




# Employee Wellness Programs

How the new regulations for employers  
impact insurers

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# The Tale of Two Wellness Plans

- Sources of regulation vary depending on the type of employer and whether the plan is a "Group Health Plan" ("GHP"):

	GHP	Non-GHP
ACA	√	
HIPAA	√	
ERISA	√*	
COBRA	√**	
ADA	√	√
GINA	√	√
FLSA	√	√
IRC	√	√
NLRA	√	√
State Laws	<i>sometimes</i>	√

\*Church and non-federal governmental Group Health Plans are exempt from ERISA. They are always subject to state law.

\*\*Church plans are also exempt from COBRA.

# When isn't a Wellness Plan a GHP?

- Generally speaking, a wellness plan is not a GHP if it:
  - Is offered to all employees regardless of their enrollment in the employer's health plan, and
  - Does not provide any "medical care."
- Example:
  - A wellness program would not be a GHP if employees receive \$100 for attending a class on nutrition or if employees receive a free gym membership.

# When is a Wellness Plan a GHP?

- Common things that will cause a wellness plan to become a Group Health Plan:
  - Providing “medical care”
    - Health Risk Assessments (i.e. health surveys) that provide advice and analysis with personalized coaching
    - Immunizations (e.g., flu shots)
    - Blood pressure screenings
    - Biometric screenings (e.g., BMI, cholesterol)
  - Premium Discounts or Surcharges:
    - Example: Providing a medical premium discount to employees who complete health screenings.

# Affordable Care Act (ACA)

- Under the ACA, all Group Health Plans must meet certain requirements, such as:
  - Providing free preventive care for a mandatory list of services (unless plan is grandfathered);
  - Providing participants with a Summary of Benefits and Coverage describing the plan; and
  - Complying with the HIPAA/ACA wellness program rules.

# Affordable Care Act (ACA) (cont'd)

- It is important that if your wellness plan is a GHP, that it is carefully structured to comply with these rules.
  - If a GHP, then ACA requirements apply. Technically, this means it must be integrated with major medical coverage that provides preventive care without cost sharing or monetary limits.
  - Easiest way to limit risk is to limit participation in the wellness program to those employees who participate in your major medical coverage.

# HIPAA Non-Discrimination Requirements

- HIPAA generally prohibits a GHP from discriminating among similarly situated individuals based on their health status.
- Plans usually cannot charge individuals different premiums based on the presence or absence of a health factor.
  - It makes no difference whether a monetary incentive tied to a wellness program is expressed as a premium “discount” or a “surcharge.”

# HIPAA Non-Discrimination Requirements (cont'd)

- Different requirements apply depending upon whether the wellness program is:
  - a “participatory” program, or
  - a “health-contingent” program.

# HIPAA – Participatory Program

- A “participatory program” is one that does not provide an award or does ***not include any conditions on obtaining a reward based on satisfying a standard*** related to a health factor.
- Participatory programs are the only programs that can be offered on individual market (but see exception for tobacco use).
- Examples:
  - A program that reimburses all or part of the cost of fitness center membership;
  - Diagnostic testing program that provides a reward for participation rather than outcome;
  - A program that provides a reward to employees for attending a monthly no-cost health education seminar.

# HIPAA – Participatory Program (cont'd)

- For *participatory programs*, the regulations require only that the program be *available to all similarly situated individuals regardless of health status*.
  - If factors other than health status limit a participant's ability to participate, a participatory wellness program does not discriminate based on a health factor.
    - e.g., if an individual cannot attend a seminar on the weekend because he has a conflict, then there is no discrimination based on a health factor.
    - However, if an individual cannot attend a seminar due to health reasons (e.g., because he is on disability at the time), then an accommodation would be necessary.

# HIPAA – Health-Contingent Programs

- A “health-contingent program” is one that requires an individual to ***satisfy a standard related to a health factor*** (or requires the participant to ***do more than a similarly situated individual*** to obtain the same reward because of a health factor).
  - Health-contingent programs can only be offered in group market

# HIPAA – Health-Contingent Programs (cont'd)

- There are two types of health-contingent programs:
  - **Activity-only:** Requires performing or completing an activity related to a health factor.
    - e.g., waiving the annual deductible for employees who participate in a walking program.
  - **Outcome-based:** Requires attaining or maintaining a specific health outcome.
    - e.g., providing a premium discount to employees who have a body mass index (BMI) within a specified range, or imposing a premium surcharge on employees who use tobacco.

# HIPAA – Health-Contingent Programs

## Condition #1: Frequency of Opportunity

- Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year.

# HIPAA – Health-Contingent Programs

## Condition #2: Size of Reward

- The ACA (health care reform) increased the maximum rewards/penalties available under health-contingent programs, from 20% of the health plan premium, to:
  - 50% for programs designed to prevent or reduce tobacco use.
    - Note: Issuers in the individual and small group market can provide a 50% surcharge for tobacco use only in connection with a health-contingent wellness program (see 45 CFR 147.102(a)(1)(iv)).
  - 30% for all other health-contingent wellness programs.

# HIPAA – Health-Contingent Programs

## Condition #2: Size of Reward (cont'd)

### •Reward Example 1:

- Annual premium for employee-only coverage is \$6,000, of which employer pays \$4,500 and employee pays \$1,500.
- \$600 reward for health-contingent wellness program and \$2,000 surcharge for tobacco users.
- Since the total of all rewards is \$2,600 (i.e., \$600 + \$2,000 = \$2,600), the reward does not exceed 50% of the total annual cost of employee-only coverage (i.e., \$3,000). When tested separately, the \$600 reward for wellness program unrelated to tobacco use does not exceed 30% of the total annual cost of employee-only coverage (\$1,800).
- Thus, the rewards comply with the wellness program reward limits.

# HIPAA – Health-Contingent Programs

## Condition #2: Size of Reward (cont'd)

### •Reward Example 2:

- Total annual premium for employee-only coverage (including both employer and employee contributions) is \$5,000.
- The plan provides a \$250 reward to employees who complete a health risk assessment, without regard to issues identified through the assessment (i.e., a participatory wellness program).
- The plan offers the “Healthy Heart” program, which is a health-contingent wellness program with a \$1,500 reward.
- Although the \$1,750 total reward (i.e., \$250 + \$1,500) exceeds 30% of the cost of employee-only coverage (i.e.,  $\$5,000 \times .3 = \$1,500$ ), only the reward for the health-contingent wellness program (i.e., \$1,500) is taken into account.
- In other words, the \$250 for the participatory wellness program is irrelevant because participatory programs are not subject to the 30% limit under HIPAA, and the \$1,500 health-contingent reward is acceptable.

# HIPAA – Health-Contingent Programs

## Condition #2: Size of Reward (cont'd)

**•CAUTION – Above examples may not comply with ADA (discussed later) or with ACA “pay or play” affordability requirements for large employers.**

- For employers with 50 or more FTEs, the employer may pay a penalty under the ACA if the premium charged to employees for health coverage is not “affordable.”
  - Employers can use the reduced premium (counting the wellness incentive) to calculate “affordability” only to the extent the wellness program financial incentive is contingent on tobacco use.
  - If the financial incentive is contingent on standards other than tobacco use (such as a reward for completing a health risk assessment or biometric screenings), those discounts will be ignored when calculating whether the premium charged to the employee is affordable.

# HIPAA – Health-Contingent Programs

## Condition #3: Reasonable Design

- Health-contingent wellness programs ***must be reasonably designed*** to promote health or prevent disease.
- A wellness program is reasonably designed if it:
  - has a ***reasonable chance of improving the health of, or preventing disease*** in, participating individuals;
  - is not overly ***burdensome***;
  - is not a ***subterfuge for discrimination*** based on a health factor; and
  - is not ***highly suspect*** in the method chosen to promote health or prevent disease.

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard

- ***Uniform Availability:*** The full reward must be available to all similarly situated individuals who satisfy a reasonable alternative standard.
  - A participant may take some time to request, establish, and satisfy a reasonable alternative standard; the same, ***full reward must be provided to that individual as is provided to individuals who meet the initial standard.***

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard (cont'd)

- ***Reasonable Alternative***: Plans are not required to establish a reasonable alternative standard before an individual's request, as long as a reasonable alternative standard is provided upon request (or the condition is waived).
  - Plans can determine a reasonable alternative standard ***for an entire class or on an individual-by-individual*** basis depending on the facts and circumstances.

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard (cont'd)

- Facts and circumstances determine if an alternative is reasonable, including:
  - If the reasonable alternative standard is a ***completion of an education program, the plan must make the program available or assist the employee in finding a program.***
    - The plan cannot require the individual to find a program unassisted and ***may not require an individual to pay the cost of the program.***

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard (cont'd)

- Facts and circumstances (cont'd):
  - The ***time commitment must be reasonable.***
    - e.g., requiring nightly attendance at a one-hour class would be unreasonable.
  - If the reasonable alternative standard is a ***diet program***, the ***plan must pay any membership or participation fee***, but does not have to pay for food.

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard (cont'd)

- Facts and circumstances (cont'd):
  - If the individual's personal physician states that a plan standard is not medically appropriate for the individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician regarding medical appropriateness.
    - The recommendation of the individual's personal physician must be followed under all circumstances.
    - Plans and issuers can impose their standard cost sharing under the plan for medical items and services furnished based on a physician's recommendations.

# HIPAA – Health-Contingent Programs

## Condition #4: Uniform Availability and Reasonable Alternative Standard (cont'd)

- Different Reasonable Alternative in Subsequent Years:
  - Plans cannot *cease to provide a reasonable alternative standard simply because a person did not satisfy the initial standard*, and plans must continue to offer a reasonable alternative standard if the person fails to meet the standard in subsequent years.
  - The alternative in subsequent years may be the same or different.
    - e.g., for tobacco program, reasonable alternative in year 1 may be educational program. If employee still does not quit, reasonable alternative in year 2 may be nicotine replacement therapy.

# HIPAA – Health-Contingent Programs

## Condition #5: Notice of Availability of Reasonable Alternative Standard

- ***Notice of Reasonable Alternative Standard:*** Plans and issuers must disclose the availability of a reasonable alternative standard for the reward (and, if applicable, the possibility of a waiver) in ***all plan materials*** describing the terms of the health-contingent wellness program. A model notice is available.
  - The disclosure must include ***contact information*** for obtaining the alternative and ***a statement that a personal physician's recommendations will be accommodated.***

# HIPAA – Health-Contingent Programs

## Condition #5: Notice of Availability of Reasonable Alternative Standard (cont'd)

- Disclosure of the reasonable alternative standard is ***not required in plan materials that merely mention that a wellness program is available, but do not describe its terms*** (e.g., an SBC).
- For outcome-based wellness programs, this notice must also be included in any notice that an individual did not satisfy the initial standard. The regulations include sample language that plans and issuers can use for the disclosure.

# HIPAA - Health-Contingent Programs Reasonable Alternative Standard

- Additional requirements for reasonable alternative standards apply depending on whether a program is:
  - Activity-only; or
  - Outcome-based.

# HIPAA - Reasonable Alternative Standard – Additional Requirements for Activity-Only Wellness Programs

- ***Activity-Only Programs require Reasonable Alternative Standard for Medical Reasons Only:***

- Activity-only programs only must make a reasonable alternative standard (or waiver) available to individuals for whom, for that period, it is either ***unreasonably difficult due to a medical condition*** to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard.

# HIPAA - Reasonable Alternative Standard – Additional Requirements for Activity-Only Wellness Programs (cont'd)

- ***When it is reasonable*** that medical judgment is required to evaluate the validity of a request, ***plans and issuers can ask for verification***, including a statement from the individual's personal physician.
  - No verification can be requested where it would be unreasonable (e.g., medical verification that a paraplegic cannot participate in a walking program).

# HIPAA - Reasonable Alternative Standard – Additional Requirements for Outcome- Based Wellness Programs

- Reasonable Alternative Required for All: Outcome-based programs must provide a reasonable alternative standard to all who do not meet or achieve a particular health outcome, regardless of the reason why.
  - Unlike an activity-only program, an outcome-based wellness program cannot request medical verification as a condition of providing a reasonable alternative to the initial standard.

# OTHER LEGAL REQUIREMENTS

# ERISA Compliance

- If the wellness plan is a Group Health Plan and the employer is subject to Employee Retirement and Income Security Act of 1974 ("ERISA"), then it must comply with all other aspects of ERISA, including:
  - Plan document;
  - Summary Plan Description ("SPD");
  - Claims procedures; and
  - Form 5500 filings.
- Requirements can be satisfied by incorporating a description of the wellness program in the major medical plan, or by creating a separate plan with cross-references to the medical plan document.

# COBRA – Continuation Coverage

- (Non-Church Plan) GHPs, including wellness plans, are subject to COBRA continuation coverage requirements:
  - Initial/general COBRA notice provided to all participants;
  - COBRA election notice provided upon the occurrence of a “qualifying event” by a “qualified beneficiary”;
  - Continuation coverage from 18-36 months, depending upon the qualifying event;
  - Calculation of the “applicable premium”;
  - Employers with fewer than 20 employees are exempt.

# ADA – Proposed EEOC rules

- The Equal Employment Opportunity Commission (“EEOC”) has released proposed rules regarding wellness programs and the Americans with Disabilities Act (“ADA”).
  - Although rules are proposed, rules can be relied on for ADA compliance until EEOC issues final rules.
- ADA typically applies to employers, but EEOC has taken the position that an insurer is subject to the ADA if it is the employer’s “agent” (a different discussion for a different day).

# ADA – Reasonable Design

- ADA typically applies to employers, but EEOC has taken the position that an insurer is subject to the ADA if it is the employer's "agent" (a different discussion for a different day).
- A wellness program must be "reasonably designed" to promote health and prevent disease.
  - Must not be overly burdensome or highly suspect.

Good	Bad
Conducting a health risk assessment or screening for the purpose of alerting participants to health risks.	Collecting information without providing any follow-up information, advice, or tools.
Developing disease management programs based on assessments and screenings.	Requiring an overly burdensome amount of time to participate in a program as a condition of obtaining a reward.
	Requiring participants to go through intrusive procedures as a condition to obtaining a reward.

# ADA – Confidentiality

- Wellness programs must comply with the ADA's confidentiality provisions.
  - Employers may only receive aggregate, unidentifiable information unless identifiable information is necessary for health plan administration purposes.
  - If the program is part of a group health plan, HIPAA's privacy rules would apply and impose similar restrictions.

# ADA – Voluntary Participation

- Participation in a wellness program that includes disability-related inquiries or requires medical examinations must be “voluntary.”
- What does “voluntary” mean?
  - The employer doesn't require participation in the program.
  - The employer doesn't deny employees who choose not to participate in the program access to health coverage under any of its group health plans or benefit package options.

# ADA – Voluntary Participation (cont'd)

- The employer doesn't limit the coverage under the health plan for employees who choose not to participate.
- The employer does not retaliate or take employment action against those who fail to participate.
- If the wellness program is part of a group health plan, the employer must provide notice that clearly explains what information will be obtained, how the medical information will be used, who will receive it, restrictions on its disclosure and the methods used to prevent improper disclosure of the information.
  - This is in addition to the notice required for health-contingent wellness programs under HIPAA.

# ADA – 30% Rule

- Any incentives offered as part of a wellness program that is part of a group health plan and that includes disability-related inquiries or requires a medical exam must be limited to 30 percent of the total cost of employee-only health coverage.

## ADA – 30% Rule (cont' d)

- If a wellness program provides multiple methods of earning points to reach a reward, some of which are connected with disability-related inquiries and/or medical exams, and some of which are not, the program as a whole will not be subject to the 30 percent threshold as long as the employees can acquire the necessary points for the reward without answering questions related to a disability or taking a medical exam.

- *Note:* This portion of the EEOC rule was informal and it is not clear it will be included in final rules.

## ADA – 30% Rule (cont'd)

- Programs that include **tobacco cessation** may impose a reward up to **50 percent** of the total cost of employee-only coverage.
  - Tobacco cessation programs that obtain tobacco use information through a blood test or other medical exam would be subject to the 30 percent limitation.
  - In addition to modifications to the tobacco cessation reward, employers that previously incorporated a 50 percent tobacco reward into their affordability calculations for IRC § 4980H(b) purposes may need to adjust the premiums charged to employees.

# ADA – Reasonable Accommodation

- A wellness program must reasonably accommodate individuals with disabilities in order that they may participate.
  - e.g., access to facilities where classes are held, participation in walking programs, events held while employee is on disability, sign language interpreters at nutrition counseling classes for deaf employees, blood draw alternatives for those who cannot safely draw blood.

# ADA – Putting It All Together

Bucket	Program Design	Example	Permissible Reward/Penalty
1	<ul style="list-style-type: none"><li>• No medical information requests</li><li>• No medical exam or screening</li><li>• Not required to complete an activity</li></ul>	Reward to any employee who attends a stress reduction or nutrition counseling class regardless of health status	No caps on reward

# ADA – Putting It All Together (cont'd)

Bucket	Program Design	Example	Permissible Reward/Penalty
2	Reward is contingent on responding to a request for medical information or medical exam	<ul style="list-style-type: none"><li>• Reward for completing a health risk assessment without regard to health status</li><li>• Reward for completing a screening without regard to outcome</li><li>• Reward for completing a health risk assessment and meeting certain benchmarks</li></ul>	Subject to cap of 30% of total cost of employee-only coverage

# ADA – Putting It All Together (cont'd)

Bucket	Program Design	Example	Permissible Reward/Penalty
3	Reward is based solely on "activity"	Compliance with walking program, exercise program or diet/nutrition program	Subject to cap of 30% of total cost of employee-only coverage OR family coverage if family members are allowed to participate

# ADA – Putting It All Together

Bucket	Program Design	Example	Permissible Reward/Penalty
4	Tobacco cessation based SOLELY on inquiry	Reward provided for those who certify their tobacco use status or, if they certify tobacco use, they complete a smoking cessation program	Up to 50% (combined with any rewards for programs in Buckets 2 and 3) of total cost of employee-only coverage OR family coverage if family members are allowed to participate

# Genetic Information Nondiscrimination Act ("GINA") – Health Risk Assessments

- GHPs cannot request or collect any genetic information where a reward is offered for completion of an HRA, or the HRA is conducted prior to or in connection with enrollment (including open enrollment).
  - Genetic information is defined very broadly and includes questions regarding family medical history, whether an employee has undergone genetic testing, and/or whether an employee has received genetic services.

# GINA – Health Risk Assessments (cont'd)

- Open-ended questions that could invite disclosure of genetic information in response must include a disclaimer that employees should not provide any genetic information in their answer.
- Non-GHP programs may inquire about genetic information under very limited circumstances.

# Fair Labor Standards Act ("FLSA") – Compensable Time and Overtime

- Although there is not clear authority, time spent completing wellness activities (e.g., a health risk assessment) could be regarded as compensable time under the FLSA.
- If you pay a bonus rather than provide a premium reduction (as would typically happen with a non-GHP wellness plan), the bonus must be included in calculating the employee's "regular rate" for overtime purposes.

# Internal Revenue Code (“Code”)

- Reductions in Group Health Plan premiums, deductibles or co-payments for wellness plan participation are generally tax-free to employees.
- Other types of financial inducements typically associated with non-GHP wellness plans are generally taxable.
  - e.g., cash, gift cards, health club memberships.
  - Withholding and reporting rules are unclear – insurer might be responsible for withholding and reporting in some cases

# National Labor Relations Act (“NLRA”)

- Unionized employers may have to negotiate with their union regarding introduction or amendment of wellness plans.
  - Wellness plans are an employee benefit that would be considered a term or condition of employment.
  - Unilateral action could constitute Unfair Labor Practices.

# State Law Regulation and ERISA Preemption

- If a wellness plan is subject to ERISA, then state law is generally preempted if the law “relates to” the terms of the wellness plan.
  - Most, but not all state laws will be preempted:
    - e.g., state laws protecting smokers are likely preempted.
    - e.g., state laws requiring wage payments are likely not preempted.
- If the wellness plan is not subject to ERISA, then state law always applies.
  - e.g., non GHPs, Church plans, non-federal governmental plans.
  - State insurance law always applies to insurance policies

# Anecdotal Health Care Provider Concerns

- Some health care providers are concerned that “know your numbers” programs result in fewer doctor visits where other, potentially more serious concerns, might be caught.
  - Providers seem more supportive of wellness programs that reward participants who comply with recommended guidelines for treatment and examinations, in addition to knowing their numbers.
- Some providers question wisdom of offering rewards while increasing deductibles that act as a barrier to access (i.e., even if someone “knows their numbers,” the deductible might prevent them from seeking treatment for other serious conditions until it costs more to treat).
  - Some health care providers have said that they are seeing fewer and fewer patients as deductibles increase.
  - Patients are having pharmacies call to keep renewing prescriptions due to increased cost sharing until health care provider says enough is enough.

# Questions?

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