

# Everything You Never Knew About Wellness Programs

(BUT PROBABLY SHOULD BECAUSE IT'S IMPORTANT.)

## WHY OFFER A WELLNESS PLAN?

1

Reduce  
healthcare costs

2

Keep  
employees healthy

## TWO MAJOR TYPES OF WELLNESS PLANS

### 1 NON-Group Health Plans

- Provide information or voluntary activities only
- Do not involve medical tests
- No incentives
- No questions re: medical history or genetic information



#### Examples of Non-Group Health Plan Wellness Plans:

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

### 2 Group Health Plans

- Tied to a medical plan or offer medical benefits.



#### If your wellness program offers any of the following, it is likely a Group Health Plan:

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

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

NO

YES

### You may have a Non-Group Health Plan.

Your plan's compliance burden is much less burdensome!

### You likely have a Group Health Plan.

Your compliance burden is much more complicated!

#### Be mindful that your plan cannot discriminate based on:

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

These guidelines could also apply to a Group Health Plan.

#### Your plan will need to comply with:

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

## HIPAA

Under HIPAA, there are two types of Wellness Programs.

1

Participatory

2

Health Contingent

Activity Only

Outcome-Based

Generally, HIPAA prohibits programs from discriminating against individuals in eligibility, benefits or premiums based on a health factor (such as medical condition, medical history, genetic information, etc.).

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

Incentives will look different depending on whether the Wellness Plan is Participatory or Health Contingent. See pages 7-8 for more information on incentives.

## Participatory Examples

Generally, these are programs that do not provide any incentive or do not condition the incentive on satisfaction of a standard related to a health factor.

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

- No limit on the amount of the incentive!
- Must be available to all similarly situated persons.

## Health Contingent Program Examples

### Activity Only

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

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

### Outcome-Based

- Typically have a test or screening determining the initial standard.
  - Screens for high blood pressure, high glucose, abnormal BMI, etc.
- Require employees to meet the standard in order to get the incentive
  - If an individual is in a normal or healthy range, they get the incentive
  - If an individual is NOT in the normal or healthy range, they participate in wellness activities in order to meet the standard and get the incentive

## HEALTH CONTINGENT PROGRAM ISSUES UNDER HIPAA:

### Safeguards

- Reasonably designed to improve health/prevent disease
- Not overly burdensome
- Not a pretense for discriminating based on a health factor
- Annual opportunity to qualify
- Incentive must be available to all similarly situated individuals

### Incentive Limits

- Generally must not exceed 30% of cost of employee only coverage
- Another 20% allowed if program is aimed at preventing/reducing tobacco use (total of 50%)
- If Dependents are covered under family coverage, limits are calculated based on cost of family coverage
- Should take into account the ADA's and GINA's incentive limits (which may be lower!)

See pages 7-8 for more info on incentives.

### Reasonable Alternative Standard

#### Activity Only

- Unreasonably difficult or inadvisable for medical reasons
- May seek verification from physician

#### Outcome-Based

- Must be available to anyone not meeting the standard, regardless of reason
- Cannot seek verification from physician
- Must give person the opportunity to comply with their physician's recommendation

#### Both

- Availability of a reasonable alternative must be disclosed in all plan materials
- Plan materials must include contact information for obtaining the alternative and state that physician recommendations will be accommodated (sample disclaimers are available)

# THE AMERICANS WITH DISABILITIES ACT (ADA)

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

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

1. Reasonable accommodations
2. Disability related inquiries and medical exams
3. Maintaining of medical records
4. Notice requirement

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

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

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

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

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

### What is the ADA?

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

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

## 2 Employers cannot make inquiries that are likely to elicit information about an individual's disability. (Includes most HRAs)

But, there are limited circumstances under which the ADA permits medical exams or questions about medical history. Note: an employer cannot require an employee to undergo a medical screening or answer disability-related questions except as part of a voluntary wellness program

### The medical exams and inquiries must be voluntary, but the employer cannot:

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

### The medical inquiries or exams must be reasonably designed to promote health or prevent disease.

#### REASONABLE:

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

#### UNREASONABLE:

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

Please refer to page 7 for more information on incentives and the ADA.

# THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

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

This most often occurs when questions about family medical history are included in a Health Risk Assessment.

## Genetic information typically includes:

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

## Examples of information/ tests that are NOT genetic in nature:

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

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## GINA'S IMPACTS ON WELLNESS PROGRAMS

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

Employers offering Wellness Programs that seek genetic information under Group Health Plans may want to consider two distinct Wellness Plan Health Risk Assessments ("HRA"): **A pre-enrollment HRA and a post-enrollment HRA.**

### PRE-Enrollment Wellness Plan HRAs:

- HRAs that collect genetic information to determine an individual's eligibility for wellness plans violate GINA
- Pre-enrollment HRAs cannot ask about family medical history
- Pre-enrollment HRAs cannot provide rewards to collect genetic information (even if rewards are not based on the outcome!)
- Pre-enrollment HRAs cannot request that an individual undergo genetic testing

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

### POST-Enrollment Wellness Plan HRAs:

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

- The first assessment instructs the individual to answer only for the individual and not their family. It does not ask for genetic information, and the plan offers a reward for completing it.
- The second assessment asks for family medical history and genetic information. Completion is voluntary and the plan offers no reward, nor will completion affect the reward from the first assessment. Because the second assessment is not used for underwriting purposes, no reward is offered in the second assessment, and the second assessment is not connected to the first, neither assessment violates GINA.

If a Wellness Plan is offered outside a Group Health Plan or Insurance Coverage, there is a limited exception to the above prohibitions on collecting genetic information. This is contained in **GINA Title II**. This exception means:

1

The employer may collect genetic information about an employee or their family if it offers health or genetic services (including wellness programs) on a voluntary basis. No inducement may be offered for genetic information. (An employer cannot condition participation in a wellness program on disclosing an individual's or their spouse's genetic information!)

**Such a wellness program that collects genetic information must be "reasonably designed to promote health or prevent disease"**

- This means that the program must provide the participants with:
  - results, follow-up information, or advice designed to improve the participant's health

OR

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

2

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

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

- Incentives can only be given for a information about manifestations of a spouse's diseases or disorders (NO other information re: genetic information is allowed!)
  - The spouse must be the person providing the information
  - The spouse must provide a prior knowing, voluntary, and written authorization
- However, NO retaliation is allowed for a spouse's refusal to provide information about manifested diseases or disorders

The interaction of GINA Title I and Title II re: incentives for spouses is murky. **Please seek legal counsel if considering this option.**

**Information regarding limits on incentives can be found on pages 7-8.**

# WELLNESS PROGRAM INCENTIVES

## HIPAA Incentive Limits:

Watch out for when the ADA or GINA apply, as they have lower incentive amounts.

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

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

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

### Examples of Wellness Program Incentives:

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

30%

HIPAA Incentive Limit generally must not exceed 30% of employee only coverage.

20%

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

50%

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

## ADA Incentive Limits:

**If a Wellness Program is a Group Health Plan and makes disability related inquiries or includes a medical examination, under the ADA the incentive cap would be 30%.**

- If coverage is required to participate in the Wellness Program, calculate the incentive using the self-only cost of the plan the employee is enrolled in (even if dependents are enrolled)
- If coverage is NOT required to participate in the Wellness Program, calculate the incentive using the lowest cost self-only coverage (even if employee is not enrolled in or eligible for that plan)
- No additional incentive is allowed for smoking cessation if a test for nicotine/tobacco is required

**A court has overturned the existing ADA and GINA incentives, and they will no longer be in effect after 12/31/18. We expect the EEOC to propose new guidelines prior to that date.**

## GINA Incentive Limits:

- If the program is a GHP, no incentives may be offered for answering question involving genetic information
- For the employee: If GINA does not apply, generally follow the ADA (or HIPAA as applicable)
- For the employee's spouse, if manifestation of disease or disorder is provided: 30% incentive limit (but only if program in not a GHP!)
- Under GINA, information about tobacco use does not constitute genetic information

## If coverage is required to participate in the Wellness Plan



Calculate the incentive using the self-only cost of the plan the employee is enrolled in (even if dependents are enrolled)

## If coverage is NOT required to participate in the Wellness Plan:



- If employer offers one or more group health plans providing major medical coverage, calculate the incentive using the lowest cost self-only coverage
- If the employer does NOT offer a group health plan providing major medical coverage, calculate the incentive based on the cost of self-only coverage available to an individual who is 40 years old and a non-smoker under the second-lowest-cost silver plan available through the Exchange in the location that the employer identifies as its principal place of business.

**A court has overturned the existing ADA and GINA incentives, and they will no longer be in effect after 12/31/18. We expect the EEOC to propose new guidelines prior to that date.**

## Incentives Extras:

- Incentive limits are calculated using the cost of premiums for fully insured plans.
- For self-insured plans, there is little guidance on this issue, but it should be reasonable for the employer to use a good faith estimate of their projected costs
- Incentives may be offered to similarly situated individuals based on a bona fide employment classification
  - Examples would be: to employees only and not spouses, or employees only and not retirees



## WHICH LAW APPLIES?:

1

If Wellness Program involves a disability related inquiry or medical exam



Follow ADA incentive restrictions



If a wellness program has multiple incentives, and only certain incentives require a medical exam or answers to disability-related questions, the ADA's 30% limitation should apply only to those incentives that require a medical exam or answers to disability-related questions.

2

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



Follow ADA and GINA incentive restrictions

3

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



Follow HIPAA Non-discrimination incentive restrictions

4

For Wellness Plans involving Nicotine/Tobacco:



Under the ADA, no additional incentive is allowed for smoking cessation if a test for nicotine/tobacco is required. In addition, under GINA, information about tobacco use does not constitute genetic information, so GINA would not apply either. If no test is required, the ADA's limit does not apply, thus HIPAA's additional 20% is allowed.

This information is an introduction to Wellness Plan compliance and does not cover all applicable laws and regulations.

## HELPFUL RESOURCES:

**Compliancedashboard Wellness Taxes and Penalties Quick Reference Chart**

[www.compliancedashboard.net/uploads/Wellness-Taxes-and-Penalties.pdf](http://www.compliancedashboard.net/uploads/Wellness-Taxes-and-Penalties.pdf)

**Compliancedashboard Activity Only vs. Outcome Based Quick Reference Chart**

[www.compliancedashboard.net/uploads/Activity-Only-vs-Outcome-Based.pdf](http://www.compliancedashboard.net/uploads/Activity-Only-vs-Outcome-Based.pdf)

**Compliancedashboard HIPAA vs. ADA Wellness Program Requirements Chart**

[www.compliancedashboard.net/uploads/HIPAA-vs-ADA.PDF](http://www.compliancedashboard.net/uploads/HIPAA-vs-ADA.PDF)

**RAND Workplace Wellness Study and Report**

[www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/workplacewellnessstudyfinal.pdf](http://www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/workplacewellnessstudyfinal.pdf)

**Workplace Wellness Programs: Services Offered, Participation, and Incentives**

[www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/WellnessStudyFinal.pdf](http://www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/WellnessStudyFinal.pdf)

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

[www.kff.org/health-costs/report/2016-employer-health-benefits-survey/](http://www.kff.org/health-costs/report/2016-employer-health-benefits-survey/)