Guide to Understanding Wellness Programs and their Legal Requirements

A wellness program is any formal or informal program that educates employees about health-related issues, promotes 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 reduced employee contribution for medical coverage, reduced deductibles or copays, gift cards, or cash or prizes (such as T-shirts, mugs, or tickets). The term "incentives" includes financial and in-kind incentives for participation, such as awards of time off, prizes, or other items of value.

Wellness programs can be:

- Part of or provided by a group health plan.
- Provided by a health insurance issuer (carrier) offering group health insurance in conjunction with a group health plan.
- Offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance.

Wellness programs are governed by a plethora of laws and regulations. At the forefront are the Patient Protection and Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Genetic Information and Nondiscrimination Act (GINA), and the Employee Retirement Income Security Act (ERISA). In addition to these regulations, wellness programs are governed by the Internal Revenue Code (IRC), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act, the Equal Pay Act, the National Labor Relations Act (NLRA), the Age Discrimination in Employment Act (ADEA), state laws, and more.

When reviewing the obligations under the ACA, HIPAA, ADA, GINA, and ERISA, wellness programs are often categorized differently by different regulations. A wellness program plan design that has very little obligation under HIPAA might have significant obligations under the ADA. However, these obligations of a wellness program can sometimes come into conflict.

There are five main questions that wellness program sponsors should ask and work through to determine the obligations of their wellness program.

1. Is the wellness program part of a group health plan (GHP) or is it a stand-alone program?

General ERISA and Summary of Benefits of Coverage (SBC) Obligations

Wellness program sponsors need to consider a wellness program's requirements under ERISA as well as the ACA's requirements for an SBC. Determining these obligations will hinge on whether the wellness program is part of a GHP or is a stand-alone program, whether the wellness program provides health care or benefits (such as biometric screenings, physical exams, flu shots, or counseling by trained professionals), and whether the wellness program affects the GHP's deductibles, coinsurance, or copays.

If the wellness plan provides medical care or benefits, then it may be subject to ERISA, which requires plan documents, summary plan descriptions (SPDs), Form 5500 filings, notices, and appeals rights. If the wellness program offers only gym membership discounts or health education seminars, for example, then it is typically not subject to ERISA.

An SBC is a four-page (double-sided) communication required by the federal government. It must contain specific information, in a specific order, and with a minimum size type about a group health plan benefit's coverage and limitations.

As a rule, an SBC is needed if the wellness program is a "group health plan" or GHP. Generally, a plan is a GHP if it directly or indirectly provides medical care or benefits to employees, like the one mentioned above. Employers who have a wellness program offering health care to employees should consult legal counsel to determine if their plan design constitutes a group health plan.

Wellness Program Is Integrated with GHP

If the wellness program is part of (or integrated with) a GHP, it is relatively simple to include the wellness requirements in the GHP documents, including in the ERISA documents and SBC. If the wellness program affects deductibles, coinsurance, or copays and the wellness program is part of a GHP, the GHP sponsor should take special care to meet ERISA obligations by including details of the wellness program in the group health plan documents, the SBC, and more.

For instance, if the plan has a wellness program that varies the deductibles, copayments, coinsurance, or coverage for certain medical services, the plan must complete the calculations for those medical services assuming that the patient is *not* participating in the wellness program. Additionally, if applicable, the plan must include a box below the coverage examples with the following language (and appropriate contact information):

> Note: These numbers assume the individual does not participate in the plan's wellness program. If you participate in the plan's wellness program, you may be able to reduce your costs. For more information about the wellness program, please contact: [insert].

However, 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 addressed in an SBC.

Further, when a wellness program is part of a GHP, HIPAA's privacy, security, and breach notification rules protect information collected from or created about participants that can be used to identify them (such as their address or birth date) and that relates to any past or present health condition.

HIPAA also sets limits on the uses and disclosures that may be made of such information. An employer that sponsors a GHP may receive this information but must certify to the plan that it will safeguard and not improperly use or share it. Employees who receive this information (as necessary for health plan administration) should not be in the position of making hiring, firing, or promotion decisions of employees.

Stand-Alone Wellness Program

A wellness program that is not connected to a GHP may be an ERISA plan on its own if it provides significant medical care. At present, "significant medical care" is not well-defined by the regulations.

Further, if the wellness program is not part of a GHP and affects deductibles, coinsurance, or copays, it may need its own SBC. The standard SBC template must be used, even though many of the lines will be completed with "not applicable."

If the wellness program is not part of the GHP and does not affect deductibles, coinsurance, or copays, but provides significant medical care, ERISA may require plan documents, an SPD, Form 5500 filing, annual notices, and appeal rights.

2. Is the employer an Applicable Large Employer (ALE) under the ACA? If so, wellness programs may impact affordability and minimum value calculations.

When deciding if the employee's share of the premium is affordable (less than 8.39 percent in 2024, 9.12 percent in 2023, and 9.61 percent in 2022 (indexed annually)), the employer may not consider wellness incentives or surcharges except for a non-smoking incentive. In other words, the premium for non-smokers or those who have satisfied the tobacco cessation/reduction program will be used to determine affordability (even for smokers).

Any other type of wellness incentive must be disregarded; 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 (in other words, the employer applies a surcharge), the penalty must be included in the affordability calculation.

When calculating minimum value, if incentives for non-use of tobacco may be used to reduce cost-sharing (that is, the deductible or out-of-pocket costs), those incentives may be considered when determining minimum value. Other types of wellness incentives that affect cost-sharing may not be considered.

3. Under HIPAA, is the wellness program considered participatory? (All wellness programs will either be participatory or health-contingent under HIPAA. If the answer is no, move on to Question Four.)

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 reimburses an employee for some or all of a gym membership) 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 wellness lunch-and-learns). Most educational programs that are offered either to all employees or to all plan participants will be considered participatory. The regulations provide these participatory program examples:

- A smoking cessation program where the wellness reward is provided whether or not the person quits smoking
- A wellness reward for attendance at a periodic health education seminar
- A program that provides a reward to employees who complete a health risk assessment without any further action required by the employee
- Reimbursement of some or all of a gym membership

Participatory wellness programs are not required to satisfy any of the five standards (set out in Question 4 below) that apply to health-contingent wellness plans. However, participatory programs offered by employers with 15 or more employees are subject to the ADA and GINA. For that reason, being in compliance with HIPAA and the ACA does not relieve the employer from having to comply with other laws, such as the ADA and GINA.

4. Under HIPAA, is the wellness program considered health-contingent? (All wellness programs will either be participatory or health-contingent under HIPAA. If the answer is no, go back to Question Three.)

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 to attain the reward because of the person's health status. Health-contingent programs are divided into "activity-only" programs and "outcome-based" programs.

Activity-Only Programs

An activity-only program requires the individual to perform or complete an activity related to a health factor 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
- A smoking cessation program, if the program does not have a target health measure

Outcome-Based Programs

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.

Health Factors

A "health factor" is very broad and includes anything that considers or affects a person's physical condition. Therefore, the following may qualify as health-contingent wellness programs since they may satisfy a health factor standard:

- Exercise programs
- Diet programs
- Programs that consider tobacco use
- 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.

Health-Contingent (Activity- or Outcome-Based) Program Requirements

To be considered nondiscriminatory under law, a health-contingent wellness program must meet all five of the following requirements:

1. The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
2. The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor is limited – generally, it must not exceed 30 percent (or 50 percent for programs designed to prevent or reduce tobacco use) of the cost of employee-only coverage under the plan. If dependents (such as spouses or dependent children) may participate in the wellness program, the reward must not exceed 30 percent (or 50 percent) of the cost of the coverage in which an employee and any dependents are enrolled.
3. The program must be reasonably designed to promote health and prevent disease. (Note: different requirements apply for activity-only and outcome-based programs.)
4. The full reward must be available to all similarly situated individuals. This means the program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard). (Note: different requirements apply for activity-only and outcome-based programs.)
5. The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard (or the possibility of a waiver of the otherwise applicable standard). (Note: different requirements apply for activity-only and outcome-based programs.) The Employee Benefits Security Administration provides model language.

Annual Opportunity

A plan offers employees 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 for employees to qualify:

- A person who has not used tobacco in the past year can receive the non-smoker premium.
- A physical 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.
- An exercise program requires a person to exercise 150 minutes per week during any eight months during the calendar year and provides a premium reduction if a person meets the exercise target for the required eight months.

HIPAA Incentive Limits

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.

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, the maximum total reward or penalty is 50 percent of the cost of coverage.

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

Reasonable Design

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

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

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

To ensure that an outcome-based wellness program is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a test or screening that is related to a health factor.

Reasonable Alternatives

HIPAA has various requirements that employers offer certain employees reasonable alternatives. A reasonable alternative standard is an alternative means of receiving the incentive.

Who must be offered a reasonable alternative standard?

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 (or other reasonable alternative).

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.

Medical Evidence of Reasonable Alternative Needs

An activity-only program may require verification from the participant's personal physician that the participant needs a reasonable alternative standard because of the participant's 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.

Physician's Recommendations

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.

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 the participant is under the treatment of a physician for identified health risks.

Responsibilities

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.

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 pay for any food costs).

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.

May an employer limit the number of times a person can get a reasonable alternative?

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.

Can a reasonable alternative be a physical activity?

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.

Can a reasonable alternative be another outcome?

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.

Employee Uniformity in the Reasonable Alternatives

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.

Waiving Reasonable Alternatives

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.

Examples of Reasonable Alternatives

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.

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.

Completing a Reasonable Alternative

When an employee completes a reasonable alternative, the employee must receive the same reward as the employee would have received if the employee 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.

Publicizing the Reasonable Alternative

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 notice to participants stating they have not met the standard, that notice must include the reasonable alternative disclosure.

Tobacco Cessation Programs

Employers who wish to charge employees different premiums for the GHP based on their use or abstention from tobacco can only do so with a bona fide wellness program in place, including reasonable alternatives. Failure to do so is a violation of HIPAA's nondiscrimination regulations.

There is also no acceptable method for employers to require employees to "prove" that they have quit using tobacco, by virtue of the reasonable alternative requirements.

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. Some employers require a note from the employee's physician certifying the employee does not use tobacco.

Because of the ACA's anti-rescission rules, if an employee misrepresented their smoker status, the employer could not terminate the employee's coverage for falsification, but it likely could charge the smoker premium retroactively. Employers should also avoid any program design that includes "random" tobacco checks. This would likely violate HIPAA.

Defining "Tobacco Free"

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.

Family Premium Considerations under HIPAA

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.

The surcharge may be added to the employee's share of the premium.

How HIPAA Views Common Wellness Plans

Participatory	Health-Contingent (activity-only)	Health-Contingent (outcome-based)
• Incentive to undergo a screening or complete a health risk assessment (HRA) • Attend a lunch-and-learn on a wellness topic • Free flu shots • Reimbursement of fitness center fees	• Tobacco cessation coaching programs • Diet programs • Walking or other exercise programs • Meeting with health coach required only of employees who do not meet weight, blood pressure, or glucose goals	• Body Mass Index (BMI) below 30 • Cholesterol below 200 • Blood pressure below 130/85 • Tobacco-free

5. Does the wellness program include a medical examination, a biometric screen, or a health risk assessment (HRA)?

If the answer is yes, then the ADA and GINA now also regulate the wellness program. GINA applies to employers with 15 or more employees, addressing the use of genetic information in health insurance. Title II of GINA prohibits the use of genetic information in employment, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information. Title I of the ADA also applies to employers with 15 or more employees, prohibiting discrimination against people with disabilities and requiring equal opportunity in promotion and benefits, among other things.

These regulations have a series of complex requirements that sometimes contradict the requirements under HIPAA. In the event of conflict, an employer should follow the more stringent set of requirements. In the event of separate, but non-conflicting requirements under HIPAA and the ADA or GINA, an employer should follow both sets of requirements.

These rules have not been without confusion. This timeline of GINA and ADA wellness program rules, further addresses where we stand today.

Aug. 2014 — The Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a company (Orion Energy) claiming that the penalty for not participating in the wellness program was so large that, as a practical matter, the employee's decision to participate or not in the program was not voluntary. The program was designed so that the company paid 100 percent of the health insurance premium for employees who participated in the wellness program and paid nothing toward the premium of any employee who did not participate.

Sept. 2014 — The EEOC filed a lawsuit against another company (Flambeau, Inc.) because that company required employees to complete a health risk assessment and biometric testing to obtain group health coverage. Employees who completed these requirements were only asked to pay 25 percent of the premium. The EEOC suit says that having to choose between health

coverage and participating in a wellness program makes the wellness program involuntary, in violation of the ADA.

May 2016 — The EEOC issued two final regulations that address which wellness programs are subject to the ADA and GINA.

- The 2016 ADA rule applied to any wellness program that included disability-related inquiries or medical examination, clarifying that limited incentives under the program would not make the program "involuntary." Specifically, it stated that employers may use incentives as either a reward or penalty as long as the maximum reward did not exceed 30 percent of the total cost of self-only coverage.
- The 2016 GINA rule applied to wellness programs where part of the offered incentive related to any information about current or past health status or to taking a medical examination for the employee's spouse. Specifically, the rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employee's employer-provided group health plan – including as part of a wellness program – and provides information about their current or past health status. (Note that since the 2016 rules were vacated, employers will no longer be able to offer inducements for spousal medical history as of Jan. 1, 2019, and until the EEOC issues final rules regarding incentive limits.) This kind of information usually is provided as part of a health risk assessment, which may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels.

Oct. 2016 — Shortly after the ADA and GINA rules were issued, the American Association of Retired Persons (AARP) filed a lawsuit on behalf of its members, arguing that the 30 percent incentive was inconsistent with the "voluntary" requirement, making employees pay more for health insurance coverage if they did not want to disclose their private medical information as part of the wellness program. The federal district court vacated the 2016 ADA and GINA rules, making them null and void beginning on July 1, 2019.

Jan. 2021 — The EEOC issued proposed wellness program regulations, clarifying what it means for a wellness program to be "voluntary" as well as which incentives an employer may offer (such as de minimis incentives like aa water bottle) without changing the program from voluntary to involuntary. The Biden Administration required that the EEOC withdraw these regulations as part of a regulatory freeze pending review.

As of this resource's update, no new EEOC regulations have been issued, leaving employers with no clear guidance on what incentives they can offer their employees and their families through their wellness programs.

Until the EEOC issues new rules regarding ADA and GINA wellness programs requirements, risk-averse employers should consider discontinuing wellness programs that require a medical exam, biometric screening,

or health risk assessment for participants to receive an incentive. While the 2016 incentive limits are vacated, the less restrictive ACA-amended HIPAA regulations will continue to apply.

Examples

Example 1:

The owner of Cole's Dry Cleaner is concerned that many of his employees smoke cigarettes while on break. To combat this, Cole decides to charge tobacco users an additional $50 a month for the employee portion of premium for the group health plan. The total cost of the group health plan is $5,000 annually, and the employees regularly pay $125 a month for their portion of the premium. Smokers will pay $175 a month. What regulations are implicated?

Cole cannot charge employees who smoke any more than non-smokers unless he implements a bona fide wellness program. If the only goal is to encourage participants to stop using tobacco, Cole will likely implement an outcome-based tobacco cessation program. It must meet the five requirements under HIPAA for health-contingent programs, it must meet the HIPAA requirements for reasonable design, and it must meet the requirements of providing an annual opportunity to earn the incentive or avoid the surcharge. Cole's program must ensure it has reasonable alternatives in place, and that those alternatives are advertised. Cole's surcharge cannot exceed $2,500 annually, which is 50 percent of the total cost of employee only coverage.

Example 2:

Ann's Auto Shop is next door to Cole's Dry Cleaner. Ann has 60 full-time employees. Ann hears from Cole that his tobacco cessation wellness program has encouraged some of his employees to quit smoking. Ann decides she would also like to implement a tobacco cessation program, but she is uncomfortable with employees simply attesting to their tobacco use status. She decided she wants employees to undergo a biometric screening that tests for nicotine in an individual's blood as part of the wellness program. The total cost of Ann's group health plan is $7,500 annually, and the employees pay $200 a month for their portion of the premium. Ann decided that if someone's biometric screen indicates the person is not a tobacco user, or if the person completes the reasonable alternative, Ann will only charge them $100 a month for that employee's portion of the premium. What regulations are implicated?

Ann's program must meet HIPAA's five requirements for reasonable design, and it must meet the requirement of providing an annual opportunity to earn the incentive or avoid the surcharge. Ann's program must have reasonable alternatives in place, and those alternatives must be advertised. Ann's program also involves the ADA and GINA because of the biometric screening. Because we are still awaiting EEOC guidance on reasonable and voluntary design of wellness programs, Ann may want to consider discontinuing the biometric screening until further guidance is issued.

Ann must also notify the employees whether the program complies with privacy and security measures established by HIPAA.

Example 3:

Richard's Printing Press has 150 employees. Richard is concerned about his employees' health and offers a robust wellness program for his employees. His program is available to any employee enrolled in the group health plan and requires participants to participate in various activities to earn points. Once an individual earns 5 points or more, the monthly premium for the group health plan is reduced by $50. The annual cost of employee-only coverage is $5,000. Employees pay a premium of $200 a month for employee-only coverage.

There are many activities that employees can participate in to earn points, including preventive care appointments with their physicians, taking a smoking cessation class, tracking steps with a pedometer, lowering BMI or cholesterol by certain amounts, attending nutrition seminars, undergoing a biometric screening, completing a health risk assessment, meeting with a wellness coach, and more. Anyone who earns 1 or more points during the year can also earn a $10 a month reimbursement for a gym membership. What regulations are implicated?

Richard's program is subject to both HIPAA regulations and the ADA and GINA. Because the activities run the gamut from participatory, health-contingent activity-based, health-contingent outcome-based, and include medical exams, biometric screenings, and health risk assessments, the wellness program as a whole will need to follow the strictest sets of requirements.

Richard's program must meet HIPAA's five requirements for reasonable design, and it must meet the requirement of providing an annual opportunity to earn the incentive or avoid the surcharge. Richard must also notify the employees whether the program complies with privacy and security measures established by HIPAA.

Because we are still awaiting EEOC guidance on reasonable and voluntary design of wellness programs, Richard may want to consider discontinuing the medical exams, biometric screenings, and health risk assessments until further guidance is issued.

Richard's program does not provide a practical way to differentiate between a reward for tobacco cessation and a reward for other wellness activities. As a result, when determining the health plan's affordability under the ACA, Richard must assume that none of his employees participate in the wellness program (that is, they pay $200 a month for employee-only coverage).

Example 4:

Lynn's Accounting Agency has 200 employees. The annual premium for employee-only coverage under Lynn's group health plan is $6,000. Lynn 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. There are no health risk assessments, biometric screenings, or medical examinations. 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. What regulations are implicated?

Lynn's program must meet the five requirements under HIPAA for health-contingent programs, it must meet the HIPAA requirements for reasonable design, and it must meet the requirements of providing an annual opportunity to earn the incentive or avoid the surcharge. Lynn's program must ensure it has reasonable alternatives in place, and that those alternatives are advertised. Lynn's program must provide an annual 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. Lynn must also notify the employee whether the program 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.

Lynn's program is permissible because the total of all rewards is $2,600 ($600 + $2,000 = $2,600) 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). When calculating the plan's affordability for ACA purposes, Lynn can report that the lowest cost employee-only plan is $125 a month ($1,500 annually) even for employees who are assessed the $2,000 tobacco premium surcharge. Lynn must disregard the availability of the $600 reduction when calculating affordability.

Example 5:

Acme Oyster Restaurant 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. Jane does not use tobacco and completed the cholesterol screen, so the cost of her actual premium is $3,500 ($4,000 - $300 - $200). John uses tobacco and does not do the cholesterol screen, so the cost of his actual premiums is $4,000. For purposes of affordability, Acme will use $3,700 as the cost of coverage for both Jane and John ($4,000 less the available $300 non-smoker discount).

Example 6:

Smith's Bakery has a wellness program that increases premiums by $200 for employees who do not participate in its walking program. The annual employee premium is $4,000. Dan decides not to participate in the walking program, so the cost of his actual premium is $4,200. For purposes of affordability, Smith's Bakery will use $4,200 as the cost of coverage for all employees, even if they participate and are not charged the additional $200.

Example 7:

Employers can set wellness incentives as a percentage rather than a dollar figure. Johnson Bros. offers coverage that costs $500, with the cost split equally between the employee and the company. Employees who use tobacco (and don't complete the reasonable alternative) are assessed a 35 percent surcharge, and those who do not meet BMI standards (or complete the reasonable alternative) are assessed a 15 percent surcharge. Tom smokes and did not meet the BMI target or reasonable alternatives. Assuming the wellness program meets all federal

requirements under HIPAA, ADA, and GINA (with additional guidance pending for both ADA and GINA), and the tobacco use is not part of the BMI screening, Tom's premium is calculated:

$250 base premium

+ $175 smoker surcharge [35 percent of the total $500 cost of coverage]

+ $ 75 BMI surcharge [15 percent of the total $500 cost of coverage]

$500 premium charge

Note here that BMI calculations are typically done through biometric screenings. Because we are still awaiting EEOC guidance on reasonable and voluntary design of wellness programs, any biometric screenings measuring BMI in the above example should be discontinued from the wellness until further guidance is issued.

Example 8:

Lulu's Coffee Shop offers a group health plan that costs $7,000 annually. Employees pay $150 a month for their portion of the premium, or $1,800 annually. Employees who undergo an annual physical with their primary care physician receive a $240 discount on their portion of the premium, or $20 a month. What regulations are implicated?

Under HIPAA, Lulu offers a participatory wellness plan, so there are no HIPAA concerns as to the wellness plan's design for Lulu. However, Lulu must still provide an annual 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 the plan 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.

The plan involves a medical screening, though, so the program is subject to the ADA and GINA. Because we are still awaiting EEOC guidance on reasonable and voluntary design of wellness programs, Lulu may want to consider discontinuing the medical exam requirement until further guidance is issued.

Lulu cannot offer an incentive that is greater than $2,100 annually, which is 30 percent of the lowest cost employee-only plan.

Updated 10/20/2023