



## Frequently Asked Questions (FAQ) About Wellness Programs' Legal Requirements

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**Q1: What is a wellness program?**

A1: A wellness program is any formal or informal program that educates employees about health-related issues, promotes following healthy lifestyles, or encourages employees to make healthier choices. Wellness programs vary greatly and are not always called wellness programs. Some are purely educational and have no financial incentives. Others have financial incentives that may take the form of reductions in the employee's contribution for medical coverage, reduced deductibles or copays, gift cards, cash or prizes (e.g. T-shirts, mugs, tickets, etc.).

Wellness programs can be part of or provided by a group health plan or by a health insurance issuer (carrier) offering group health insurance in conjunction with a group health plan, or they can be offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance.

**Q2: What kinds of wellness programs must follow the Health Insurance Portability and Accountability Act (HIPAA) and Patient Protection and Affordable Care Act (PPACA) rules?**

A2: Wellness programs may be "participatory" or "health-contingent." Participatory programs are not required to follow the HIPAA/PPACA rules that are discussed in this FAQ. They may need to follow some or all of the requirements in other laws – see [Q52](#). Health-contingent programs are required to follow the HIPAA/PPACA rules and many of the other laws discussed in Q52. Examples of the different types of wellness programs include:

Participatory	Health-Contingent (activity-only)	Health-Contingent (outcome-based)
<ul style="list-style-type: none"> <li>• Incentive to undergo a screening or complete a health reimbursement arrangement (HRA)</li> <li>• Attend a lunch-and-learn on a wellness topic</li> <li>• Free flu shots</li> <li>• Reimbursement of fitness center fees</li> </ul>	<ul style="list-style-type: none"> <li>• Tobacco cessation coaching programs</li> <li>• Diet programs</li> <li>• Walking or other exercise programs</li> <li>• Health coach meeting required only of employees who do not meet weight, blood pressure or glucose goals</li> </ul>	<ul style="list-style-type: none"> <li>• Body Mass Index (BMI) below 30</li> <li>• Cholesterol below 200</li> <li>• Blood pressure below 130/85</li> <li>• Tobacco-free</li> </ul>

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**Q3: What kinds of wellness programs must follow the American's with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) rules?**

A3: Wellness programs that include disability-related inquiries; primarily through health risk assessments (HRAs) and medical examinations, such as biometric screenings, are subject to the ADA and GINA. Furthermore, wellness programs with disability-related inquiries that are offered outside of a group health plan are subject to the ADA and GINA.

**Q4: What is a participatory program?**

A4: A participatory program is a wellness program in which none of the conditions for obtaining the wellness reward require the individual to satisfy a condition related to a health factor.

Said another way, a participatory program is one that either has no reward or penalty (such as a program that provides free flu shots to employees who want one) or that does not include any conditions for obtaining the reward that are based on or related to a health factor (such as attending a series of lunch-and-learns that virtually anyone can do regardless of their health). Most educational programs that are offered either to all employees or to all plan participants will be considered participatory.

Examples in the regulations of participatory programs include reimbursement of a fitness center membership, a reward for participating in diagnostic testing programs like a cholesterol screen that does not base any part of the reward on the outcome of the test, a smoking cessation program where the wellness reward is provided whether or not the person quits smoking, and a wellness reward for attendance at a periodic health education seminar. As long as a participatory program is equally offered to all similar employees, the HIPAA/PPACA requirements will not apply to the program. This means that there are no limits on the amount of incentives that can be offered, and a reasonable alternative is not required. (Similar employees include, for example, all employees in a certain location, all those hired before or after a certain date, or all hourly employees.)

**Q5: What is a health-contingent program?**

A5: A health-contingent wellness program is a program that either requires the participant to satisfy a standard related to a health factor (such as maintaining a healthy weight, blood pressure, blood sugar, or cholesterol level) or requires the individual to do more than other similarly situated individuals in order to attain the reward because of the person's health status. Health-contingent programs are divided into "activity-only" programs and "outcome-based" programs.

**Q6: What is a health factor?**

A6: A "health factor" is very broad and includes anything that considers or affects a person's physical condition. This includes exercise programs, diet programs, programs that consider tobacco use, and programs with biometric targets. A program that requires persons with a particular health condition to attend a specific educational program is considered a health-contingent program.

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**Q7: Can a group health plan have a smoker surcharge or a non-smoking discount without a wellness program?**

A7: No, the Department of Labor has stated that it cannot. Smoking is considered a health factor. A plan cannot charge a person more, offer different benefits, or change eligibility requirements because of a health factor, unless it does this as part of a wellness program.

**Q8: What is an activity-only program?**

A8: An activity-only program is a program that requires the individual to perform or complete an activity related to a health factor in order to obtain the wellness reward. However, the person simply needs to complete the activity, and not achieve specific results, to receive the reward.

An activity-only program includes things like a walking program, nutrition counseling, or a smoking cessation program, if the program does not have a target health measure. It also includes programs that require individuals with certain health factors – such as those who have unhealthy BMIs, blood pressure levels, etc. – to participate in educational programs, even though they only need to attend the programs, because those individuals are required to do more to get the reward than those who have healthy levels.

**Q9: What is an outcome-based program?**

A9: An outcome-based program requires the individual to achieve or maintain a specified health outcome, such as reaching or maintaining a healthy weight or blood cholesterol level, or not using tobacco.

**Q10: What must a health-contingent program do?**

A10: A health-contingent wellness program must meet all five of these requirements:

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

**Q11: Why do wellness programs have so many rules?**

A11: HIPAA provides that a group health plan may not consider a person's health status when determining eligibility, benefits, or premiums under the group health plan. Qualifying wellness programs provide an exception to that prohibition. Title I of the ADA is a federal civil rights law that prohibits employers from discriminating against individuals on the basis of disability. It also generally restricts employers from obtaining medical information from applicants and employees but allows them to make inquiries about

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employees' health or do medical examinations that are part of a voluntary employee health program. Employee health programs include many workplace wellness programs.

Additionally, Title I of the ADA requires employers to make all wellness programs, even those that do not obtain medical information, available to all employees, to provide reasonable accommodations (adjustments or modifications) to employees with disabilities, and to keep all medical information confidential.

GINA is a federal law that prohibits discrimination in insurance and employment on the basis of genetic information.

The wellness rules, therefore, are intended to make sure that the wellness program helps employees – even those with health issues – improve their health and not just be a way to penalize those who are less healthy. The rules also protect employees from having their genetic information used in making decisions about employment, and from being discriminated against on the basis of a disability.

### **Q12: What does “reasonably designed to promote health or prevent disease” mean?**

A12: A program is considered reasonably designed to promote health or prevent disease if it:

- a) Has a reasonable chance of improving the health of, or preventing disease in, the participating individual;
- b) Is not overly burdensome;
- c) Is not a subterfuge for discriminating on the basis of a health factor; and
- d) Is not highly suspect in its methods.

This means, for example, that a plan cannot simply charge non-smokers less, without also helping smokers to quit.

Furthermore, a wellness program with a biometric screening or HRA requirement will not be able to show that it is reasonably designed to promote health if it merely claims that the collection of information is useful. Conversely, asking employees to complete an HRA in order to alert them to health risks they might have been unaware of would meet the standard of promoting health. Employers that use aggregated information from HRAs or biometric screening to design programs to meet the needs of their employee population (for example a program for individuals with diabetes or high blood pressure) would be sufficient.

Collecting information without meaningful follow-up and advice is not sufficient. Employers must ensure that any wellness program involving medical screenings or HRAs is sufficient to promote health; any program that merely collects information should be avoided.

### **Q13. Can a participating employee provide an attestation from his or her physician that the employee is under the care of a physician, and that any identified health risks are being managed by the physician, to obtain an incentive relating to the health risk assessment or biometric screening?**

A13. No. The Equal Employment Opportunity Commission (EEOC) has indicated that is not a “reasonable design.”

## **Q14: What does “voluntary” mean?**

A14. The EEOC provided a definition of “voluntary” for wellness programs that include disability-related inquiries. Wellness programs that do not include disability-related inquiries should consider the EEOC’s guidance when designing their wellness program. A voluntary program is one that:

1. Does not require employees to participate;
2. Does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation; and
3. Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA.

The second requirement of a voluntary wellness program prohibits the outright denial of access to a benefit available by virtue of employment. When an employer denies access to a health plan because the employee does not answer disability-related inquiries or undergo medical examinations, this is discrimination by virtue of requiring the employee to answer questions or undergo medical examinations that are not job-related and consistent with business necessity, and is not voluntary.

Practically speaking, this means employers cannot offer a “basic” group health plan and a more comprehensive group health plan, with the comprehensive health plan only being offered to employees who participate in the wellness program that involves an HRA or biometric screening.

## **Q15. Are there any other requirements for wellness programs that include disability related inquiries such as health risk assessments or biometric screenings?**

A15: Yes. Employers must provide a notice that clearly explains:

- What medical information will be obtained,
- Who will receive that medical information,
- How the medical information will be used,
- The restrictions on its disclosure, and
- The methods the covered entity will employ to prevent improper disclosure of the medical information.

The employer must also notify the employee whether it complies with privacy and security measures established by HIPAA. The information must be written so that the employee whose medical information is being obtained is reasonably likely to understand it.

## **Q16: What is an annual opportunity to qualify for the incentive?**

A16: A plan has an annual opportunity to qualify if the tracking period is one year or less and each person has an equal chance to qualify each year. For example, these programs provide an annual opportunity to qualify:

- a) A person who has not used tobacco in the past year can receive the non-smoker premium.
- b) Biometric testing occurs each year as part of open enrollment and anyone who has reached the blood pressure, cholesterol, and blood glucose targets receives an HRA contribution.

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- c) An exercise program requires the person to exercise 150 minutes per week during any eight months during the calendar year and provides a premium reduction if they meet the exercise target for the required eight months.

### **Q17: Does a wellness incentive have to be positive?**

A17: The wellness program rules clearly state that an incentive may either be positive (such as a reduced deductible, coinsurance, copays or premiums, or a cash award, for those who complete the activity or reach the goal) or negative (such as a higher deductible, coinsurance or co-pays or a premium surcharge for those who do not complete the activity or reach the goal).

### **Q18: What is the maximum incentive a plan can provide?**

A18: The reward or penalty can be as much as 30 percent of the cost of coverage if the incentive is not related to tobacco usage. If there are multiple parts to the program (such as meeting certain BMI, blood pressure, cholesterol, and exercise targets), the maximum total reward or penalty for all parts of the program is 30 percent.

Specifically, the maximum allowable incentive (including in-kind incentives) for wellness programs that include health risk assessments or medical exams, or for health-contingent programs that require participants to satisfy a standard related to a health factor may not exceed:

- 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) where participation in a wellness program depends on enrollment in a particular health plan;
- 30 percent of the total cost of self-only coverage when the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
- 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; or
- 30 percent of the cost to a 40-year-old nonsmoker of the second-lowest-cost Silver Plan (available under the Affordable Care Act) in the location that the employer identifies as its principal place of business, where the covered entity does not offer a group health plan or group health insurance coverage.

The reward or penalty for not using tobacco can be up to 50 percent of the cost of coverage. If the program includes non-tobacco rewards or penalties, too, the maximum total reward or penalty is 50 percent of the cost of coverage. Tobacco or smoking cessation programs that include a medical exam or biometric screening that tests for the presence of nicotine or tobacco would be subject to the 30 percent limits, not the higher 50 percent limit. Calculation of the incentive limit follows four methods outlined above. Smoking cessation programs that ask employees whether they use tobacco, or whether or not they ceased using tobacco at the conclusion of a program, is not a program that includes disability-related inquires or medical exams.

### **Q19: What is the cost of coverage on which the incentive should be based?**

A19: The cost of the coverage includes both the employer's share and the employee's share of the premium (that is, employers may use the Consolidated Omnibus Budget Reconciliation Act (COBRA) premium, excluding the two percent administrative charge, as the cost of coverage).

*Example:* The annual premium for employee-only coverage under XYZ Company's group health plan is \$6,000 (XYZ pays \$4,500 per year and the employee pays \$1,500 per year). The plan offers employees a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for meeting all five targets is an annual premium reduction of \$600. The plan also has a \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. (Those who participate in the plan's tobacco cessation program are not assessed the \$2,000 surcharge.)

XYZ's program is permissible because the total of all rewards is \$2,600 ( $\$600 + \$2,000 = \$2,600$ ), which does not exceed 50 percent of the total annual cost of employee-only coverage (\$3,000), and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage (\$1,800).

### **Q20: Can an employer base the incentive on the family premium?**

A20: An employer may use the family premium if the whole family is eligible to participate in the wellness program. If the wellness program is only available to employees, the reward or incentive may only be based on the cost of single coverage. If the spouse and employee are eligible, the incentive may be based on the employee plus spouse rate. If family members other than the spouse may participate, the employer may base the awarded incentive on both the employee's and applicable family members' results. The employer may use any reasonable method to allocate the incentive if some, but not all, covered persons who are eligible meet the goal.

If the wellness program is subject to GINA (involves a disability-related inquiry through a health risk assessment, medical exam, or biometric screening) special rules apply. First, employers may not offer incentives to an employee's children (biological or adopted) for participation in a wellness program (or charge penalties for children that do not participate in a wellness program) that includes disability-related inquiries. Second, the wellness programs that offer incentives to spouses for disability-related inquiries, the inducement may not exceed 30 percent of the total cost of:

- 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) where participation in a wellness program depends on enrollment in a particular health plan;
- 30 percent of the total cost of self-only coverage when the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
- 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; or
- 30 percent of the cost to a 40-year-old nonsmoker of the second-lowest-cost Silver Plan (available under the Affordable Care Act) in the location that the employer identifies as its

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principal place of business, where the covered entity does not offer a group health plan or group health insurance coverage.

*Example:* An employee is enrolled in a group health plan through the employer at a total cost of \$14,000 for family coverage (taking into account both employer and employee contributions toward the cost of coverage). That plan has a self-only option for a total cost of \$6,000, and the employer provides the option of participating in a wellness program to the employee and spouse if they participate in the plan. The employer may not offer more than \$1,800 to the employee and \$1,800 to the spouse. The 30 percent limit is based on the \$6,000 cost of self-only coverage rather than the cost of family coverage.

### **Q21: Can a surcharge be added to the employee's share of the premium?**

A21: Yes, the surcharge may be added to the employee's share of the premium.

*Example:* Johnson Bros. offers coverage that costs \$500, with the cost split equally between the employee and the company. Employees who use tobacco are assessed a 35 percent surcharge, and those who do not meet BMI standards are assessed a 15 percent surcharge. Tom smokes and did not meet the BMI target. Tom's premium is calculated:

\$250 base premium  
+ \$175 smoker surcharge [35% of the total \$500 cost of coverage]  
+ \$ 75 BMI surcharge [15% of the total \$500 cost of coverage]  
\$500 premium charge

### **Q22: What is a reasonable alternative standard?**

A22: A reasonable alternative standard is an alternative means of receiving the incentive.

### **Q23: Who must be offered a reasonable alternative standard?**

A23: The reasonable alternative requirements are different for activity-only and outcome-based programs.

If the program is activity-only, the reasonable alternative only needs to be offered to a person for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the activity-based standard. Keep in mind that medical conditions that might affect a person's ability to perform an activity range from temporary conditions such as pregnancy or a recent injury or surgery to chronic conditions like arthritis or asthma.

If the program is outcome-based, a reasonable alternative must be offered to all participants who do not meet the initial standard, regardless of their health status. This means, for example, that a plan with a non-smoker discount must automatically provide all smokers with the non-smoker discount if they complete a smoking cessation program.

### **Q24: Must the reasonable alternative be determined in advance?**

A24: The reasonable alternative standard does not have to be determined in advance. In some situations, the reasonable alternative may vary based on the employee's health status.



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### **Q25: May the employer require medical evidence that the employee needs the reasonable alternative?**

A25: An activity-only program may require verification from the participant's personal physician that the participant needs a reasonable alternative standard because of his or her medical condition, but only if it is reasonable to determine that medical judgment is required to evaluate the validity of the request. (If it is obvious that a reasonable alternative standard is required, such as a running program where the participant is wheelchair-bound, then the plan cannot require verification from the participant's physician of the need for a reasonable alternative standard.) An outcome-based program may not require medical verification.

### **Q26: Must the employer consider the physician's wishes when determining a reasonable alternative?**

A26: The plan must accommodate the recommendations of the participant's personal physician as to the medical appropriateness of the reasonable alternative. This applies to both activity-only and outcome-based reasonable alternatives.

*Example:* Brown Corp. imposes a 25 percent smoker surcharge. Its reasonable alternative is use of a nicotine patch for three months. Jane has a heart condition and, because of that, her physician recommends that she complete a biofeedback program instead. Because the physician's recommendation is based on Jane's medical condition, the plan must follow the physician's recommendation.

Sue does not want to use a patch and wants to go to a smoking cessation class instead. She asks her doctor to provide a note saying she should be excused from the patch requirement, which he does. Because there is no medical reason for this request, the employer most likely does not have to honor it. (The regulations are not entirely clear on how far a plan must go to honor a physician's recommendation.)

Neither the employee nor the employee's spouse who is participating in a wellness program may earn a wellness program reward (or avoid a penalty) by submitting an attestation that they are under the treatment of a physician and that their physician is treating them for identified health risks.

### **Q27: Who is responsible for finding a reasonable alternative?**

A27: The plan sponsor must find the reasonable alternative. For example, if the reasonable alternative for failing to meet a cholesterol standard is a class on diet and exercise, the employer must find a class on using diet and exercise to reduce cholesterol levels.

### **Q28: Who must pay for a reasonable alternative?**

A28: The plan sponsor must pay for an educational program. If the alternative is a weight loss program, the employer must pay the program fees (but not for any food costs).

### **Q29: Do other requirements apply to reasonable alternatives?**

A29: The reasonable alternative may not require an unreasonable amount of time or otherwise be too burdensome. For example, requiring attendance at a class that meets every evening, or is a long distance, would not be acceptable.

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### **Q30: May an employee request a different reasonable alternative?**

A30: An employee with a medical issue would need to have his or her medical situation accommodated as described above. It does not appear that if an employee simply prefers an alternative other than the one provided by the employer that the employer would need to accommodate that preference.

### **Q31: May an employer limit the number of times a person can get a reasonable alternative?**

A31: No, but it may require a different reasonable alternative if previous ones have failed. For example, if an employee completes a smoking cessation program but continues to smoke, the employer could require use of a nicotine patch as the reasonable alternative in the next program year.

### **Q32: Can a reasonable alternative be a physical activity?**

A32: Yes, but if the reasonable alternative also is an activity-only wellness program (for example, a walking program substituted for a running program), another alternative must be made available to an employee who provides a doctor's note stating that because of the employee's health the reasonable alternative is medically inappropriate.

### **Q33: Can a reasonable alternative be another outcome?**

A33: Yes, but if the reasonable alternative is a different level of the same standard, additional time must be provided to meet that alternative standard. For example, if the initial outcome-based standard is to maintain a BMI of 30 or below, and the participant measures a BMI of 40 on a health screen, the plan might offer, as a reasonable alternative, a requirement to reduce the BMI level by 10 percent. In this case, the plan must allow a reasonable amount of additional time for the participant to meet the incremental alternative standard; the regulations offer an example of one year.

### **Q34: Must all employees get the same reasonable alternative?**

A34: The rules state that the employer may provide different reasonable alternatives to different classes of employees, or to different employees. For example, the reasonable alternative the first year an employee is in a non-smoking alternative program may be a smoking cessation class, but the second year it might be use of a nicotine patch. Of course, employers should be sure that employees are not treated worse than others because of a protected status such as age, race, gender, or health.

### **Q35: May an employer waive the reasonable alternative requirement and simply give the employee the incentive?**

A35: Yes, an employer can treat employees with a health condition more favorably than those without a health condition, which includes simply waiving the requirement. The waiver can be for all employees who do not meet the standard or just certain employees. (If the standard is just waived for some employees, the employer should write a memo to file explaining why the standard was waived for certain people.)

### **Q36: What are some examples of reasonable alternatives?**

A36: For non-use of tobacco, options would include smoking cessation classes, required use of nicotine gum or patches for a period of time, hypnosis, or biofeedback programs.

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For a walking program, reasonable alternatives might include a reduced frequency or distance, a substitute activity (for example, swimming or water aerobics for an employee with arthritis), or a requirement to watch a video on stretching.

For a lower cholesterol level, alternatives would include a percentage reduction in the person's current cholesterol level, an exercise program, or nutrition counseling.

### **Q37: What happens if an employee satisfies the reasonable alternative?**

A37: The employee must receive the same reward as the employee would have received if he had met the original standard. If it took time to meet the reasonable alternative, the employer must make sure the employee receives the full incentive in a reasonable amount of time. Generally, the incentive must be provided in the current year, although the incentive may be provided early in the following year if the standard was met late in the year. The employer may not pay the incentive over the course of the following year.

*Example:* A plan measures BMI in the fall and those who meet the target have their premium reduced by \$60 per month over the next calendar year. The target outcome is a BMI below 27. The reasonable alternative for those who do not meet the target is three meetings with a health coach during the first quarter of the year. An employee who has a BMI above 27, but who completes the coaching sessions by March 31, must receive the \$60 per month for the entire year. After the employee completes the health coaching, the employer may either pay the amounts due for January through March in a lump sum of \$180 with a \$60 per month premium reduction from April through December or it may pay the reward for the first quarter pro rata for the rest of the year, with monthly premium reductions of \$80 for April through December.

*Example:* A plan measures cholesterol in December and those who meet the target have their premium reduced by \$90 per month over the next calendar year. The target outcome is a cholesterol level below 200. The reasonable alternative for those who do not meet the target is an 8percent reduction in their cholesterol level at the next December screening. An employee who has a cholesterol level of 220 in December 2013 but who has reduced his or her cholesterol to 202 in the December 2014 screening must receive the \$90 per month for the entire 2014 plan year. Because it is so late in 2014, the employer is not required to pay the employee the \$1,080 reward by December 31, 2014, but it must do so shortly after that – the employer may not simply reduce the employee's monthly premium for the 2015 plan year.

### **Q38. Are there confidentiality requirements regarding wellness programs?**

A38. Yes. Medical records developed in the course of wellness programs (and other voluntary health services generally) must be maintained in a confidential manner. Covered entities may not require employees to agree to the sale, exchange, sharing, transfer, or disclosure of information (except as required to carry out the wellness program) or to waive confidentiality in any way. If the wellness program is part of the group health plan, it is subject to HIPAA's privacy, security, and breach notification rules.

Individuals who handle medical information that is part of an employee health program should not be responsible for making decisions related to employment, such as hiring, termination, or discipline. If an employer uses a third-party vendor, it should be familiar with the vendor's privacy policies for

ensuring the confidentiality of medical information. Employers that administer their own wellness programs need adequate firewalls in place to prevent unintended disclosure of information.

**Q39: May an employer have both participatory and health-contingent requirements in its program?**

A39: Yes. The main effect is that any reward for completing a participatory requirement does not apply to any maximum incentive calculation.

**Q40: Must the employer publicize the reasonable alternative?**

A40: Employers must provide notice that a reasonable alternative standard is available in all materials that describe the program. The notice does not need to include details of the alternative, but it does need to describe how to get more information about the reasonable alternative. The notice also must say that the recommendations of the person's physician will be accommodated. The regulations suggest a notice such as: "Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."

Materials that simply state a wellness program is available do not need to include the reasonable alternative disclosure. A communication that discusses a premium reduction or surcharge must include the reasonable alternative notice.

Also, if the plan sends any type of a notice to participants stating they have not met the standard, that notice must include the reasonable alternative disclosure.

**Q41: Do these rules apply to grandfathered plans?**

A41: Yes, both grandfathered and non-grandfathered plans must meet these requirements.

**Q42: May a grandfathered plan add a wellness program without losing grandfathered status?**

A42: Yes, a grandfathered plan may add a wellness program, but it still must meet all of the requirements for remaining grandfathered. Most often, this means that when creating an incentive, care must be taken to ensure that employees who do not qualify for the incentive do not pay too large a percentage of the premium. For example, if the employee paid 35 percent of the premium in March 2010, an employee that does not qualify for a wellness discount, or who must pay a non-wellness surcharge, may not be required to pay more than 40 percent of the premium if grandfathered status is to be maintained.

**Q43: Does an employee have the right to appeal denial of a request for a reasonable accommodation?**

A43: Yes. The process that applies to an appeal of a claim denial should be followed.

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### Q44: Are wellness incentives taxable?

A44: If the incentive is directly connected to a group health plan (such as a reduced premium or deductible or a contribution to a flexible spending account, health savings account or health reimbursement arrangement) the incentive is not taxable. All other rewards are taxable unless they are *de minimis*. *De minimis* is not well-defined, but if it seems unreasonable to spend accounting and payroll time to determine the value of the item and account for and tax the item, it generally can be excluded from taxes. For instance, T-shirts, water bottles, and movie tickets are considered *de minimis* if provided infrequently. Cash and gift cards are always taxable income to the employee, no matter how small, because the value is known.

**Caution:** While employer contributions to a health FSA or HRA are popular wellness incentives because of their favorable tax treatment, employers need to be certain that they comply with recent changes to the rules. To meet current requirements:

- An employer contribution to a health FSA may not exceed two times the employee's contribution plus \$500, and
- The health FSA may only be provided to an employee who is also eligible for coverage under the group medical plan.

An HRA may only be offered to employees who are actually enrolled in the group medical plan sponsored by the employer (or, if the employer chooses, by the plan offered by the employee's spouse).

### Q45: How may an employer enforce certifications of non-smoker status?

A45: An employer may require an employee to certify that he or she is not a smoker and provide that the company's usual rules for falsification apply. Some employers require confirmation through a blood, breath, or urine test; employers considering this should consult with local counsel as some states prohibit this. This type of confirmation would trigger the wellness program requirements under the ADA and GINA, and would limit the incentive that could be offered to 30 percent rather than 50 percent. Some employers require a note from the employee's physician certifying the employee does not use tobacco. Because of the anti-rescission rules, if an employee misrepresented his or her smoker status the employer could not terminate the employee's coverage for falsification, but it likely could charge the smoker premium retroactively.

### Q46: How is tobacco-free defined?

A46: Self-funded and large insured plans may use any definition they prefer, although because of the annual qualification requirement the tobacco-free period should not exceed 12 months. Employers should clearly explain what is meant by tobacco use, including whether it includes smokeless tobacco like chewing tobacco and e-cigarettes. Insurers that differentiate between tobacco and non-tobacco users in the small group and individual markets may not define tobacco use more strictly than using tobacco in any form an average of four or more times per week during the past six months. While employers are not required to use this standard it may provide a starting place.

### **Q47: Are Summaries of Benefits and Coverage (SBCs) needed for wellness programs?**

A47: An SBC is needed if the wellness program is a “group health plan.” Generally, a plan is a group health plan if it directly or indirectly provides health care to employees. There are no clear rules for how much health care needs to be provided to create a group health plan – for instance, flu shots are health care, but it seems unlikely that the government intends to consider a program that simply provides flu shots a group health plan.

### **Q48: How should an SBC illustrate a wellness program?**

A48: If the wellness program simply affects the group health plan’s premium (whether through a surcharge or a discount), the SBC does not need to address the wellness program at all, since premiums do not need to be shown in an SBC.

If the wellness program affects the deductible, coinsurance, copays, or other plan benefits, the examples should assume that the person meets the wellness program criteria. The example should include a short explanation that the example assumes the person has met the plan’s wellness criteria and, therefore, the person’s deductible (or whatever the plan adjusts) was decreased accordingly.

If a wellness program is not related to the group health plan, a separate SBC usually will be needed. The standard SBC template must be used, even though many of the lines will be completed with “not applicable.”

An employer needs to provide details of the wellness program in most written materials, but in general the details do not need to be included in an SBC.

### **Q49: When do the rules take effect?**

A49: The ACA rules, which are similar to the prior requirements except for the reasonable alternative requirements – are effective as of the start of the 2014 plan year. The rules under GINA and the ADA are effective as of the start of the 2017 plan year.

### **Q50: What are the penalties for violating these rules?**

A50: An excise tax of up to \$100 per affected person per day applies.

### **Q51: Does the ADA’s safe harbor for insurance companies apply to wellness programs?**

A51: No. The ADA provides an insurance “safe harbor” that prohibits insurers or benefit plan administrators from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law. Essentially, the safe harbor permits insurers and employers to treat individuals differently based on disability, but only in certain justified situations according to accepted principles of risk classification.

However, the EEOC notes that this safe harbor relates to underwriting and rate-making that was in place before the ADA and does not apply to the wellness programs that involve disability-related inquiries and medical examinations.

### Q52: Do any other laws apply to wellness programs?

A52: Wellness programs – including participation-only programs – may have to follow requirements in the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), Employee Retirement Income Security Act (ERISA), Internal Revenue Code, Title VII, Equal Pay Act, Age Discrimination in Employment Act (ADEA), National Labor Relations Act (NLRA), state privacy and off-duty laws, and Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security rules. A brief description of the main issues follows.

**ERISA.** ERISA may require plan documents, summary plan descriptions, Form 5500 filings, notices, and appeals rights. If the wellness program is linked to a group health plan, it generally is relatively simple to include the wellness requirements in the group health plan document. A wellness program that is not connected to a group health plan may be an ERISA plan if it provides significant medical care. At present, “significant medical care” is not well-defined by the regulations.

**Internal Revenue Code.** The Code affects taxation of incentives.

**Title VII, Equal Pay Act, and ADEA.** Wellness standards that are harder for a protected group to meet may violate Title VII (which prohibits discrimination based on race, gender, and religion), the Equal Pay Act, or ADEA. For example, a requirement that employees be able to run a certain distance might be unduly hard for older employees to meet. Blood pressure requirements may be harder for African-Americans to meet.

**NLRA.** An employer with employees covered by a collective bargaining agreement may need to negotiate the addition or the terms of a wellness program.

**State privacy and off-duty conduct laws.** Several states have laws that protect smokers or a person’s conduct outside of their workplace.

**HIPAA Privacy and Security.** A group health plan may need to protect individually identifiable health information. Care should be taken that only employees who need information be given it and that information be masked as much as possible (for example, by taking steps so that the Payroll Department only knows the total premium discount amount and not which particular standards an employee meets). A business associate agreement may be needed with the wellness program vendor.

### Q53: How does a wellness program affect an applicable large employer’s (ALE’s) affordability calculations for employer shared responsibility provisions?

A53: When deciding if the employee’s share of the premium is affordable (less than 9.5 percent indexed of the employee’s safe harbor income), the employer may not consider wellness incentives or surcharges except for a non-smoking incentive.

In other words, the premium for non-smokers will be used to determine affordability (even for smokers). Any other type of wellness incentive must be disregarded, and employers must assume that no one earned the incentive when calculating affordability. If the employer’s program is designed to penalize employees that do not participate in the program (provides a surcharge), the penalty must be included in the affordability calculation.

## UBA Compliance Advisor

*Example:* Acme has a wellness program that reduces premiums by \$300 for employees who do not use tobacco products or who complete a smoking cessation course. Premiums are reduced by \$200 if an employee completes cholesterol screening during the plan year. The annual employee premium is \$4,000. Employee B does not use tobacco and completed the cholesterol screen, so the cost of his actual premium is \$3,500 [ $\$4,000 - 300 - 200$ ]. Employee C uses tobacco and does not do the cholesterol screen, so the cost of her actual premium is \$4,000. For purposes of affordability, Acme will use \$3,700 as the cost of coverage for both Employee B and Employee C [ $\$4,000$  less the available \$300 non-smoker discount].

*Example:* Acme has a wellness program that increases premiums by \$200 for employees who do not participate in their walking program. The annual employee premium is \$4,000. Employee B decides not to participate in the walking program, so the cost of his actual premium is \$4,200. For purposes of affordability, Acme will use \$4,200 as the cost of coverage for all employees, even if they participate and are not charged the additional \$200.

### **Q54: How does a wellness program affect minimum value calculations?**

A54: When calculating minimum value, if incentives for nonuse of tobacco may be used to reduce cost-sharing (i.e., the deductible or out-of-pocket costs), those incentives may be taken into account when determining minimum value. Other types of wellness incentives that affect cost-sharing may not be considered.

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