

EEOC Freezes Rules on Wellness Programs and Union 'Official Time'

SHRM | By Lisa Nagele-Piazza, J.D., SHRM-SCP | 2/18/21



In response to a White House directive, the Equal Employment Opportunity Commission (EEOC) recently paused several of the prior administration's proposed and pending rules.

On Jan. 20, President Joe Biden's first day in office, the White House asked all federal agencies to freeze proposed regulations and those with pending effective dates. The president's appointees should "have the opportunity to review any new or pending rule," said Biden's chief of staff, Ronald Klain, in a letter to the leaders of federal departments and agencies.

In response, the EEOC froze a set of proposed rules regarding voluntary wellness programs and a regulation on the agency's union "official time" rule. The previously proposed wellness rules would limit the value of incentives employers may use to encourage employee participation in programs that collect employees' health data. The agency's union "official time" rule would limit the on-the-clock time federal employees who are labor union representatives can spend aiding co-workers with discrimination complaints.

"The next steps for each rule are under consideration," according to the EEOC website.

We've rounded up resources and articles from *SHRM Online* and other trusted outlets on the news.

Union 'Official Time' Rule

The EEOC announced that its union "official time" rule will be withdrawn from *The Federal Register*. Commission members had voted 3-2 to end the practice of paying federal workers who are union representatives for the work time they spend handling discrimination complaints. "The commission is doing this because it believes that the relevant labor relations statute articulates the best policy for determining if someone receives official time when they act for a labor organization and the commission does not want its regulations to undermine this approach," according to the initial proposal. Critics of the rule said it would deprive federal workers of valuable resources on how to navigate the EEOC complaint process. The final rule was announced on Jan. 7 but wasn't published in *The Federal Register* before the White House's Jan. 20 directive on freezing pending regulations.

Wellness Program Incentive Limits

Under the now-paused wellness program proposals, employers could comply with the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) only if they offer no more than a minimal (or "de minimis") incentive to encourage participation in wellness programs outside of the group health plan, if those programs collect employee health data. The proposed ADA rule stated that it "adopts the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty," and so nongroup wellness programs that include disability-related inquiries or medical exams "may offer no more than de minimis incentives to encourage employees to participate." The EEOC's proposed GINA rule used similar language.

Future of Regulations Uncertain

Although the EEOC's proposed rules on wellness program incentives have been paused, the ultimate fate of the proposals is unclear. Employers should look for further clarity from the EEOC and the Biden administration on wellness programs.

Update to Conciliation Program Takes Effect

The EEOC's final rule on its voluntary conciliation program still took effect on Feb. 16. The program offers employers and employees an alternative to litigation for resolving workplace discrimination complaints, and the final rule provides more information to employers during the conciliation process. The final rule was published in *The Federal Register* on Jan. 13. "Any conciliations that begin after that date will be conducted in accordance with the rule," an EEOC spokesperson told Bloomberg Law.

Burrows Named Chair of EEOC

Biden recently named Charlotte Burrows as chair of the EEOC. Burrows has served as an EEOC commissioner since 2015, having been initially nominated by former President Barack Obama. In 2019, she was renominated and unanimously confirmed for a second term ending in 2023. The EEOC has three Republican commissioners—Janet Dhillon, Keith Sonderling and Andrea Lucas—and two Democratic commissioners—Burrows and Jocelyn Samuels. Samuels is the agency's new vice chair. The EEOC enforces federal laws that prohibit employment discrimination, such as the ADA, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, and promulgates rules governing employer-sponsored wellness programs.