BENEFITS BRIEF

December • 2019

Wellness Plan Compliance Checklist

Employers offer wellness plans for a number of reasons, but the main reasons are often to contain health care costs and to encourage employees to improve their health and prevent disease. There are many different laws and legal considerations that govern wellness plans. The design of an employer's wellness plan will often determine which federal law will apply. This brief will touch on some of these laws but employers will also have to consider additional laws upon implementation of a wellness plan. It is important to consult a trusted advisor when designing a wellness plan.

The Health Insurance and Portability and Accountability Act (HIPAA) Nondiscrimination Rules

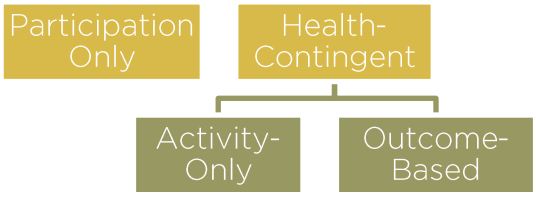
An employer should begin with HIPAA when reviewing their wellness plan compliance. In order to determine if your wellness plan has to comply with HIPAA's nondiscrimination rules, an employer will need to determine if their wellness plan is a "group health plan" or part of a group health plan that falls within HIPAA's wellness exception.

A "group health plan" is broadly defined by ERISA as an employee welfare benefit plan that provides medical care. Determining if the wellness plan provides medical care may not be an easy determination. Examples of wellness plans that are not group health plans include a fitness center or simply providing a health newsletter.

Caution: Even if a wellness plan is not a group health plan, it may still be affected by various laws if it provides rewards or incentives that relate to a major medical coverage (for example, using incentives that reduce premiums).

HIPAA Nondiscrimination Wellness Exception: In general, HIPAA prohibits group health plans from using "health status-related factors" to discriminate among similarly situated individuals in terms of plan eligibility, employee contribution and premium amount. Based

Exceptions from the nondiscrimination rules for certain types wellness plans which fall into two categories…

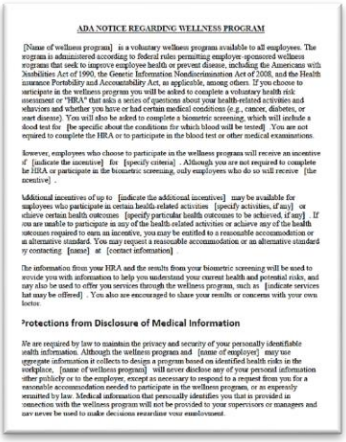


on the nondiscrimination rules, it would seem that all wellness plans would violate HIPAA. However, HIPAA created an exception from the nondiscrimination rules for certain types wellness plans which fall into two categories: **(1) participation-only** plans, and **(2) health-contingent** plans. A health-contingent wellness plan may be an activity-only wellness plan or an outcome-based wellness plan. Determining whether the wellness plan falls into one of these three categories requires deeper examination than the scope of this brief.

Compliance Tip: For a health contingent wellness plan, the employee should provide an employee notice that discloses the availability of a reasonable alternative standard.

The Americans with Disabilities Act (ADA)

Employers should also consider the interaction of the ADA with their wellness plan to determine compliance. Under the ADA, employers are not allowed to discriminate against individuals with disabilities. Also, an employer can only make disability-related inquiries or require medical exams if they are job-related.



ADA NOTICE REGARDING WELLNESS PROGRAM

[Name of wellness program] is a voluntary wellness program available to all employees. The program is administered according to federal rules permitting employer-sponsored wellness programs that seek to improve employee health or prevent disease, including the Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act of 2008, and the Health Insurance Portability and Accountability Act, as applicable, among others. If you choose to participate in the wellness program you will be asked to complete a voluntary health risk assessment or "HRA" that asks a series of questions about your health-related activities and behaviors and whether you have or had certain medical conditions (e.g., cancer, diabetes, or heart disease). You will also be asked to complete a biometric screening, which will include a blood test for [be specific about the conditions for which blood will be tested] . You are not required to complete the HRA or to participate in the blood test or other medical examinations.

However, employees who choose to participate in the wellness program will receive an incentive of [indicate the incentive] for [specify criteria] . Although you are not required to complete the HRA or participate in the biometric screening, only employees who do so will receive [the incentive] .

Additional incentives of up to [indicate the additional incentives] may be available for employees who participate in certain health-related activities [specify activities, if any] or achieve certain health outcomes [specify particular health outcomes to be achieved, if any] . If you are unable to participate in any of the health-related activities or achieve any of the health outcomes required to earn an incentive, you may be entitled to a reasonable accommodation or an alternative standard. You may request a reasonable accommodation or an alternative standard by contacting [name] at [contact information] .

The information from your HRA and the results from your biometric screening will be used to provide you with information to help you understand your current health and potential risks, and may also be used to offer you services through the wellness program, such as [indicate services but may be offered] . You also are encouraged to share your results or concerns with your own doctor.

Protections from Disclosure of Medical Information

We are required by law to maintain the privacy and security of your personally identifiable health information. Although the wellness program and [name of employer] may use aggregate information it collects to design a program based on identified health risks in the workplace, [name of wellness program] will never disclose any of your personal information either publicly or to the employer, except as necessary to respond to a request from you for a reasonable accommodation needed to participate in the wellness program, or as expressly permitted by law. Medical information that personally identifies you that is provided in connection with the wellness program will not be provided to your supervisors or managers and may never be used to make decisions regarding your employment.

Wellness plans that include disability-related inquires or medical examinations must comply with the ADA wellness rules. For example, health risk assessment questionnaires and biometric screenings in connection with a wellness plan are covered by the ADA. If an employer has this type of wellness plan, the employer must structure the plan so it fits within the ADA regulations. The wellness plan must **(1)** be **voluntary**, **(2)** have a **30% incentive limit** *(this requirement has currently been vacated by a court order)*, (3) be **reasonably designed**, **(4)** the information must be kept **confidential**, and **(5)** the employer must **provide a notice** to employee. EEOC has provided a **model notice**.

While the 30% incentive limit requirement was vacated by court order, the rest of the listed requirements are still valid. Employers should continue to structure their wellness plans covered by the ADA to comply with the above requirements.

The Genetic Information Nondiscrimination Act (GINA)

Another law to consider when reviewing your wellness plan is GINA. GINA has two main parts, Title I and Title II (Title I applies to group health plans and Title II applies to employers).

Title I

Title I of GINA **prohibits** group health plans from **(1)** adjusting group premium or contribution rates on the basis of genetic information, **(2)** requesting or requiring an individual or an individual's family member to undergo genetic testing, and **(3)** requesting, or purchasing genetic information for underwriting purposes or prior to or in connection with enrollment.

Genetic information includes, but is not limited to the genetic test of an individual or their family members and family medical history. GINA has a broad definition of family members, which includes the individual's spouse.

If the employer's wellness plan uses a health risk assessment (HRA) for an employee or an employee's spouse or requires a spouse to complete a biometric screening, it would be subject to GINA. Under GINA, a group health plan may not provide a reward or incentive to an individual for completing a HRA that requests genetic information, such as family medical history. Also, an employer cannot collect "genetic information" prior to, or in connection with enrollment, or anytime for "underwriting purposes" (for example, wellness plans may offer incentives such as a discount on premiums that would affect plan cost). In order to stay compliant with GINA, employers could structure their HRAs to include no incentive or rewards. If an employer is going to have an incentive in their wellness plan, the plan should be structured so each individual earns their own reward.

If the employer's wellness plan uses a health risk assessment (HRA) for an employee or an employee's spouse or requires a spouse to complete a biometric screening, it would be subject to GINA.

Title II

Title II applies to *employers with 15 or more employees*. GINA prohibits employers from requesting genetic information of an employee or family member. However, there is an exception to Title II for "voluntary" wellness plans offered by the employer, as defined in the regulations. Employers may request family medical history under a wellness plan if the employee **voluntarily** provides the information. Also, the wellness plan must be reasonably designed to improve health or prevent disease and the employee must give written authorization to the employer prior to providing genetic information or providing family history.

GINA also provided that wellness plans could offer a **maximum incentive limit of 30%** for information provided by an employee's spouses' manifestation of a disease or disorder as part of a HRA. The incentive for providing the spouse's health history could be in **addition to the 30%** available to employees under the ADA (**60% total**). As explained below, *the maximum incentive limit has been vacated by court order*.

AARP v. EEOC

AARP challenged the ADA and GINA rules' that state that a wellness plan can offer a maximum incentive of 30% of the total cost of employee-only coverage and still be "voluntary". The AARP argued that the incentive limit was arbitrary, coercive, and involuntary. The court ultimately agreed with AARP and vacated the incentive provisions, effective January 1, 2019. The EEOC formally removed the incentive

sections of the ACA and GINA regulations, but has not proposed replacement language. This leaves uncertainty for employers who have wellness plans covered by the ADA and GINA. Until further guidance is issued, an employer who offers incentives with their wellness plan should carefully consider their plan design.

Affordable Care Act (ACA)

The ACA had a big impact on wellness plans and included many provisions that promoted and supported wellness plans.

The ACA implemented market reforms and mandates that apply to group health plans (for example, out-of-pocket maximums and prohibitions on annual and lifetime dollar limits on essential health benefits). **When a wellness plan is tied to a major medical plan, they are complying with the ACA's PHSA mandates by default if the group health plan is already complying the ACA.** However, if a wellness plan is a stand-alone group health plan, and no exemption applies, they will have to comply ACA's PHSA mandates on their own.

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***Employer Shared Responsibility Payment*:** For ALEs (applicable large employers) who need to determine if their plan meets minimum value or is affordable, employers only have to take into consideration **incentives related to tobacco** use in their wellness plan. If the wellness plan offers any other kind of incentive, employers do not have to take those into account when determining minimum value and affordability. Tobacco-related incentives that affect deductibles, copayments, or other cost-sharing will be treated as earned in determining a plan's minimum value. Tobacco-related incentives that affect premiums will be treated as earned in determining a plan's affordability.

***W-2 Reporting*:** Large employers who are required to file **at least 250 W-2's** must report the total cost of employer-sponsored group health coverage on employee's W-2s. The IRS has indicated that coverage provided under a wellness plan is includible in the aggregate reportable cost only to the extent that the coverage is provided under a plan that is a group health plan. Significantly, an employer is not required to include the cost of coverage provided under a wellness plan if that employer does not charge a premium with respect to that type of coverage for purposes of COBRA or other federally required continuation coverage (or the employer is not subject to COBRA). If, however, the employer charges a premium with respect to that type of coverage, reporting is required.

The Employee Retirement Income Security Act (ERISA)

If your **wellness plan provides medical care**, as discussed above, it will be **subject to ERISA**. If the wellness plan is subject to ERISA, it must comply with ERISA's applicable compliance and disclosure requirements, including having a written plan document, distribution of a summary plan description and filing a Form 5500 (if the plan has more than 100 participants at the beginning of the plan year). Other compliance obligations may also apply, like establishing claims procedures.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

As discussed above, if your **wellness plan is a group health plan**, it would be **subject to COBRA** (if the employer is subject to COBRA's provisions). If the employer's wellness plan is embedded into their major medical plan, the employer would not have to separately comply with COBRA's requirements for their wellness plan. If the wellness plan is a stand-alone plan, however, the wellness plan would have to separately comply with COBRA's notice and election process.

Compliance Tip: Only employees who are eligible for the group health plan should be eligible for the wellness plan.

• • • ACTION ITEMS • • •

- ☐ Determine **which laws apply to your wellness plan** to ensure compliance (keep in mind that compliance with one law does not guarantee compliance with another law)
- ☐ Comply with the **notice requirements** of each law (if applicable to your wellness plan)
- ☐ Determine **COBRA** obligations
- ☐ Monitor **upcoming litigation** (watch for EEOC's new proposed regulations or other guidance)

COWDEN
444 Liberty Avenue, Suite 605
Pittsburgh, PA 15222
Ph: 412.394.9330
Website: www.cowdenassociates.com