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Wellness Programs



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Wellness Programs

Employers often consider sponsoring a wellness program to promote better health and higher morale among employees, and with the hope that helping employees embrace a culture of health will lead to increased performance, less absenteeism, and lower health-related costs.

Federal Nondiscrimination Laws

Federal laws that are designed to prevent discrimination can affect the employer's options in designing a workplace wellness program. The three laws that usually come into play are the following:

- The Health Insurance Portability and Accountability Act (HIPAA) applies to all wellness programs that are made part of a group health plan or are themselves a group health plan;
- The Affordable Care Act (ACA) applies to program design, availability, and notice requirements; and
- The Americans with Disabilities Act (ADA) generally applies only to programs that include medical exams/screenings or disability-related inquiries.

The Genetic Information Nondiscrimination Act (GINA) applies if family members or the employee's family medical history is included. HIPAA is regulated and enforced by the Department of Labor (DOL), while the ADA and GINA are under the regulatory authority of the Equal Employment Opportunity Commission (EEOC). Employers with fewer than 15 workers are exempt from most ADA and GINA requirements

ACA and HIPAA Rules

ACA and HIPAA prohibit health plans from basing eligibility, benefits, or contributions on an individual's health factors, but make an exception for wellness programs that meet certain design, disclosure, and administration requirements. HIPAA rules for group health plans define two types of wellness programs:

- **Participatory-only program.** The program is offered to all similarly situated employees, and any incentives are based solely on participating. Examples include health education classes and health risk assessments, but without regard to any results and without requiring any follow-up steps. There are no caps on the incentive amounts that can be offered under participatory-only programs. A program that provides an incentive simply for tracking and reporting hours of sleep, regardless of results, would be participatory only.
- **Health-contingent program.** The program may be based on activity only (e.g. completed a walking program) or outcome based (e.g. stopped using tobacco). Health-contingent programs that offer an incentive based either on meeting an initial health standard (e.g., satisfactory health screenings) or, if failing to meet the initial health standard, on meeting a reasonable alternative standard (e.g., participating in an educational program or exercise program). A program that provides an incentive based on attaining an optimal BMI would be a health-

contingent program. Health-contingent programs must comply with extensive design and administration criteria under the HIPAA rules, including all of the following:

- The program is reasonably designed to promote health and prevent disease;
- Employees are given an opportunity to qualify for the incentive at least once per year;
- The incentive is not more than 30% of the group health plan cost (or up to 50% for programs designed to prevent or reduce tobacco use);
- Employees who do not meet the initial health standard are offered a reasonable alternative standard (e.g., attending an educational class or attempting a smoking cessation program, whether or not the employee succeeds in meeting the health standard); and
- Plan materials describe the availability of a reasonable alternative standard to qualify for the incentive.

Plan cost, on which the maximum allowable incentive is based, generally is defined as the COBRA rate (without admin fee) of the plan in which the employee is enrolled. That is, the self-only COBRA rate if the wellness program is limited to employees. (See Tax Issues, below.) The incentive may be structured as a reward or as a penalty (surcharge), although employees can never be required to pay more than 100% of the insurer's premium rate (or the self-funded plan's equivalent-premium rate).

The requirement to offer a "reasonable alternative standard" (RAS) is an important component of the HIPAA rules for a health-contingent wellness program. This comes up from time to time with weight reduction programs or exercise programs. Note that the employer may be required to make a second alternative standard available if the employee's physician recommends that the first alternative standard is medically inappropriate.

Specifically:

- A program that offers an incentive based on the individual's health factors or meeting health standards is required to automatically offer a RAS.
- A program that offers an incentive based on the individual participating in health-related activities is required to provide a RAS but only if the individual requests.
- A program that offers an incentive based on the individual participating in general activities is not required to provide a RAS.

ADA and GINA

The ADA and GINA, as mentioned above, are regulated and enforced by the EEOC and not by the DOL. Over the years, the EEOC has issued several sets of rules about wellness programs. The EEOC rules once imposed a 30% cap on incentives if the wellness program included any health exams, screenings, or inquiries. The cap was based on "plan cost," but used a different definition than the HIPAA definition referring to the COBRA rate.

In recent years, however, the EEOC rules regarding incentives were challenged in court and then nullified, which meant that any incentive amount could be impermissible. Now, finally, the EEOC is considering new regulations that would allow certain types of wellness program incentives along the lines of the HIPAA provisions. Until specific regulations are issued, however, employers should work carefully with legal counsel before offering employees incentives to submit to medical exams or screenings.

Next, a word regarding extending a wellness program to spouses of employees. Employers often are cautioned to avoid doing so, particularly if the program would include individual medical information such as health risk assessments. The ADA pertains only to employees, not spouses, so that is not an issue. The rules under GINA, however, can become complex and employers that want to offer wellness programs to spouses are advised to work with legal counsel that offers expertise in these matters. Also, as a practical matter, employers generally do not want spouses to come onto the employer's premises, which could be an issue if health screenings or wellness program activities are conducted onsite.

Tax Issues

When incentives are offered, the employer also must consider potential tax issues. Generally, employers are advised to provide any incentives "inside" the group health plan, so the amount is exempt from income and payroll taxes. Examples include reduced contributions (payroll deductions) for group medical plan coverage and/or reduced deductibles or copays under the group medical plan. (Either reduced contributions or reduced (or waived) deductibles are allowed, although employees tend to prefer reduced contributions since deductibles and copays only matter if they incur expenses for non-preventive care.) Providing cash, gift cards, or in-kind incentives, on the other hand, should be avoided since the amounts would be subject to taxes.

Summary

As employers compete to recruit and retain qualified employees, wellness programs present an opportunity to communicate a message of commitment to the well-being of employees. A sustained program may lead to healthier employees and higher productivity with lower health-related costs.

As we've seen, employers also need to consider several federal laws in designing a wellness program. HIPAA applies to wellness programs that are part of a group health plan or are themselves a group health plan. Depending on the program's design, additional laws such as the ADA and GINA may apply. Employers are encouraged to work with legal counsel offering expertise in these matters since the issues and rules can be complex, particularly since the EEOC has not yet released new guidance on the ADA.



Official Guidance

- [EEOC Genetic Information and Nondiscrimination Act](#)
- [HIPAA and Workplace Wellness Programs](#)
- [HIPAA and the Affordable Care Act Program Requirements](#)





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