

FYI[®] In-Depth

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Wellness Plans – Diagnosing Compliance Concerns

Employers face a variety of challenges when it comes to offering health care and managing costs. Many turn to wellness programs, which have been endorsed by the Obama administration through the ACA, to enhance care management strategies and subsequently impact medical trends and costs by promoting healthy behavior. But when the employer plays a role in influencing employee (and possibly family) conduct, such programs face a host of compliance challenges. While the agencies that regulate wellness programs continue to scrutinize and address their particular compliance concerns, employers maintaining and implementing them must pay careful attention to a wide array of laws and regulations.

In this article: [Background](#) | [HIPAA Nondiscrimination](#) | [ADA](#) | [GINA](#) | [HIPAA Privacy](#) | [ERISA](#) | [Health Care Reform](#) | [COBRA](#) | [Tax Laws](#) | [Other Employment Laws](#) | [State Lifestyle Discrimination Laws](#) | [Common Designs and Applicable Laws \(Table\)](#) | [In Closing](#)

Background

Some experts have linked illnesses and chronic conditions to lowered employee productivity that ultimately affects the employer's bottom line, so employee health and well-being continues to be a significant concern. Organizations cite their commitment to promoting health and wellness as a business strategy, showing a continued desire to expand initiatives in hopes of boosting individual engagement and organizational performance. (See our [Working Well](#) survey highlights in sidebar.) Employers implement wellness programs to provide assistance to and create incentives for individuals to improve their health, for example, by adhering to a particular course of treatment, or otherwise changing or positively modifying behavior. In addition to covering employees, some wellness programs extend to spouses and other dependents.

Survey Says...

- 95% of respondents say they offer Employee Assistance Programs
- 78% say they offer biometric health screenings
- 68% say they offer telephonic lifestyle coaching

Today's wellness programs encompass components of wellness, health improvement, health management, disease management, absence management, and disability management (STD, LTD and workers compensation). Some offer only limited benefits (e.g., informational brochures or periodic educational sessions). Others offer a wide range of benefits (e.g., information, education, preventive care and wellness rewards), or provide a comprehensive system of coordinated health-related communications, assessments and incentives intended to raise employees' awareness and promote positive health behaviors. Incentives include modified premium contributions, cost-sharing or other financial rewards (including avoiding a penalty or surcharge).

This *FYI* discusses wellness program compliance concerns and will flag or offer comments on specific issues. But employers must confer with legal counsel and other trusted advisors for appropriate strategies regarding specific program design and implementation.

Roadmap: Many laws affect wellness programs, including:

- [HIPAA nondiscrimination](#)
- [ADA](#)
- [GINA](#)
- [HIPAA privacy](#)
- [ERISA](#)
- [Health Care Reform \(ACA\)](#)
- [COBRA](#)
- [Tax](#) and [Other employment laws](#)
- [State lifestyle discrimination laws](#)

HIPAA Nondiscrimination Rules

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), enforced by the Department of Health & Human Services (HHS), IRS and DOL (the departments), applies to group health plans and insurers. (While we provide a brief overview of HIPAA's nondiscrimination rules below, a detailed description of those rules can be found in our [July 16, 2013 FYI In-Depth](#).)

Group Health Plans Only

Generally, a plan is a group health plan if it's maintained by an employer and provides health care to employees and their dependents. The HIPAA wellness program rules apply only if the wellness program is part of (or is itself) a group health plan. For example, a wellness program not provided under the group health plan that offers participants cash prizes if they complete a walking program would not be subject to the HIPAA rules.

Discrimination Based on Health Factors Prohibited

HIPAA generally prohibits a group health plan from discriminating against individual participants and beneficiaries with respect to eligibility, benefits or premiums based on a health factor. Health factors include (but are not limited to) health status, medical condition, claims experience and medical history. The Affordable Care Act (ACA) essentially codified (with some modifications) the 2006 HIPAA nondiscrimination and wellness regulations, which were re-proposed and finalized in 2013.

Exception for Programs that Promote Health

The HIPAA nondiscrimination regulations include a limited exception for wellness programs that meet certain requirements. Generally, a group health plan can provide rewards/incentives under a wellness program that promotes health and prevents disease. The definition of reward includes not only financial incentives (such as lower premium contributions and reductions in cost-sharing), but also the avoidance of a penalty (such as the absence of a premium surcharge or other financial or nonfinancial disincentives). The requirements for this exception differ depending on whether the wellness program is participatory or health-contingent.

Participatory Programs. A program is considered participatory if none of the conditions for obtaining a reward are based on an individual satisfying a standard related to a health factor. Participatory programs are not considered discriminatory and are not subject to the heightened scrutiny applied to health-contingent programs (see below). Participatory programs include programs that provide:

- Discounted health club memberships
- Rewards for individuals who receive physicals, well-baby visits or diagnostic testing (where the reward is not based on test results)
- Rewards for attending free health seminars or smoking cessation program participation

A participatory wellness program must be available to all similarly situated individuals, regardless of health status.

Comment. While participatory programs are not subject to any higher standards under HIPAA, they might be subject to other laws and requirements. For example, providing an incentive for completing a health risk assessment (HRA) complies with HIPAA as a participatory program so long as it is available to all similarly situated individuals. However, as discussed below, such an HRA is subject to stricter requirements under the [ADA](#) (and in some cases, [GINA](#)).

Health-Contingent Programs. Health-contingent programs require an individual to satisfy a standard related to a health factor to obtain a reward. Such programs fall into two categories — activity-only and outcome-based.

Both activity-only and outcome-based programs must comply with five requirements for health-contingent wellness plans. However, the requirements differ slightly depending on the type of program. See our [July 16, 2013 FYI In-Depth](#) for a more extensive discussion of the requirements. For purposes of this *FYI*, we discuss these requirements generally.

Opportunity to qualify for reward. Individuals must be given the opportunity to qualify for the reward at least once a year.

Size of reward. Generally, the maximum reward for participation in a wellness program is 30% of the total cost of employee-only coverage. A greater percentage is permitted for tobacco use-related programs (described below). The total cost of coverage is the sum of employer and employee contributions — generally the COBRA rate without the 2% administrative fee. Rewards offered in conjunction with participatory wellness programs do not count toward the limit for health-contingent programs.

Two Categories of Health-Contingent Programs

Activity-only: To receive a reward, an individual must perform or complete an activity related to a health factor (e.g., diet or walking program)

Outcome-based: To receive a reward, an individual must meet a specific health outcome or attain a specific health metric (e.g., reward for meeting certain BMI or cholesterol levels)

- **Incentives for family member participation.** The HIPAA regulations specifically address how family member participation may affect the size of the reward. If any of an employee's dependents are eligible to participate in the wellness program, the incentive cannot exceed the applicable percentage of the cost of the coverage tier (e.g., employee-only, employee plus one, family) in which the employee and dependents are enrolled.

Comment. Where family members are eligible for a reward but not all members participate or qualify for the reward, the regulations allow plans to apportion the reward among family members, as long as the method is reasonable.

- **Incentives for tobacco users.** An additional 20% incentive can be applied to wellness programs designed to prevent or reduce tobacco use (up to a 50% total incentive, with the additional 20% applying only to the tobacco program). Note that the ADA proposed regulations, while modeled on the HIPAA regulations, do not allow for an increased incentive (see discussion [below](#)).

Reasonable design. A health-contingent wellness program must be “reasonably designed to promote health or prevent disease” and cannot be “overly burdensome.” Whether a program is reasonably designed depends on all relevant facts and circumstances. For example, a program that collects a substantial level of sensitive personal health information without providing information or assisting individuals to make positive behavioral changes (e.g., quit smoking or lose weight) is not considered reasonable. Additionally, a program that requires an excessive time commitment or travel is not reasonable.

Uniform availability and reasonable alternative standard (RAS). The full reward must be available to all similarly situated individuals, regardless of health status. The plan must furnish an RAS or waive the condition for obtaining the reward. The RAS requirements differ depending on whether the program is activity-only or outcome-based:

- **Activity-only program.** Generally, a reward will be deemed available to all similarly situated individuals if the program offers an RAS (or waiver) for obtaining the reward for any individual for whom it is:
 - Unreasonably difficult due to a medical condition to satisfy the standard; or
 - Medically inadvisable to attempt to satisfy the standard
- **Outcome-based program.** A reward will be deemed available to all similarly situated individuals if the program offers an RAS to any individual who does not meet the initial (healthy) standard (e.g., nonsmoking status, cholesterol level, BMI, blood pressure) regardless of the individual's medical condition or other health status. To ensure that an initial standard is not subterfuge for discrimination or underwriting based on a health factor, the plan must offer an RAS to any individual who does not meet the target and cannot require doctor verification of an individual's health condition.

Notice of RAS. A plan must disclose the availability of the RAS to qualify for the reward (and, if applicable, the possibility of a waiver) in all plan materials describing the program. The disclosure must include contact information and a statement that the recommendation of the individual's personal physician will be accommodated.

ADA

Title I of the Americans with Disabilities Act (ADA), enforced by the Equal Employment Opportunity Commission (EEOC), prohibits employment discrimination on the basis of disability. The law applies to employers (with 15 or more employees), employment agencies and labor organizations. The ADA requires employers to provide reasonable accommodations to allow disabled employees equal access to benefits offered to employees without disabilities.

A difference in benefits does not violate the ADA unless it results from a disability-based distinction. Denying an employee any term, condition or privilege of employment (e.g., coverage under a more robust health benefit option or other wellness reward) because of an actual or perceived physical or mental impairment, or because of the employee's association or relationship with a person with a known disability (e.g., a spouse) could violate the ADA.

“Disability” Defined

The ADA defines “disability” broadly, as (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such impairment, or (3) being regarded as having such an impairment. Generally, an individual may be covered under the ADA by virtue of any one of these three.

Medical Examinations and Disability-Related Inquiries Prohibited

Generally, the ADA prohibits employers from requiring a medical examination or inquiring about either (1) the existence of an employee's disability, or (2) the nature or severity of an employee's disability, unless the requirement or inquiry is job-related. A medical examination is defined as a procedure or test that seeks information about an individual's physical or mental impairments or health, such as a biometric screening. A disability-related inquiry is a question or series of questions, such as an HRA, that is likely to elicit information about a disability.

Comment. A wellness program that simply promotes a healthier lifestyle, or does not ask the employee any disability-related questions or require a medical examination, would not fall within this general prohibition. For example, a program that encourages employees to attend nutrition, weight-loss or smoking-cessation classes does not involve a disability-related inquiry or medical exam. Note, however, that such a program is subject to the ADA generally, including the reasonable accommodation requirement, and so, for example, access for hearing- or sight-impaired individuals to the classes should be provided. Also, the program could be subject to the HIPAA nondiscrimination rules (discussed [above](#)) and other relevant employment or benefit laws (discussed [below](#)).

In addition to permitting medical examinations or disability-related inquiries that are “job-related and consistent with business necessity,” the ADA allows such exams and inquiries if they are part of either one of the following:

- “Bona fide benefit plan” — i.e., insured and self-insured health plans that are based on underwriting risks, classifying risks, or administering such risks, and not subterfuge for discrimination
- Voluntary employee health program where any medical records acquired as part of the program are kept confidential and separate from personnel records

The EEOC has published proposed regulations (discussed in more detail below) related to wellness programs, and a footnote in the preamble says that the bona fide benefit plan exception is not “the proper basis for finding wellness program incentives permissible.” Thus, the proposed regulations and this *FYI* focus on voluntary employee health programs. (For a discussion of the bona fide benefit plan exception, see our [August 23, 2012 For Your Information.](#))

Exception for Voluntary Programs

The ADA allows medical examinations or disability-related inquiries that are part of a voluntary employee health program. Historically, the EEOC has questioned whether wellness programs that provide an individual with financial incentives for having a biometric screening and/or completing an HRA (medical examination and disability-related inquiry) are voluntary. For many years, the benefits community has pondered the meaning of “voluntary” in the context of the ADA and wellness programs.

In April 2015, the EEOC issued [proposed regulations](#) and interpretive guidance (in addition to some [Q&As](#)) that would amend current ADA regulations on permissible medical examinations and inquiries. (See our [April 17, 2015 FYI Alert](#).)

Proposed Regulations. These proposed regulations address the extent to which a wellness program that includes medical examinations and/or disability-related inquiries can provide incentives and still fall within the ADA’s exception for voluntary employee health programs. Modeled on the HIPAA nondiscrimination regulations, these proposed regulations provide that medical examinations and/or disability-related inquiries are permitted as long as the program is reasonably designed, is voluntary, meets confidentiality and notice requirements and, if part of a group health plan, limits any incentive to 30% of the cost of employee-only coverage.

Reasonable design. As with the HIPAA rules, the proposed regulations provide that an employee health program must be reasonably designed to promote health or prevent disease, not overly burdensome, and not a subterfuge for violating the ADA or other laws prohibiting employment discrimination. The methods chosen to promote health or prevent disease must not be “highly suspect.”

A reasonably designed wellness program might offer an HRA or biometric screening to alert employees to health risks — such as high cholesterol or blood pressure. Additionally, a program that uses aggregate employee information obtained from such assessments to design and offer health programs aimed at specific conditions prevalent in the workforce (like diabetes) also would be considered reasonably designed. However, a program that collects medical information without providing follow-up or

“Voluntary” – A History Lesson

- 2000 – EEOC enforcement guidance says a program is “voluntary” if the employer neither requires participation nor penalizes employees who don’t participate.
- 2009 – Two informal EEOC discussion letters find one program that requires completion of an HRA as a prerequisite to enrolling in the employer’s health coverage (e.g., gateway design) and another that rewards completion of an HRA with a contribution to an “employer-funded health reimbursement arrangement” are involuntary and violate the ADA. (See our [May 14, 2009 FYI](#).)
- 2012 – Employee lawsuit contends that a financial incentive associated with biometric screening and HRA causes a program to be involuntary and violates the ADA. Eleventh Circuit Court of Appeals skirts “voluntary exception” analysis and holds that under the ADA’s bona fide benefit plan safe harbor, requiring HRAs and biometric screenings does not violate the ADA. (See our [August 23, 2012 FYI](#).) EEOC maintains that this safe harbor is not the appropriate basis for finding wellness program incentives permissible.
- Early 2014 – EEOC hears [testimony](#) about the impact of ADA enforcement and the voluntary standard on wellness programs.
- Late 2014 – EEOC brings actions against three employers claiming wellness programs were not voluntary and otherwise violate the ADA (and GINA). See our [November 4, 2014](#) and [October 30, 2014](#) issues of *FYI Alert*.
- 2015 – EEOC issues proposed regulations.

advice, or requires an overly burdensome amount of time, arbitrarily intrusive procedures or significant costs would not be considered reasonably designed.

Voluntary. Any program that includes disability-related questions or medical examinations, regardless of whether it is part of a group health plan, must be voluntary. Generally, the proposed regulations provide that such a program will be considered voluntary as long as there is:

- **No requirement to participate.** Employees are not required to take part.
- **No retaliation.** The employer does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten nonparticipating employees.
- **No denial of coverage or benefit package.** The employer does not penalize employees for nonparticipation by denying coverage under any group health plan or particular benefit packages within a group health plan, or limit the extent of benefits (with the exception of the 30% incentive limit noted below).

Example. To be eligible for the coverage offered under the Bison Burgers, LLC group health plan, employees must participate in a wellness program that includes a biometric screening. Under the proposed regulations, denying nonparticipating employees access to coverage in this manner would be discriminatory because participation in the wellness program is not considered voluntary.

Now, suppose Bison Burgers' group health plan has two benefit options — a standard option high-deductible health plan (HDHP) with an HSA, and a preferred option PPO. Access to the PPO is limited to employees who participate in the wellness program (for example, a “gateway” design). Under the proposed regulations, a program that limits access to coverage in this manner would also not be considered voluntary.

Note this program (conditioning eligibility on submitting to biometric testing) is a [participatory program](#) under the HIPAA wellness rules and will not violate those rules as it is offered to all similarly situated employees regardless of health status.

Comment. The EEOC has consistently expressed disapproval of this “gateway” design concept. In the proposed regulations, the EEOC specifically cites the ADA for the premise that an employer may not deny “access to health coverage or generally limit coverage under its health plans for nonparticipation” in a wellness program. It’s uncertain, but seems unlikely, that the EEOC will change its position in final regulations. Employers that have this type of design might consider changing their approach.

ADA Proposed Regulations

The proposed rules permit employers and other covered entities to conduct “voluntary medical examinations,” including voluntary medical histories, as part of an employee health program (such as medical screening for high blood pressure, weight control, and cancer detection), provided that participation in the program is voluntary, information obtained is maintained according to the ADA’s confidentiality requirements, and the information is not used to discriminate against an employee. If a program is part of an employer’s group health plan, incentives of up to 30% of the cost of employee-only coverage are permitted.

Size of reward. The proposed regulations permit a wellness program that is part of an employer's group health plan to offer incentives (either reward or penalty) of up to 30% of the total cost (i.e., employer plus employee contributions) of employee-only coverage. Similar to the [HIPAA regulations](#), a reward includes not only financial incentives (such as lower contributions or reductions in cost-sharing), but also the avoidance of a penalty (absence of a premium surcharge or other financial or nonfinancial disincentives).

- **Incentives for family members.** Unlike the [HIPAA nondiscrimination rules](#), the ADA proposed regulations do not address if or how this limit applies to an employee enrolling in family coverage (rather than employee-only coverage) or whether it applies when family members also participate in the wellness program. Pending final regulations, it appears that the incentive is limited to 30% of the cost of employee-only coverage regardless of the coverage tier (e.g., employee plus one; family) in which the employee is enrolled. These proposed regulations for this voluntary employee health program exception apply to only employees. While Title I of the ADA protects employees from discrimination based on their relationship or association with a disabled individual (like a spouse), and could apply if an employee were denied a benefit (e.g., wellness reward) due to a health status of a spouse or family member, these proposed regulations are not applicable to the medical examinations or disability-related questions asked of spouses or family members.

Incentives for family members under ADA

For example, a program that denies an employee a reward because of a spouse's health status (e.g., high cholesterol or blood pressure), revealed through a questionnaire or medical examination under a wellness program could violate the ADA generally, but would not specifically be a violation of these proposed regulations.

Comment. EEOC personnel have confirmed informally that the ADA does not apply to spousal incentives offered in connection with disability-related questions and/or medical examinations. GINA protects the spouse in this instance. Employers that offer employees an incentive associated with an HRA and/or biometric screening in excess of 30% of the cost of employee-only coverage and those that offer incentives for family member participation should consider, in light of these proposed regulations [and the [GINA proposed regulations](#) (discussed below)], whether program design changes are needed.

- **Incentives for tobacco users.** EEOC guidance states that a program that merely asks employees about their tobacco use (e.g., an attestation) is not an employee health program that involves a disability-related inquiry or medical examination. This means that the ADA incentive limitation would not apply to such a program. However, the limitation would apply if the program involves a biometric screening or other medical examination for the presence of cotinine (which indicates tobacco use).

Comment. Unlike the [HIPAA nondiscrimination rules](#), the ADA does not provide for an increased incentive for programs related to tobacco use. Many wellness programs offer screenings for cotinine either through biometric testing or other medical examinations. The ADA regulations are proposed and the EEOC has received comments on this discrepancy. Clarification should be forthcoming. Employers should be aware of this “disconnect” between the ADA and HIPAA regulations and decide whether to make design changes that reconcile the two positions or wait for further guidance.

Provide written notice. If the wellness program is part of a group health plan, the plan must provide employees with a clear, concise, written notice that describes the type of medical information that will be obtained, the purposes for which it will be used, and the restrictions on its disclosure, including the methods used to protect it.

Comment. The proposed regulations do not provide much detail around this notice requirement. It's not clear what form this notice should take, how it should be delivered, and whether it must be provided on a stand-alone basis, or whether it may be combined with other notices (like those required under [HIPAA nondiscrimination rules](#) or open enrollment). Additionally, the EEOC has requested comments on whether the notice should be required only when incentives are more than a de minimis amount, what that amount would be, and if employees should be asked to provide confirmation that they understand their participation in the wellness program is voluntary.

Confidentiality. Except as permitted under existing EEOC regulations or as needed to administer the health plan, information obtained through the wellness program can be provided to the employer only in aggregate terms and cannot disclose, or be reasonably likely to disclose, the identity of any employee. Additionally, where the wellness program is part of a group health plan, the individually identifiable health information collected is protected under [HIPAA privacy, security and breach notification rules](#).

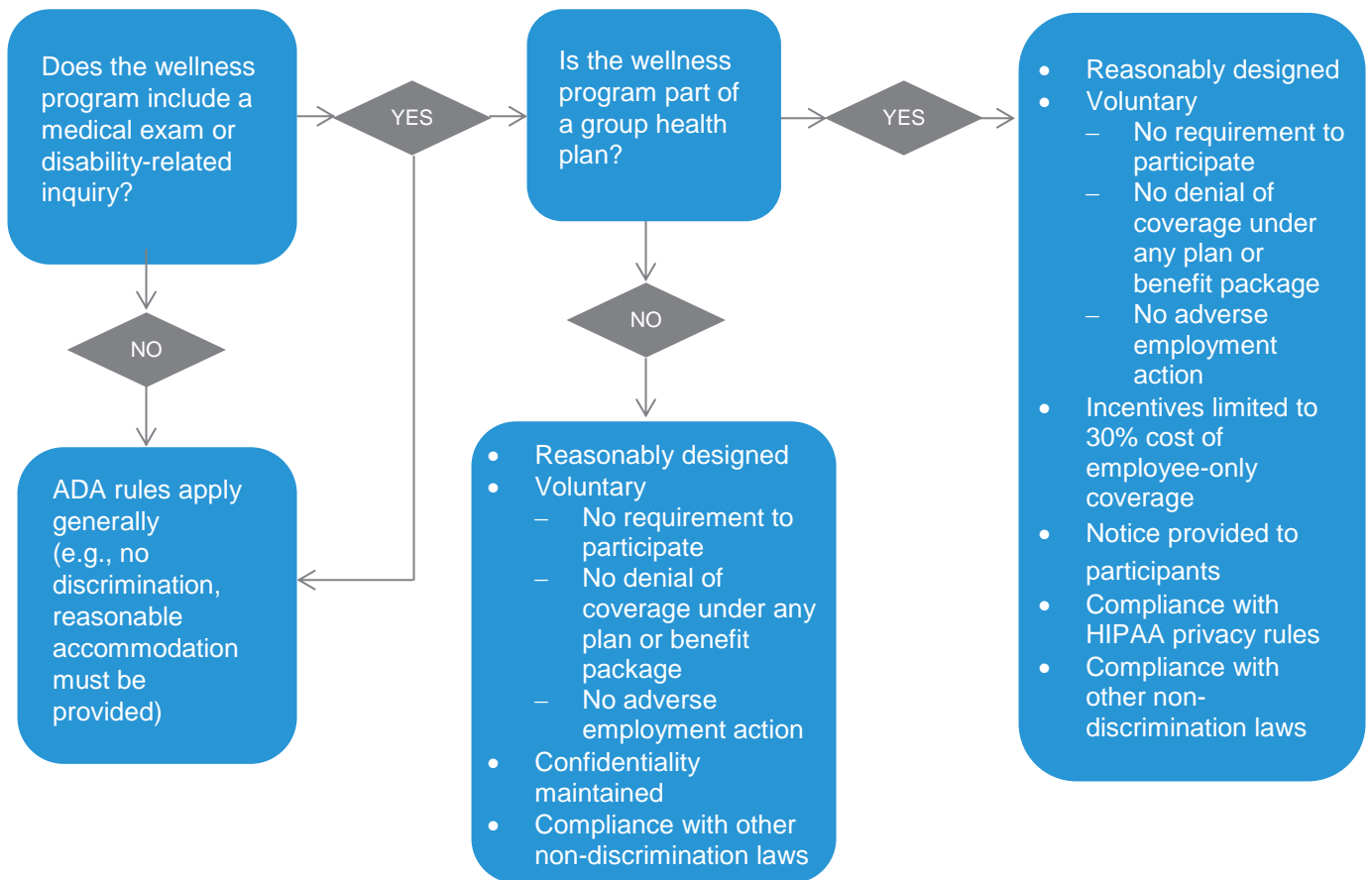
Compliance with other employment nondiscrimination laws. Compliance with the proposed regulations does not relieve the employer from complying with [Title VII](#) of the Civil Rights Act, the [ADEA](#), [Title II of GINA](#) and other provisions of the ADA.

Effective date. The EEOC has indicated that while employers are not required to comply with the proposed rule, those that do may rely on them. It is unlikely that the EEOC (or a court) would find that an employer violated the ADA if it complied with the rules before final regulations are issued.

ADA Proposed Rules Flowchart

The flowchart below provides an analytical overview of the regulatory requirements for a wellness program that includes a medical exam or disability-related inquiry:

ADA Proposed Rules



Comparing HIPAA and the ADA

The following table and example highlight some of the similarities and differences between HIPAA and the ADA.

HIPAA and the ADA Comparison of Wellness Plan Regulatory Requirements for Group Health Plans (GHPs)		
	HIPAA	ADA
Type of Program	Part of GHP Participatory or health-contingent Health-contingent: activity-only or outcome-based, subject to stricter standards	Part of or outside of the GHP Does not adopt participatory/health-contingent distinction
Maximum Incentive	No specific limit for participatory programs Total reward for health-contingent programs cannot exceed 30% of total cost of employee-only coverage (or tier in which employee enrolled if family members also can participate) Additional 20% reward permitted for tobacco use wellness programs	No specific limit if no inquiry or exam, subject to general ADA rules on reasonable accommodation Total reward for GHP medical exam or inquiry cannot exceed 30% of total cost of employee-only coverage No additional reward for tobacco use wellness programs
Opportunity to Qualify for Reward/ Incentive	Once a year	No specific requirement
Alternative Standard	Reasonable alternative standard required for health-contingent programs	Reasonable accommodation required/equal access to benefits (for disabled individuals)
Notice Requirements	Required for health-contingent programs Notice must provide: <ul style="list-style-type: none"> • Availability of reasonable alternative standard • Program terms (in all plan materials) • Contact information and statement that recommendations of individual's physician will be accommodated Sample language provided	Required for programs part of GHP Notice must explain: <ul style="list-style-type: none"> • What medical information obtained • Who receives information • How information used • What restrictions placed on disclosure • What methods used to prevent improper disclosure Sample language not provided
Confidentiality and Privacy	Subject to HIPAA privacy, security and breach notification requirements Privacy procedures; business associate agreements with vendors and TPAs; authorization to disclose protected health information	Medical information only provided to employer (covered entity) in aggregate terms except as otherwise required for GHP administration or permitted by ADA Employers and TPAs (acting on behalf of employers) must ensure confidentiality GHP — subject to HIPAA privacy, security and breach notification rules

Pulling Together HIPAA and the ADA — an Example

Bison Burgers, LLC offers a \$25/month health coverage premium reduction to employees who participate in the Steps Program (a walking program) and an additional \$50/month premium reduction for completing a biometric screening and attending one nutrition class. The incentive amount meets the limitations under HIPAA and the ADA. Under the HIPAA wellness rules, the Steps Program is an [activity-only program](#), and the biometric screening and nutrition class are [participatory programs](#). While the Steps Program and the nutrition class are subject to the ADA generally, only the biometric screening falls under the ADA [proposed regulations](#) on medical examinations and disability-related inquiries.



Andy and Sharon are employees of Bison Burgers. Andy has a broken leg. Under the ADA, Andy must be reasonably accommodated so he can receive the benefit under the Steps Program. Under the HIPAA nondiscrimination rules, Andy must be given an RAS. EEOC interpretive guidance provides that offering a RAS under HIPAA likely fulfills an employer's obligation to provide a reasonable accommodation under the ADA. Andy's doctor verifies (permitted under HIPAA for activity-only programs) that it is unreasonably difficult, as well as medically inadvisable, for Andy to participate in the Steps Program. Bison Burgers waives the Steps Program for Andy and he receives the premium reduction. This also satisfies the ADA.

Sharon is visually impaired and has a medical condition making the blood draw for the biometrics dangerous. She is able to participate in the Steps Program. Although no RAS is required for the biometric screening because it is a participatory program under HIPAA, absent undue hardship, the ADA requires Bison Burgers to accommodate Sharon's visual impairment with appropriate materials so she can earn the reward for attending the nutrition class (or waive the program) and provide an alternative test, certification or waiver in place of the biometric screening.

GINA

The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination on the basis of an individual's "genetic information" by group health plans, insurers and employers. Title I, enforced by the DOL, IRS and HHS, restricts the collection and use of genetic information by group health plans and health insurers. Title II, enforced by the EEOC, bars employment discrimination based on genetic information. Issues for wellness programs often stem from incentives tied to genetic testing or the completion of HRAs that contain questions on family medical history, which is considered genetic information. (For purposes of this discussion, we focus on issues unique to wellness programs.) A detailed description of GINA's rules can be found in our *For Your Information* publications from [February 1, 2011](#), [October 15, 2009](#), [March 17, 2009](#), and [May 27, 2008](#).

Comment. A group health plan or insurer (under Title I) or an employer (under Title II) could be exposed to liability for the same prohibited action. For example, a wellness program that requires individuals to provide genetic information as a condition of participation in a group health plan (e.g., coverage eligibility tied to completion of an HRA) could violate GINA under both Title I and II.

Title I – Collecting Genetic Information Prohibited

Title I of GINA generally prohibits a health plan from requesting, requiring or purchasing genetic information for any purpose prior to or in connection with an individual's enrollment in the plan or for underwriting purposes (with the exception of the incidental collection of information in certain circumstances). "Underwriting purposes," defined broadly, includes rules for determining eligibility for benefits and the computation of premium or contribution amounts. Interim final regulations clarify that "underwriting purposes" include changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, payments in-kind or other premium differentials in return for activities, such as participating in a wellness program or completing an HRA. (See our [October 15, 2009 For Your Information](#) for definitions and details about GINA Title I.)

No Exception for Group Health Plan Wellness Programs

There is no special exception for wellness arrangements under Title I. Generally, a group health plan is prohibited from giving any reward in connection with the solicitation of genetic information. In addition, genetic information (such as family medical history) may never be collected prior to enrollment. Thus, providing a reward for the completion of an HRA that contains family medical history questions is prohibited. And while an HRA containing family medical history questions implemented after enrollment (i.e., after the effective date of the coverage) is permitted, incenting or rewarding the completion of the assessment is not. Incentives for completing an HRA (either before or after enrollment) can be offered as long as the incentive is not tied to the collection of genetic information/family medical history. The regulations suggest that offering the HRA after enrollment and separating the family medical history questions — bifurcating the HRA — with the instructions indicating that completion is entirely voluntary and does not affect the reward associated with the HRA — can cure the problem. (A discussion of issues posed by incentives associated with spousal HRAs is [below](#).)

Example. Bison Burgers, LLC provides an HRA through a wellness program that is part of its group health plan. After the beginning of the plan year, employees can complete two (separate and distinct) HRAs — one that does not request genetic information and one that does. A \$100 annual premium reduction is offered for completion of the first assessment (the one that does not ask family medical history questions). Employees are given clear instructions that the completion of the assessment that includes questions about family medical history is wholly voluntary and will not affect the receipt of the reward. Neither HRA violates GINA.

Comment. Offering a wellness program incentive when requesting family medical history violates GINA, and could violate the ADA prohibition of disability-related inquiries unless it complies with the [ADA proposed rules](#). This type of request, however, would be considered a [participatory program](#) under the HIPAA nondiscrimination rules and thus subject to less scrutiny (as compared to a [health-contingent program](#)).

Genetic Information

Under both Title I and Title II, genetic information is defined as information about an individual's genetic tests, information about the genetic tests of an individual's family members, or information about the manifestation of a disease or disorder in an individual's family member (i.e., family medical history). Family member includes relatives by marriage. Thus, under both titles, information about the medical conditions of an employee's spouse is considered genetic information of the employee (even though the employee and spouse do not share any genetic material). (See our [March 8, 2013 FYI](#).)

Title II – Collecting Genetic Information Prohibited

Title II of GINA generally prohibits employers from discriminating against employees with respect to compensation, terms, conditions, or privileges of employment based on genetic information. Health benefits fall within this definition. Similar to Title I for group health plans, employers are prohibited from requesting, requiring, or purchasing genetic information with respect to an employee or an employee's family member, except in certain limited cases. (See our [October 30, 2015](#), [February 1, 2011](#) and [March 17, 2009](#) issues of *For Your Information*.)

Exception for Wellness Programs

Title II provides several exceptions to the prohibition on acquiring genetic information. One exception is where the employer offers health or genetic services, including such services offered as part of a voluntary wellness program. EEOC guidance, including [newly proposed amendments](#) (proposed regulations) to existing regulations, provides the requirements for voluntary wellness programs. To qualify for this exception, the program must be:

Reasonably designed. Adopting the same standard set out in the [HIPAA nondiscrimination regulations](#) as well as the [ADA proposed regulations](#), wellness programs must be reasonably designed to promote health or prevent disease.

Voluntary. Individuals must provide the genetic information voluntarily — no requirement or penalty may be imposed on an individual who withholds such information. Additionally, while employers may offer financial incentives to encourage participation in wellness programs, they may not offer incentives, no matter the size, specifically for providing genetic information. Similar to the Title I regulations, an employer may offer incentives to encourage individuals to complete an HRA that includes questions about genetic information (e.g., family medical history) as long as the HRA identifies the questions that request such information and clearly states that the incentive is available regardless of whether those questions are answered (e.g., a bifurcated HRA). Furthermore, an employer can offer those who have voluntarily provided genetic information (e.g., risk of a disease indicated through completion of an HRA) an incentive to participate in a disease management program, but only if the employer also offers the same incentive to other individuals who did not provide the genetic information (but whose current health conditions or lifestyle choices put them at risk for developing the targeted condition).

Inducement Defined

Use of the term “inducement” in the GINA Title II proposed regulations mirrors that in HIPAA and the ADA and includes both financial and in-kind incentives — such as time-off awards, prizes, premium or contribution discounts, or other items of value — in the form of either rewards or penalties.

Proposed GINA Regulations and Reliance

The EEOC issued proposed regulations that amend existing rules and address incentives offered to employees in exchange for a spouse's participation in a group health plan's wellness program. While employers are not required to comply with the proposed rule, those that do may rely on them.

Comment. Many employers and group health plans have responded to GINA and the regulatory requirements (under Titles I and II) by omitting questions about family medical history from HRAs. The new proposed regulations address the issue of medical examinations and HRAs offered to spouses and family members. (See discussion below.)

Authorized. The individual must give “voluntary, knowing and written authorization” before providing genetic information. Similar to the ADA notice for voluntary plans, the notice must be clear,

concise and easily understood. The notice must describe the information that will be obtained, the general purposes for which it will be used and the restrictions that apply to the disclosure of the genetic information. If the program is also offered to spouses, authorization may be provided by the employee and spouse on the same form (i.e., a separate authorization for the spouse is not needed).

Comment. The GINA notice requirement is similar to that in the [ADA proposed regulations](#). Under the ADA proposed regulations, however, the EEOC asks for comments about whether an individual should be required to provide a written confirmation that their participation is voluntary.

Confidentiality. Individually identifiable information may be provided only to the individual (or family member receiving the genetic services) and the licensed health care professionals or board-certified genetic counselors providing the services. Also, the individually identifiable information can be available only for purposes of the services and may not be disclosed to the employer, except in aggregate terms that do not disclose the identity of the specific individuals.

Incentives for family members. Under GINA, information about the current or past health status of a spouse or other family member is considered genetic information of the employee. Offering incentives in return for a spouse providing health information could be construed as prohibited under GINA. However, the proposed regulations permit an employer to offer such an incentive as long as it is:

- Offered as part of a wellness program described under GINA that is provided under the group health plan
- Connected only to questions about the spouse's past or current health status and not the spouse's genetic information (e.g., family medical history) or results of genetic tests; or health or genetic information about an employee's children
- Associated with health coverage under which the employee and spouse are covered (i.e., the employee is enrolled in family or a tier of coverage that also covers the spouse)

Comment. Employers extending wellness program rewards for participation by an employee's child should ensure that incentives are not attached to an HRA, biometric screening or other programs that could elicit genetic information. The exception for spouses doesn't apply for children because the potential for discriminating against an employee based on genetic information is greater when an employer has access to information about the health status of the employee's children. Incentives for a child's participation, however, would be permissible for participation in other activities designed to promote health or prevent disease, like attending nutrition classes. Note: [general ADA rules](#) would apply.

Spouse's Health Information = Employee's Genetic Information

Information about the current or past medical conditions of a spouse or a family member is considered genetic information about the employee. Late in 2014, the EEOC initiated court proceedings against employers that, among other things, offered employees a financial incentive if their spouses completed HRAs. (See our [November 4, 2014 FYI Alert](#).) The EEOC argued that under GINA Title II, medical information relating to manifested conditions of a spouse is considered family medical history, and the program is not voluntary if the employer offers financial inducements to provide such information as part of a wellness program. With these proposed regulations, the EEOC changes its position, permitting this narrow exception.

Size of reward. The maximum incentive permitted for the collection of information about the current or past health status of an employee and spouse may not exceed 30% of the total cost of the coverage in which the employee is enrolled. The maximum portion of the incentive that may be offered in exchange for the employee providing current or past health status information is 30% of the cost of employee-only coverage. The maximum portion of the incentive that may be provided in exchange for a spouse providing current or past health information may not exceed the difference between 30% of the cost of the coverage in which the employee is enrolled and 30% of the cost of employee-only coverage.

Comment. As a practical matter, 30% of the cost of employee-only coverage will be the maximum incentive that can be offered to an employee providing information about his or her current or past health status. The GINA Title II proposed regulations are consistent with the [ADA proposed regulations](#) for medical examinations or disability-related questions, so the maximum portion of incentive that may be offered to an employee **alone** may not exceed 30% of the total cost of employee-only coverage. Employers now should feel more comfortable with offering incentives for spousal HRAs and biometrics, but it will be important to apportion incentives as set out in the proposed regulations.

Pulling Together GINA, HIPAA and the ADA — an Example

Bison Burgers, LLC offers a wellness program through its group health plan. The total cost of employee-only coverage under the plan is \$6,500. The total cost of employee plus spouse coverage is \$10,000 and the total for family coverage is \$14,200. The wellness program, which includes an HRA and a physical exam (with biometric screening), offers incentives in exchange for employee, spouse and child participation. The HRA does not contain any family medical history questions, but does ask for each participant's current and past health information. Bison Burgers offers a cash incentive of \$200 to employees who complete the HRA and offers \$100 for each spouse and/or child who completes the HRA. It offers a \$200 credit, applied to the deductible as claims are processed, for each individual who has a physical exam (with biometric screening). Those who participate in the program receive a written report with recommendations and tips for healthy living based on the results of the HRA and physical/biometric screening. The HRA is completed online and all assurances of confidentiality and privacy (under [GINA](#), the [ADA](#) and [HIPAA](#)) are provided. The vendor administering the program is a business associate of the plan and complies with the HIPAA privacy and security requirements. Participants are informed that the information obtained through this program will be used exclusively for the report provided only to them. The participant provides authorization as part of the automated process before access to the HRA is given.

After seeking counsel with trusted advisors on wellness program design, Bison Burgers discovers that incentives may not be offered in exchange for information about a child's current or past health condition. Bison Burgers redesigns its wellness plan so that incentives are offered only for employees and spouses who complete HRAs and obtain physicals/biometrics.

An employee, Maggie, is enrolled in family coverage with her spouse, Alex, and daughter, Hannah. Maggie and Alex complete the HRA and each have a physical exam (provided in-network at no cost under the group health plan, in compliance with the ACA). Maggie receives \$300 (\$200 + \$100) in cash (which is included in taxable income) when she and Alex complete the HRA. She also earns a \$400 credit against the group health plan's deductible (which is a non-taxable benefit) when she and her spouse get a physical and biometric screening. (See [below](#) for discussion of non-taxable and taxable incentives.)

- GINA.** The wellness program is subject to the proposed GINA rules since it is provided under the group health plan and offers an incentive for a spouse to provide current or past health information. The maximum incentive that could be offered is \$4,260 (30% x \$14,200). Even though incentives are offered only for the employee and spouse’s participation (and not children), the maximum incentive applies to the coverage in which Maggie is enrolled (family coverage, not employee plus one). The maximum portion of the incentive that can be offered in exchange for Maggie’s providing current or past health status information is \$1,950 (30% x \$6,500 (employee-only coverage)). The maximum portion of the incentive that may be offered in exchange for Alex providing current or past health information is \$2,310 (\$4,260 minus \$1,950). The incentives fall within the GINA limits since the maximum benefit Maggie can earn is \$700 (\$400 for her participation and \$300 for her spouse’s). Authorization and confidentiality requirements are satisfied.
- HIPAA.** The wellness program is subject to HIPAA’s nondiscrimination provisions. Both components of the program (the HRA and physical/biometrics) are considered participatory because none of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor. This participatory wellness program must be available to all similarly situated individuals, regardless of health status.
- ADA.** The wellness program provides an incentive in return for an employee completing an HRA that is likely to elicit information about a disability and seeks information about an employee’s physical or mental impairments or health (e.g., the physical and biometric screening). Under the ADA proposed rules, the maximum incentive that can be offered to Maggie is \$1,950 (30% of the cost of employee-only coverage). The incentive earned is within this limit. Note that the program is subject to the general ADA rules so that disabled employees are allowed equal access to benefits. Authorization and confidentiality requirements are satisfied.

<p>HIPAA, ADA and GINA — Comparing Notice Requirements Although similar, each associated regulation imposes slightly different notice requirements</p>		
HIPAA	Proposed ADA	GINA
<p>Notice must explain:</p> <ul style="list-style-type: none"> • Availability of reasonable alternative standard • Program terms • Contact information • Recommendation of individual’s physician will be accommodated 	<p>Notice must explain:</p> <ul style="list-style-type: none"> • Type of medical information that will be obtained • Who receives the information • Purpose for which it will be used • Restrictions placed on disclosure • Methods used to protect information 	<p>Notice must describe:</p> <ul style="list-style-type: none"> • Information that will be obtained • Purpose for which it will be used • Restrictions that apply to disclosure of genetic information • An authorization requirement (employee and spouse, if applicable)

HIPAA Privacy Rules

The HIPAA administrative simplification regulations, referred to here as the privacy rules, apply to group health plans and health care providers, and restrict the health information that may be disclosed to employers and plan sponsors. These rules apply to wellness programs that are part of a group health plan. There are no special exceptions or requirements unique to wellness programs. See our [March 8, 2013 For Your Information](#) for detailed information on complying with the HIPAA privacy rules.

Comment. The ADA proposed rules provide that compliance with HIPAA privacy rules will satisfy compliance with the [ADA proposed confidentiality requirement](#).

ERISA

Whether a wellness program is subject to ERISA depends on two factors. First, the program must be sponsored by a private-sector employer or employee organization. Second, the program must provide “medical care” so that it would be considered a group health plan. Wellness programs that offer physical examinations, BMI or cholesterol screening, or immunizations generally will be treated as group health plans subject to ERISA, while programs that merely encourage good habits, by offering healthy cooking classes or exercise programs, likely would not. Programs subject to ERISA will have to satisfy specific requirements, including plan document and summary plan descriptions, claims procedures and Form 5500 filings.

Health Care Reform (ACA)

Health care reform includes many provisions associated with wellness programs — the most well-known is the codification of the HIPAA nondiscrimination regulations. But other ACA provisions promote, support or encourage the study of wellness programs. Furthermore, wellness rewards often affect the determination of cost or value of group health plan coverage for shared responsibility purposes.

Minimum Value and Affordability

Generally, to avoid potential shared responsibility assessments under the ACA, employers must offer their full-time employees health coverage that provides minimum value and is affordable. (See our [April 17, 2014 FYI In-Depth](#).) Similarly, individuals (with some exception) face a tax penalty unless they maintain minimum essential coverage (e.g., employer-provided health coverage or coverage purchased in the public marketplace). Wellness program

Individual Mandate and Affordability

Certain individuals are exempt from the requirement to maintain minimum essential coverage — including individuals for whom coverage is not affordable. Coverage that requires a contribution of more than 8% (8.13% in 2016) of an individual’s household income is considered unaffordable for purposes of the ACA individual mandate.

Market Mandate, Fees and Reporting

Typically, a wellness program that provides medical care is a component of the employer’s comprehensive group health plan and does not have to satisfy ACA requirements on its own. However, a stand-alone wellness program that is a group health plan (and not an excepted benefit or a retiree-only plan) will be subject to the ACA generally, including the market reforms. PCORI and reinsurance fees do not apply to wellness programs that do not provide significant benefits for medical care or treatment. (See our [March 25, 2014](#) and [January 23, 2013](#) issues of *FYI*.)

incentives that impact deductibles, co-pays and other cost-sharing can affect the value of the coverage an individual receives. Incentives that impact premiums affect the amount that the employee is required to pay for coverage. But not all employees participate in wellness programs nor receive the incentives.

Proposed regulations related to minimum value and affordability of employer-sponsored coverage provide that tobacco-use incentives may be treated as earned (that is, taken into account for purposes of minimum value and affordability determinations), while wellness incentives unrelated to tobacco use should not be taken into account for those purposes. This applies regardless of an employee’s participation in the wellness program.

Final regulations on the individual mandate take a consistent approach, but provide an important nuance. A wellness incentive that includes any component unrelated to tobacco use is treated as unearned. If, however, there is an incentive for completing a program unrelated to tobacco use and a separate incentive for completing a program related to its use, then the incentive related to tobacco use may be treated as earned.

Comment. Treating a tobacco-use incentive as earned could incrementally increase the value and/or reduce the cost of the coverage. This incentive would be factored into minimum value and affordability calculations uniformly, regardless of individual employee participation or success with earning the reward. Note that the rule would apply to programs that tie a specific incentive to tobacco use. Whether a program is participatory or health-contingent (under HIPAA) or voluntary (under the ADA or GINA) is not relevant. But program design — whether the wellness program is part of the group health plan, targets tobacco use and applies a separate incentive amount — could make a difference in the value and affordability of a group health plan.

The IRS has indicated that this approach will be adopted when the final regulations on minimum value and affordability are issued. (See our [May 24, 2013 For Your Information](#).)

COBRA

Under COBRA, an employer must give a qualified beneficiary who has had a qualifying event the opportunity to continue the group health plan coverage in which he or she was enrolled immediately before the qualifying event. COBRA applies to plans maintained by an employer that provide medical care and is enforced by DOL and IRS.

A wellness program that includes benefits that are considered medical care should be treated as a group health plan or part of the medical plan subject to COBRA continuation coverage. For example, a wellness program that provides a physical exam, cholesterol screenings, or flu shots likely will be subject to COBRA. On the other hand, a wellness program that offers only educational seminars about nutrition and exercise likely will not. The same definition of group health plan applies to both [HIPAA](#) and COBRA.

Offering COBRA

Some employers make wellness programs available to all employees, including those who do not participate in the employer's comprehensive medical plan. Other employers bundle the wellness program with comprehensive medical coverage offered under the group health plan, making it available only to those enrolled in the group health plan. Generally, for purposes of offering COBRA, an employer that only offers the wellness program to individuals enrolled in group health plan coverage can define how many group health plans it maintains and can either bundle the wellness program with the comprehensive medical plan or unbundle and offer it separately.

Comment. COBRA considerations can play a key role in wellness program design. If the wellness program is considered a group health plan and offered to all employees, the COBRA obligation, administrative burden and adverse selection risk might be greater than if the wellness program is offered only to those enrolled in the employer's comprehensive medical plan. Individuals who elect to continue the wellness program under COBRA have the same open enrollment and HIPAA special enrollment rights as

COBRA and Form W-2 Reporting

The costs of a wellness program must be included in Form W-2 reporting if the employer otherwise charges a COBRA premium for the coverage.

similarly situated active employees. Thus, during annual open enrollment, the qualified beneficiary with the wellness program coverage could elect the employer's comprehensive medical plan or add a spouse and/or other dependents. The access to coverage could increase the adverse selection risk for the group health plan. That said, the availability of comprehensive coverage and premium or cost-sharing reductions in the ACA marketplaces likely reduces the attractiveness of the employer's plan.

Incentives

Whether a COBRA qualified beneficiary is entitled to a wellness program incentive may depend on the type of incentive offered. Some compliance experts argue that incentives consisting of premium discounts relate to the cost of the coverage (particularly for a self-insured plan) and would not need to be offered to qualified beneficiaries because these individuals pay 102% of the cost of coverage. Thus, it could be argued that premium discounts or cash incentives arguably relate to the cost of coverage and not the provision of medical benefits (to which COBRA relates).

Comment. The departments have not specifically addressed wellness programs, incentives and COBRA coverage in any formal guidance. So while it is clear that COBRA applies to the group health plan and benefits provided under such a plan, how it applies to incentives provided through a wellness program is not always clear. For example, would incentives that consist of cost-sharing reductions or surcharges need to be provided to COBRA qualified beneficiaries who participate in a wellness program? Although such incentives generally are rare in the wellness program arena, employers should take care to consider COBRA when designing a program.

Notices

If the wellness program is a group health plan, COBRA's notice and election requirements apply. This includes:

- Initial notice provided to each program participant and his or her spouse when coverage under the program first begins
- Election notice to each qualified beneficiary
- Notice of termination when COBRA coverage terminates before the end of the maximum coverage period

Comment. The initial notice requirement applies to each employee eligible for the wellness program (and each eligible spouse), creating an administrative burden and expense if the wellness program is offered separately from the comprehensive medical. Employers that limit wellness program eligibility to those participating in the medical plan would avoid this burden and expense.

Tax Laws

The type and form of incentives provided through a wellness program can also provide tax reporting challenges. Some incentives — such as cash awards and gift certificates, cards and coupons — are taxable, as the IRS treats them as [cash equivalents](#) includable in the employee's gross income and subject to employment tax reporting and withholding (i.e., reported on Form W-2). Other incentives linked to a nontaxable benefit, such as a qualified medical expense, reduced health care premiums, deductibles, copays or contributions to a health savings account (HSA), flexible spending arrangement (FSA) or health reimbursement arrangement (HRA), may be tax-free.

Comment. As wellness program designs get more creative, it's important for employers to confer with tax experts to ensure that the tax treatment of benefits provided through the wellness program is properly reported. For example, reimbursement of health club dues is generally included in an employee's gross income unless the gym is in-house, and then it might be considered a nontaxable fringe benefit. Over-the-counter medications, such as smoking cessation treatments, provided by a third party wellness vendor would seem to require a prescription to be excluded from tax. Gift cards provided to participants by a third party administrator (TPA) or wellness vendor might be included in the employees' gross income because of the connection to the employment relationship.

Wellness program incentives can also create some unique issues for cafeteria plans (including health FSAs), health reimbursement arrangements (HRAs) and Health Savings Accounts (HSAs).

Cafeteria Plans

An incentive earned and awarded mid-year might trigger a change of election under the cafeteria plan election regulations. For example, the plan can allow a change of election with respect to pretax amounts to accommodate a reward of a premium reduction earned mid-year.

Comment. This is a matter of plan design. If the wellness incentive significantly reduces the cost of coverage for comprehensive medical coverage for all coverage options offered under the employer's plan, the regulations permit the employer to allow employees to change elections among the coverage options. As a practical matter, most employers limit the election change event and apply an automatic adjustment to the employee's share of the cost of coverage in which he or she is enrolled.

However, a mid-year contribution to a health FSA, HRA or HSA (e.g., due to earning a wellness reward), while permissible, is not an event for which the plan could permit an election change to a health FSA, major medical or other cafeteria plan benefit election.

Health Reimbursement Arrangements

Wellness rewards contributed to a health reimbursement arrangement cannot be too closely connected to cafeteria plan benefits. So, employer contributions to a health reimbursement arrangement may not be attributable (directly or indirectly) in whole or part to pretax salary reductions made through a cafeteria plan. Giving employees a choice of where to put the earned reward, for example, between a health reimbursement arrangement and a cafeteria plan benefit like a health FSA, would cause the health reimbursement arrangement to lose its tax-favored status.

HSAs

An employer is subject to a 35% excise tax on all of its HSA contributions made during the calendar year (outside of a cafeteria plan) unless it makes comparable contributions to all comparable participating employees for each month during a calendar year. Typically, wellness rewards are earned on an individual basis, depending on level of participation, so contributions can vary by employee. Thus, in many cases, an employer will not be able to avoid this excise tax if contributions under a wellness program are made outside of a cafeteria plan. (For more information on HSA comparability rules, see our [April 25, 2008 For Your Information](#).)

The 35% excise tax can be avoided if employer contributions are made through a cafeteria plan. Wellness incentives contributed to an HSA through a cafeteria plan (e.g., pretax or salary reduction) are not subject to the comparability rules. These pretax HSA contribution amounts, however, are subject to the cafeteria plan nondiscrimination rules and can impact test results, causing highly compensated or key employees to be subject to taxation.

Other Employment Laws

Tying wellness initiatives directly to compensation and promotion opportunities may invoke other employment laws, such as Title VII of the Civil Rights Act and the Pregnancy Discrimination Act. Further, some wellness goals could have the effect of discriminating against older employees. Employers should consider each of the following laws when implementing wellness programs.

Title VII of the Civil Rights Act

Coverage under an employer-sponsored group health plan must be provided without regard to the race, color, sex, national origin, or religion of the individual. Where both men and women are, or could be, affected by the same condition or helped by the same treatment, the employer will be liable for sex discrimination if it provides different coverage to employees on the basis of gender. Tying wellness goals to compensation and benefits may have a disparate impact on certain ethnic groups in violation of Title VII of the Civil Rights Act. For example, suppose as part of its wellness program an employer holds a fitness fair. Those who attend receive a \$100 per year premium reduction. If the fitness fair occurs on a religious holiday, this may have a disparate impact on employees who observe that holiday.

Pregnancy Discrimination Act

A group health plan may not discriminate based on an individual's pregnancy as to eligibility for coverage under the plan, the terms and conditions on which coverage is provided, or the amount an employee is charged for coverage. With respect to a wellness program, if an employee becomes pregnant during the year, the employer would need to modify or otherwise address any wellness initiative that would be affected by the pregnancy. That is, the pregnant employee may not be penalized based on her inability to complete a wellness goal due to her pregnancy.

Age Discrimination in Employment Act (ADEA)

The ADEA generally prohibits employers from discriminating against individuals on the basis of age with regard to employment and its privileges. These prohibitions on age discrimination are limited to individuals age 40 and older. For example, a wellness program that provides a reward using a uniform biometric standard for blood pressure might be found to discriminate against older people and violate the ADEA.

State Lifestyle Discrimination Laws

A number of states have adopted lifestyle (non)discrimination laws (e.g., protect employees who might be discriminated against because of their weight or tobacco use). These laws take various forms, but generally prohibit an employer from discriminating in terms of hiring, firing, compensation and benefits against an employee for

Impact on HSA Eligibility

It's possible that participation in a wellness program could affect an employee's eligibility to make HSA contributions. For example, coverage under a wellness program that provides significant benefits in the nature of medical care or treatment, like providing cost-free treatment for a chronic illness, prior to meeting the qualified HDHP deductible, could be considered impermissible coverage. A wellness program that offers a wide range of education and fitness services, stress management and health screenings, would not provide significant medical benefits and would not affect HSA eligibility.

engaging in certain lawful activities. Some laws limit protections to off-duty activities. A wellness program that extends to the employer’s hiring, compensation and/or benefits practices could cause an employer to run afoul of one of these laws. For example, such a law could have an impact in a state where an employer has a tobacco-free hiring policy.

Comment. While it’s important for employers to be aware of state laws, in some cases, compliance with federal laws like HIPAA and the ADA will likely accommodate the state law when it comes to incentives provided through wellness programs. Moreover, it’s also possible that for employers subject to ERISA, ERISA would preempt a state law as it relates to an employee benefits plan.

Common Designs and Applicable Laws

This table provides a sample of common wellness plan components and the laws they likely would implicate. It’s not intended to be a comprehensive analysis of any given wellness program — that would depend on the facts and circumstances. Employers should consult with counsel for a complete legal evaluation when designing and implementing a wellness program.

Component	HIPAA Nondiscrimination	ADA	GINA	Tax	Other
Nutrition classes	X Participatory program	X Reasonable accommodation			
Cash reward for walking a mile a day	X 30% max reward; coverage employee enrolled; activity-only program	X Reasonable accommodation		X	
Premium discount for meeting biometric standards – offered to employee and spouse	X 30% max reward; coverage employee enrolled; outcome-based program	X 30% max reward; employee-only coverage	X 30% max reward; coverage employee enrolled		X Confidentiality / privacy; cafeteria plan
Tobacco surcharge if test shows presence of nicotine – employee only	X 50% max reward; coverage employee enrolled; outcome-based program	X 30% max reward; employee-only coverage			X Confidentiality / privacy; cafeteria plan
Tobacco surcharge if test shows presence of nicotine – offered to employee and spouse	X 50% max reward; coverage employee enrolled; outcome-based program	X 30% max reward; employee-only coverage	X 30% max reward; coverage employee enrolled		X Confidentiality / privacy; cafeteria plan
Reward of car seat for maternity management enrollment	X Participatory program	X Reasonable accommodation		X	X Pregnancy Discrimination Act Confidentiality / privacy

In Closing

Wellness programs address the body, mind and pocketbook — helping employers reduce benefit costs and lost work time, while increasing employee health, productivity and satisfaction. But the uncertainty of the ADA proposed regulations and areas left unaddressed in other proposed and final regulations, like GINA and COBRA, leave employers with some uncertainty. Creative designs and more aggressive approaches may require a risk analysis, ensuring that the benefits and value of the program outweigh any risks. Employers must consult with legal counsel and trusted advisors for strategies or approaches that ensure compliant program design. Fitting the patchwork of laws and regulations together can feel daunting, but, in the end, wellness programs can be equally rewarding for both employees and employers.

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