above unless they're approved by an agency head appointed by President Biden. So while there's no indication that the Biden administration thinks that this proposal misses the mark generally or in any particular aspect, there's significant concern that there won't be guidance even when vaccines are readily available.

To that end, on February 1, 2021, a coalition of business groups wrote EEOC Chairperson Charlotte Burrows to urge her to issue guidance specific to incentives employers may offer for COVID-19 vaccination. The signatories included the U.S. Chamber of Commerce, the National Association of Manufacturers, the National

Association of Landscape Professionals, Blue Cross Blue Shield Association, the Society for Human Resource Management, and over thirty more employer organizations. We join them in hoping for definitive guidance. Until then, we think \$50 is a good general safe harbor for an incentive value likely to be found permissible for such programs.

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