Wellness Programs & Compliance:

A Few Considerations for Employers

Many employers are concerned about the legal limbo relating to some wellness programs, particularly those with incentives or surcharges for participation or non-participation in a health risk assessment, medical exam, or biometric screening.

As background, a wellness program is any formal or informal program designed to educate employees (and sometimes their families) about health-related issues, promotes healthy lifestyles, or encourages employees to make healthier choices. Wellness programs are designed in many ways, and may not even be called a wellness program. Some programs are part of a group health plan, some are provided by a health insurance issuer or carrier in conjunction with group health plans, some are offered as a benefit of employment by employers who don't sponsor group health plans. Wellness programs may be simple and educational in nature–monthly lunch and learns and coupons for a local gym franchise—and others are very complex, with stringent requirements employees must try to reach to earn premium or copay reductions.

Many different legal considerations and laws govern wellness programs, depending on their plan design. These laws include the Patient Protection and Affordable Care Act (PPACA), the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Age Discrimination in Employment Act (ADEA), state laws, and more.

Caution: There has been increased enforcement (e.g. litigation) surrounding wellness programs, and there may be financial consequences for not complying with all the applicable laws, therefore it is important for any wellness program that involves the following to be reviewed by counsel:

- Premium differentials
- Incentivized physicals, biometric screenings, health risk assessments, or target metrics
- Tobacco cessation programs

HIPAA Considerations

Wellness programs that offer a reward in connection with, or part of the group health plan are typically subject to HIPAA. This includes programs that offer participant contribution discounts for non-tobacco or surcharge for tobacco users, flu shots, biometric screenings, as well as programs that offer reduced copays, deductibles,and employer contributions toward a health reimbursement account for program participation.

Under HIPAA, group health plans cannot use health factors to discriminate against similarly situated individuals with regard to eligibility, premiums, or contributions. Health factors include health status (e.g. blood pressure, body mass index), medical conditions (e.g. addiction to nicotine), claims experience, medical history, genetic information, disability, and more. However, HIPAA nondiscrimination rules do allow group health plans to set different premiums, contributions, and cost-sharing amounts for individuals who participate in a wellness program.

HIPAA divides wellness programs into two categories: participatory or health contingent.

- **Participatory programs** have to be available to all similarly situated employees and either offers no reward or the reward is not conditioned on satisfying a health standard (e.g. attending a health education seminar).
- **Health contingent programs** are further divided into two categories: activity-only and outcome-based.
  - An activity-only program is a program that requires the individual to perform or complete an activity related to a health factor in order to obtain the wellness reward. For example, walking for 30 minutes which some individuals due to a health factor, like severe asthma may not be able to participate. However, the person simply needs to complete the activity, and not achieve specific results, to receive the reward.
  - An outcome-based program requires the individual to achieve or maintain a specified health outcome, such as reaching or maintaining a healthy weight or blood cholesterol level, or not using tobacco.

All health-contingent wellness program must meet 5 requirements:

1. **Be reasonably designed to promote health or prevent disease (the same rules apply to activity-only and outcome-based programs).**
2. **Give employees a chance to qualify for the incentive at least once a year (the same rules apply to activity-only and outcome-based programs).**
3. **Cap the reward or penalty at 50 percent of the total cost of coverage for avoiding tobacco and at 30 percent for all other types of wellness incentives (the same rules apply to activity-only and outcome-based programs).**
4. **Provide an alternative way (i.e. reasonable alternative standard) to qualify for the incentive for those who have medical conditions (different rules apply to activity-only and outcome-based programs).**
5. **Describe the availability of the reasonable alternative standard (RAS) of qualifying for the incentive in written program materials (the same rules apply to activity-only and outcome-based programs).**

ADA & GINA Considerations

The ADA prohibits employers from discriminating against employees with disabilities and also restricts employers from requiring medical examinations that are not job related. Likewise, GINA prohibits employers from discriminating against employees because of their genetic information or genetic information of their family members. In 2016 the EEOC issued regulations under the ADA and GINA, which permitted incentives as part of employer wellness programs if the applicable wellness programs were voluntary, reasonable, and confidential, and imposed limitations on certain health-contingent wellness programs that went above and beyond the requirements of HIPAA. These regulations apply to any wellness program that involves:

- A health risk assessment (HRA)
- A medical exam
- A biometric screening

The EEOC's regulations under the ADA only include incentive limits for employees and do not address wellness incentives for participation by spouses, as the ADA rules generally apply to employee. The regulations under GINA include incentive limits for spouses, because information about the manifestation of a spouse's disease or disorder is considered "family medical history" and thus genetic information protected under GINA. GINA prohibits offering wellness programs with an HRA, medical exam, or biometric screening to an employee's children in any circumstance, even if the children are not biologically related to the employee. Conversely, GINA permits offering these wellness programs to spouses so long as they provide prior, knowing, written consent and authorization to receive the inducement (financial reward) in return for their participation.

The ADA and GINA have different, stricter incentive limits than the HIPAA limits. Financial incentives for wellness programs regulated by GINA are the same as the ADA, and they are limited to:

Situation	Wellness Participation Limit
Participation in wellness program is limited to employees enrolled in employer's group health plan.	30% of the total cost of self only coverage (including both the employee's and employer's contribution) for the option in which the employee is actually enrolled.
Participation to wellness program is NOT limited to employees enrolled in the employer's group health plan AND the employer only offers 1 group health plan option	30% of the total cost of self only coverage for the group health plan maintained by the employer
Participation to wellness program is NOT limited to employees enrolled in the employer's group health plan AND the employer offers more than 1 group health plan option	30% of the total cost of self only coverage for the lowest cost group health plan option offered by the employer.
Employer does not offer ANY group health plan benefits	30% of the cost of self-only coverage under the second lowest cost Sliver Plan for a 40-year-old nonsmoker on the state of federal health card Exchange in the location tat the covered entity identifies as its principal place of business

AARP v. EEOC 2017 WL 3614430 (D.D.C. 2017)

In the late summer of 2017, a federal court in Washington D.C. ruled that the EEOC did not adequately substantiate how its 30% incentive limits ensured that a wellness program remained "voluntary" as required under the ADA.

The court sent the regulations back to the EEOC for reconsideration but did not overturn the regulations. In December of 2017, the court amended its ruling, and vacated the incentive provision of the regulations beginning January 1, 2019. In the spring of 2018 the EEOC indicated it has no immediate plans to issue new regulations, leaving employers wondering with no clear rules for compliance. Can employers impose penalties on employees who choose not to participate in HRAs, biometric screenings, or health risk assessments?

While the court did not rule that the 30 percent incentive rendered the employee (or spouse's) participation in a wellness program involuntary, it vacated the regulations effective January 1, 2019 when it deemed the EEOC's proposed timeline to issue revised or substantiated regulations not timely enough. As such, employers should be cautious if they wish to provide incentives for a wellness program whose design would fall under the ADA and GINA.

- A risk adverse employer would cease any incentives offered in conjunction with an employee (or an employee's spouse) participating in a wellness program that involved an HRA, medical exam, or biometric screening.
- Alternatively, an employer who after consulting with their legal counsel feels that its plan is "voluntary" based on the facts and circumstances, could continue operating a wellness program that complies with the 2018-era incentive limits. This carries a level of risk and should only be done in conjunction with counsel.
- Employers should note that even asking employees to certify that they've had a medical examination done by their primary care physician could constitute a wellness program subject to the ADA, and the ADA/GINA incentive limits would most likely apply.
- It would be ill-advised for any employer to offer a wellness program with an HRA, medical exam, or biometric screening with incentives or surcharges beyond the 30% limits.

Employers need to determine which laws apply to their wellness plan, ensure they comply with the notice requirements of each applicable law and should also be cautious and remember that the regulations governing wellness programs should be considered independently. For example, compliance with HIPAA's rules does not necessarily guarantee compliance with the ADA or GINA.

This article was last updated and reviewed on 1/22/2020.