



WELLNESS PROGRAMS *SIMPLIFIED*

Everything You Never Knew about
Wellness Programs, but Probably Should

 Compliance
Dashboard®

WHY OFFER A WELLNESS PLAN?

Reduce Healthcare
Costs

&

Maintain Employee
Health

TWO TYPES OF WELLNESS PLANS

1

Non-Group Health Plans

Provide information or voluntary activities only

Do not involve medical tests

No incentives

No questions re: medical history or genetic information

Incentive must be available to all similarly situated individuals

Examples

- Programs that pay for health club or weight loss club dues
- Giveaways such as T-shirts to people who walked a 5k
- Awarding bonuses or extra vacation to employees who don't smoke
- A stand-alone health-risk questionnaire program that does not provide or pay for health benefits

2

Group Health Plans

Tied to a medical plan or offers medical benefits

Examples:

- Blood Screenings
- Blood pressure screenings
- Flu shots
- Disease management programs
- Other benefits related to medical care

Does the wellness program provide significant benefits in the nature of medical care?

NO

You may have a Non-Group Health Plan
Your plan's compliance burden is much less burdensome!

YES

You likely have a Group Health Plan
Your plan's compliance burden is much more complicated!

Be mindful: Your plan cannot discriminate based on:

- Age (ADEA)
- Race, color, religion, sex, or national origin (Title VII)
- Pregnancy, childbirth, or related medical conditions (PDA)
- Disability (ADA)
- Genetic tests or information (GINA)

(These guidelines may apply to a Group Health Plan)

Your plan will need to comply with:

- ERISA: Reporting and Disclosure
- COBRA: Continuation coverage
- ADEA and Title VII: Discrimination
- FLSA: Overtime
- ACA: Market Reform Rules
- HIPAA: Nondiscrimination
- HIPAA: Privacy and Security

Under HIPAA, there are two types of Wellness Programs.

1

Participatory

HIPAA prohibits programs from discriminating against individuals re: eligibility, benefits, or premiums based on a health factor (e.g. medical condition, medical history, genetic information, etc.)



However, there is an exception for Wellness plans. A Wellness Plan can "discriminate" (i.e. offer different premiums, benefits, or cost-sharing) and offer "incentives" to individuals if Wellness Program requirements are satisfied.

2

Health Contingent

Activity Only

Outcome-Based

Incentives will look different depending on whether the Wellness plan is Participatory or Health Contingent. See page 8 for more information on incentives.



Participatory Examples

Programs that do not provide any incentive or do not condition the incentive on satisfaction of a standard related to a health factor:

- Fitness center reimbursement program
- Diagnostic testing program that does not base incentives on test outcomes
- Program that waives cost-sharing for prenatal or well-baby visits
- Program that reimburses employees for the cost of smoking cessation aids regardless of whether the employee quits smoking
- Program that provides incentives for attending health education seminars

No limit on the amount of the incentive!

Must be available to all similarly situated persons.

Health Contingent Program

Activity Only Examples

- Walking, dieting, or exercise program without regard to a particular outcome

Both share these 4 characteristics:

- Often involve a Health Risk Assessment “HRA”
- Must meet certain safeguards
- Limits on incentive amounts
- Must provide a reasonable alternative standard

Outcome-Based Examples

- Complete a test screening to determine the initial standard
- Screen for high blood pressure, high glucose, abnormal BMI, etc.
- Require employees to meet the standard to earn the incentive

If an individual is in a normal or healthy range, they receive the incentive

If an individual is NOT in the normal or healthy range, they participate in wellness activities to meet the standard and receive the incentive

If you have a health contingent program, HIPAA requires:

Safeguards	Incentive Limits	Reasonable Alternative Standard
Reasonably designed to promote health/prevent disease	Generally must not exceed 30% of cost of employee only coverage	Activity Only
Not overly burdensome	Another 20% allowed if program is aimed at preventing/reducing tobacco use (total of 50%)	Unreasonably difficult or inadvisable for medical reasons
Not a pretense for discriminating based on a health factor	If dependents are covered under family coverage, limits are calculated based on cost of family coverage	May seek verification from physician
Annual opportunity to qualify	Should consider the ADA's and GINA's incentive limits. See page 8 for more information.	Outcome-Based
Incentive must be available to all similarly situated individuals		Must be available to anyone not meeting the standard, regardless of reason
		Cannot seek verification from physician
		Must give person the opportunity to comply with their physician's recommendation
		Both
		Availability of a reasonable alternative must be disclosed in all plan materials
		Plan materials must include contact information for obtaining the alternative and state that physician recommendations will be accommodated (sample disclaimers are available)

THE AMERICANS WITH DISABILITIES ACT (ADA)

The ADA applies to all wellness programs that require health screenings or include an HRA.

The ADA's requirements impact Wellness Programs in four areas:

1

REASONABLE ACCOMMODATIONS

Employers must make reasonable accommodations that allow individuals with disabilities to participate.

- A program's locations (such as fitness or weight-loss centers) should be accessible to its disabled participants
- Educational programs should be accessible to participants with hearing or sight disabilities
- While additional benefits may be offered to qualified individuals with disabilities, such individuals should not be required to complete additional requirements.

3

MAINTENANCE OF MEDICAL RECORDS

Any medical information obtained as part of the wellness program must be kept separate and confidential.

4

NOTICE REQUIREMENT

Employers must give notice (before information is collected) to the employees of:

- What medical information will be obtained;
- How will it be used;
- Who will receive it; and
- Restrictions on its disclosure

What is the ADA?

The ADA states that an employer may not deny an individual with a disability equal access to insurance, or require the individual to have terms and conditions of insurance different than those of employees without disabilities.

The ADA has its own incentive limits that should be considered.

2

DISABILITY RELATED INQUIRIES AND MEDICAL EXAMS

Employers cannot make inquiries likely to elicit information about an individual's disability.

But, there are limited circumstances under which the ADA permits medical exams or questions about medical history.

Note: an employer cannot require an employee to undergo a medical screening or answer disability-related questions except as part of a voluntary wellness program.

Medical exams and inquiries must be voluntary. The employer cannot:

- Require participation
- Deny access to a Group Health Plan or limit coverage
- Retaliate against the employee if the employee chooses not to participate or fails to achieve the health outcomes of the program
- Make the incentive coercive

Medical inquiries or exams must be reasonably designed to promote health or prevent disease.

REASONABLE:

- Questions about health conditions or screenings for the purpose of alerting the individual to health risks (such as high cholesterol or elevated blood pressure)

UNREASONABLE:

- Questions about medical information on a HRA but not providing any feedback about risk factors
- Not using aggregate information to design programs or treat specific conditions

THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

GINA regulates wellness programs when they request genetic information from an employee.

This often occurs when questions about family medical history are included in a HRA

Non-Genetic information typically includes:

- An individual's age or sex
- Tests for cholesterol, liver function, blood pressure, glucose, and BMI
- Tests for HIV or the presence of alcohol or tobacco

Genetic information typically includes:

- Information about an individual's genetic tests;
- Information about the genetic test of a family member;
- Family medical history (including information about an employee's spouse);
- Requests for and receipt of genetic services by an individual or a family member; and
- Genetic information about a fetus carried by an individual or family member (includes embryos through reproductive assistance)

GINA'S IMPACT ON WELLNESS PROGRAMS

GINA Title I prohibits group health plan and group health insurance issuers from adjusting group premium or contribution amounts on the basis of genetic information. This information is often obtained through Wellness Plan HRAs.

Employers offering Wellness programs that seek genetic information under Group Health Plans may want to consider two distinct HRAs:

A Pre-Enrollment HRA and a Post-Enrollment HRA

Pre-Enrollment Wellness Plan HRAs Cannot:

- Ask about family medical history
- Provide rewards to collect genetic information (even if rewards are not based on the outcome)
- Request that an individual undergo genetic testing



HRAs that collect genetic information to determine an individual's eligibility for wellness plans violate GINA.

Watch out for HRA questions that are too broad and could result in the individual disclosing genetic information. Such questions violate GINA

Post-Enrollment Wellness Plan HRAs:

A group health plan requests enrollees to complete two health risk assessments unrelated to enrollment:

1st Assessment

Instructs the individual to answer only for the individual and not their family. It does not ask for genetic information, and the plan offers a reward for completing it.

2nd Assessment

Asks for family medical history and genetic information. Completion is voluntary and the plan offers no reward, nor will completion affect the reward from the first assessment.



Because the second assessment is not used for underwriting purposes, no reward is offered in the second assessment, and the second assessment is not connected to the first, neither assessment violates GINA.

GINA TITLE II

If a Wellness Plan is offered outside a Group Health Plan or Insurance Coverage, there is a limited exception to the prohibitions on collecting genetic information. This exception means:

1

The employer may collect genetic information about an employee or their family if it offers health or genetic services (including wellness programs) on a voluntary basis.

No inducement may be offered for genetic information. (An employer cannot condition participation in a wellness program on disclosing an individual's or their spouse's genetic information!)

Such a wellness program that collects genetic information must be

“reasonably designed to promote health or prevent disease”

This means that the program must provide the participants with:

- **Results**, follow-up information, or advice designed to improve the participant's health

OR

- The **collected information** is used to design a program that addresses a subset of the issues identified
- Such questions are specifically identified;
- The individual providing their own information must provide a prior knowing, voluntary, and written authorization
- Individually identifying information must be provided only to the individual or healthcare professional

2

The employer can offer an incentive for completing an HRA that contains questions about genetic information (think family medical history) IF:

The assessment makes it clear that the individual does NOT need to answer the questions about genetic information in order to receive the incentive.

Incentives can only be given for information about manifestations of a spouse's diseases or disorders (NO other information re: genetic information is allowed!)

- The spouse must be the person providing the information
- The spouse must provide a prior knowing, voluntary, and written authorization

No retaliation is allowed for a spouse's refusal to provide information about manifested diseases or disorders.

The interaction of GINA Title I and Title II re: incentives for spouses is murky.

Please seek legal counsel if considering this option.

WELLNESS PROGRAM INCENTIVES

Incentive limits vary depending on which law applies!
We're focusing on HIPAA, the ADA, and GINA

HIPAA Incentive Limits:

Limits only apply to health contingent programs (*but the ADA limits apply to participatory programs as well. See below.*)

- Generally must not exceed 30% of cost of employee only coverage
- Another 20% is allowed if the program is aimed at preventing/reducing tobacco use (total of 50%)
 - If a program is solely aimed at preventing/reducing tobacco use, the maximum incentive is 50%
 - However, if a Wellness plan contains tobacco goals AND other health goals, the incentives should be tested separately (up to 30% for health contingent and up to an additional 20% for tobacco cessation)
- Calculate the incentive using the cost of coverage of the plan the employee (or the employee and their family) is actually enrolled in

30%

HIPAA incentive limit must not exceed 30% of employee only coverage

20%

Additional 20% incentive is allowed if Wellness Plan is aimed at preventing/reducing tobacco use.

50%

Maximum incentive if Wellness Plan is solely aimed at preventing/reducing tobacco use.

Calculating Incentives:

- Incentive limits are calculated using the cost of premiums for fully insured plans.
- For self-insured plans, the employer should use a good faith estimate of their projected costs
- Incentives may be offered to similarly situated individuals based on a bona fide employment classification, e.g. to employees only and not spouses, or employees only and not retirees

Examples of Program Incentives:

- Premium reductions
- Premium surcharges
- In-kind inducements, such as time-off awards, prizes, or other items of value, in the form of either rewards or penalties (monetary value of such should be calculated by employer)

ADA Incentive Limits*

If a Wellness Program is a Group Health Plan and makes disability related inquiries or includes a medical examination, under the ADA the incentive cap is not yet determined.

GINA Incentive Limits*

- If the program is a GHP, no incentives may be offered for answering question involving genetic information
- For the employee: If GINA does not apply, generally follow the ADA (or HIPAA as applicable)
- For the employee's spouse, if manifestation of disease or disorder is provided: TBD (but only if program is not a GHP!)
- Under GINA, information about tobacco use does not constitute genetic information*

*As of 6/11/2020, the EEOC approved a new notice of proposed rulemaking to address the incentive limits under the ADA and GINA. The proposed rule suggests a 'de minimis' incentive, yet to be defined. The former incentive limits under the ADA and GINA have been vacated.

WHICH LAW APPLIES?

1

If Wellness Plan involves a disability related inquiry or medical exam

Follow ADA Incentive restrictions

If a wellness program has multiple incentives, and only certain incentives require a medical exam or answers to disability-related questions, the ADA's limitation should apply only to those incentives that require a medical exam or answers to disability related questions.

2

If Wellness Plan involves an inquiry/exam which includes genetic information

Follow ADA and GINA incentive restrictions

3

Otherwise, if Wellness Plan is part of a Group Health Plan

Follow HIPAA Non-discrimination incentive restrictions

But if the plan also asks disability related or genetic questions, consider ADA and GINA restrictions

4

For Wellness Plans involving Nicotine/Tobacco:

Under the ADA, no additional incentive is allowed for smoking cessation if a test for nicotine/tobacco is required.

Under GINA, information about tobacco use does not constitute genetic information, so GINA would not apply.

If no test is required, the ADA's limit does not apply, thus HIPAA's additional 20% is allowed.

HELPFUL RESOURCES:

ComplianceDashboard Wellness Taxes and Penalties Quick Reference Chart

www.compliancedashboard.net/uploads/Wellness-Taxes-and-Penalties.pdf

ComplianceDashboard Activity Only vs. Outcome Based Quick Reference Chart

www.compliancedashboard.net/uploads/Activity-Only-vs-Outcome-Based.pdf

ComplianceDashboard HIPAA vs. ADA Wellness Program Requirements Chart

www.compliancedashboard.net/uploads/HIPAA-vs-ADA.PDF

RAND Workplace Wellness Study and Report

www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/workplacewellnessstudyfinal.pdf

Workplace Wellness Programs: Services Offered, Participation, and Incentives

www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/WellnessStudyFinal.pdf

Kaiser Family Foundation/Health Research & Educational Trust, 2016 Employer Health Benefits Survey

www.kff.org/health-costs/report/2016-employer-health-benefits-survey/