UNISON
RISK ADVISORS

Wellness Program Guide

As of January 2024

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Introduction to Wellness Program Rules

Many employers choose to offer wellness programs with hopes of helping improve employees' health and reduce the employer's costs. To encourage participation in the employer's wellness program, the employer may provide incentives to participate (or penalties for failure to participate).

Wellness programs come in all shapes and sizes, in some cases targeting very specific goals or behaviors, and in other cases offering a variety of ways for employees (and sometimes family members) to participate. For employers offering such programs, especially if incentives or penalties are involved, the employer may be required to follow certain wellness program rules to avoid violating nondiscrimination rules set forth under HIPAA, the ADA, and GINA. In addition, employers should consider how such incentives/penalties should be handled from a tax perspective and how they may impact affordability under the employer mandate (§4980H(b)).

HIPAA Rules

Under HIPAA nondiscrimination rules, group health plans are prohibited from differentiating eligibility, cost of coverage, or benefit levels based on health status (no health status discrimination). However, for a wellness program that affects the group health plan (e.g., reductions in employee contributions toward medical premiums or cost-sharing, HRA or FSA contributions) or creates a group health plan itself, there is an exception allowing such programs so long as certain requirements are met. The requirements differ depending upon whether the program is participatory or health-contingent (activity-based or outcome-based).

Participatory Programs

If the program is merely participatory (i.e., not tied to achieving any particular outcome/result and not activity- related), the only requirement is that it be made available to all similarly situated individuals.

Health-Contingent Programs

A wellness program is health-contingent under HIPAA rules if the program is tied to an activity or a particular outcome/result. It could also include a program in which health status may prevent participation. Walking programs, vaccination clinics, requiring certain cholesterol or BMI results, and tobacco surcharges are all examples of health-contingent programs.

Requirements for Health-Contingent Programs
✓ Participants must be given an annual opportunity to qualify for the reward
✓ The maximum incentive (or penalty) cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs
✓ The program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws
✓ The reward must be available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard
✓ The program must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program

Incentive Limits

The incentive limit (30/50%) is based on the total cost of coverage or premium, including both the employer and the employee contribution. If only the employee is eligible for an incentive, the calculation is based on the single cost of coverage. If family members are also eligible for an incentive, then the calculation is based on whatever tier of coverage the employee enrolls in.

EXAMPLE:

	Single Medical Monthly Premium - $500	Family Medical Monthly Premium - $1,200
EE-Only, Non-Tobacco	Incentive up to $150/month	N/A
EE-Only, Tobacco	Incentive up to $250/month	N/A
Family, Non-Tobacco	Incentive up to $150/month	Incentive up to $360/month
Family, Tobacco	Incentive up to $250/month	Incentive up to $600/month

If there are multiple incentives available for meeting different wellness program requirements, all health-contingent wellness incentives must be aggregated and together cannot exceed 30% of the total cost of coverage. If there is a mix of non-tobacco and tobacco-related incentives, the non-tobacco related incentives cannot exceed 30%, and the combination of all health-contingent incentives cannot exceed 50%.

Reasonable Alternative Standard

A health-contingent program must allow certain participants to earn the same incentive (or avoid the penalty) by either waiving the original requirement or by offering a reasonable alternative standard. For outcome-based programs, a reasonable alternative standard must be available to any who cannot achieve the original standard. For activity-based programs, a reasonable alternative standard must be available to any for whom it is unreasonably difficult due to health status or medically inadvisable (if reasonable, the employer is permitted to ask for a medical provider's verification that a reasonable alternative standard is needed).

The reasonable alternative standard may be set by the employer and does not necessarily have to be decided ahead of time or be the same for all participants, although it may be easier administratively to set it ahead of time and make it uniform for all participants. The regulations indicate that all the facts and circumstances are taken into account in determining whether a reasonable alternative standard is "reasonable." HIPAA regulations identify the following facts and circumstances for the plan to consider:

- If the reasonable alternative standard is the completion of an educational program, the employer must make the program available or assist the employee in finding such a program and cover the cost of the program.

- The time commitment required must be reasonable. For example, requiring attendance nightly at a one- hour class would be unreasonable.
- If the reasonable alternative standard is a diet program, the employer is not required to pay for the cost of food but must pay any membership or participation fee.
- If an individual's personal physician states that a plan standard is not medically appropriate for that individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the physician. Plans may impose standard cost-sharing under the plan for medical items and services furnished pursuant to the physician's recommendations.

Examples of Reasonable Alternative Standards

Example 1 – Tobacco Surcharge:

For a tobacco surcharge, a reasonable alternative standard could be to offer the incentive (do not impose the surcharge) for those who complete a smoking cessation class or use smoking cessation products for a set period of time.

Example 2 – Vaccination Clinic:

For a vaccination clinic, where health status may prevent participation, it may be easiest to waive requirement for those who cannot participate due to health status, but it may be possible to require other wellness screenings as an alternative.

Example 3 – Walking Program:

For a walking program, where health status may prevent participation, or the amount of walking may be medically inadvisable, it may be easiest to waive the requirement, but it may be reasonable to require a lesser amount of time or distance, to offer a different type of exercise (e.g., biking), or to require a certain number of gym visits.

While there is flexibility in setting the reasonable alternative standard, the employer must provide the full incentive (e.g., for the entire plan year if eligible all year) to those who satisfy the reasonable alternative standard. For this reason, some employers choose to require the completion of the reasonable alternative standard prior to the beginning of the plan year, at least for those already employed, to avoid having to make retroactive adjustments. Alternatively, the employer could choose to provide the incentive and then take it away later if the reasonable alternative standard is not met.

Finally, the availability of a reasonable alternative standard must be communicated in all wellness-related materials. There are several examples of employers who were found to have non-compliant wellness programs and who were penalized for a failure to clearly communicate the availability of a reasonable alternative standard.

Below is sample model language provided by the DOL for this purpose, but it can certainly be tailored to more closely match the employer's wellness program offering and reasonable alternative standard if it has already been determined:

> 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.

Disease Management (or Condition Management) Programs

For disease or condition management programs, in which individuals with specific conditions must participate in programs to avoid being penalized in relation to the employer's group medical plan, there is informal guidance indicating that the plan will not violate HIPAA nondiscrimination rules so long as the program follows the requirements for a health-contingent wellness program. Informal guidance indicates participation in the disease management program likely satisfies the requirement to provide a reasonable alternative standard, assuming the program requirements are reasonable, and a health condition doesn't prevent an individual from participating. In addition, the incentive/penalty, should not exceed 30% of the total cost of coverage (the health plan premium, including the employer and employee contribution). See more detail in Q/A-15 of the ABA Joint Committee on Employee Benefits, Questions for the DOL (May 3, 2006). Under HIPAA wellness rules, we're not aware of a specific requirement not to exclude employees from the group health plan for non-participation in a disease management program, but we worry it could be argued that exclusion from the employer's group medical plan, or some of the plan options, certainly exceeds the 30% incentive/penalty limit.

Tobacco Surcharges

Many employers provide incentives to employees (and sometimes their family members) for not smoking or using tobacco products to encourage them to adopt healthier lifestyles and to potentially cut down on medical costs. The most common incentive (or penalty) is a tobacco surcharge for the monthly medical plan premium. However, when the incentive is tied to the employer's group health plan, some employers fail to realize that putting such incentives in place is a health-contingent wellness program.

The employer has some flexibility in setting a reasonable alternative standard, but simply providing additional time to satisfy the same standard (e.g. stop using tobacco or smoking) is not compliant. In addition, guidance indicates that the individual must be provided with the full incentive following completion of the reasonable alternative standard, regardless of whether the individual actually stops using tobacco. There must be an annual opportunity to receive the incentive, either as a non-tobacco user or by satisfying the reasonable alternative standard. For example, a tobacco user could earn the incentive each year by annually completing a tobacco cessation course. Although employers sometimes find this frustrating, consider that these individuals still have to take extra steps to earn the incentive and must do so annually.

Taking a tobacco cessation class and/or using tobacco cessation products are common options provided as reasonable alternative standards. The employer should provide a period of time for completion of the reasonable alternative standard and then provide the full incentive available to non-tobacco users for those who satisfy the requirement. If tobacco cessation classes are offered as the reasonable alternative standard, they must be provided at no cost. The regulations indicate that if the reasonable alternative standard is the completion of an educational program, the plan or issuer must make the program available or assist the employee in finding such a program and cannot require the individual to pay for the cost of the program. Tobacco cessation classes and/or counseling can be found, and are often provided at no cost, through state-run programs. The time commitment must also be reasonable. If there is an option to use tobacco cessation products for a period of time, there is not the same requirement to cover the cost; but some coverage for tobacco cessation may be provided under the medical plan as preventive coverage.

Specific Considerations for a Tobacco Surcharge

For employers using a tobacco surcharge on employee contributions, a decision needs to be made about how to both handle the surcharge for those who are tobacco users and satisfy the reasonable alternative standard. Below are a few potential options:

1. Require the completion of the reasonable alternative standard prior to the beginning of the plan year (at least for those already employed).
2. Offer the lower employee contribution and impose the surcharge prospectively for those who fail to complete the reasonable alternative standard.
3. Offer the lower employee contribution and impose the surcharge retroactively (and prospectively) for those who fail to complete the reasonable alternative standard.
4. Impose the surcharge and return the money as additional taxable compensation for those who complete the reasonable alternative standard (the lower employee contribution would be charged prospectively).

Option 3 is the most problematic, because it may be difficult to collect the surcharge retroactively. And although §125 rules would clearly allow a prospective adjustment to pre-tax elections made through a cafeteria plan because of a change in cost of coverage, it is not clear that a retroactive change would be permitted (in other words, it might be necessary to collect retroactively on an after-tax basis).

It is also necessary to consider how the tobacco surcharge may impact affordability for applicable large employers (50 or more FTEs) subject to §4980H employer shared responsibility rules. For wellness incentives that affect the employee contribution toward medical coverage, the general rule of thumb is that the non-wellness rate (the higher rate) must be used for purposes of determining affordability. However, for a tobacco-related incentive, the rules permit an employer to use the non-tobacco rate to determine affordability.

Example - Required monthly employee contribution is $250/month, and wellness incentive reduces employee contribution to $150/month.

- *If the incentive is NOT tobacco related, coverage is "affordable" so long as $250 does not exceed 9.86% (in 2019) of employee's household income. $250.00 should be entered on Line 15 of Form 1095-C.*
- *If the incentive is tobacco related, coverage is "affordable" so long as $150 (not $250) does not exceed 9.86% (in 2019) of employee's household income. $150.00 should be entered on Line 15 of Form 1095-C.*

Enforcement

Some employers simply use an employee attestation/affidavit certifying tobacco use or lack thereof, while others have taken it a step further and require medical testing. If the employer is using an affidavit/attestation (taking the employee's word) versus performing medical testing to confirm use, some decisions will need to be made about how much the employer wants to actively police whether employees were truthful on the affidavit. Keep in mind that some states have laws prohibiting employers from considering employee actions outside of work. A few things to consider for the affidavit:

- Clarify the definition of smoking and/or tobacco use. For example, are e-cigarettes included?
- Clarify whether the employee is indicating tobacco use currently, for a previous period, for a future period, or all three.
- Communicate the repercussions of falsification. For example, indicate whether the surcharge will be imposed retrospectively, or only prospectively, or whether coverage may be terminated (retrospectively or prospectively).

Whatever is decided, it would be advisable to have the affidavit reviewed by legal counsel to ensure that it correctly communicates the employer's intentions and enables the employer to enforce said intentions.

Summary

Although tobacco-related incentives continue to be a popular way to encourage changes in employee (and family member) behavior and are therefore often promoted by insurance carriers and wellness vendors, employers must carefully consider the incentives provided and whether wellness rules apply. Many tobacco-related incentives are tied to the group health plan, requiring compliance with, among other things, HIPAA incentive limits and reasonable alternative standards. Further, in an attempt to simplify enforcement efforts, some employers have moved toward medical testing to confirm use, which then requires compliance with lower EEOC incentive limits and confidentiality disclosure requirements.

EEOC Rules (ADA & GINA)

The Americans with Disabilities Act (ADA) restricts when an employer may make disability-related inquiries or require medical examinations and requires reasonable accommodations for those with a disability. Wellness programs often include both disability-related questions and medical examinations or testing (e.g., health risk assessments or biometric screenings), but are allowed under the ADA so long as the program is considered "voluntary." In addition, a reasonable accommodation may be required for those who are unable to participate or satisfy certain criteria due to a disability.

Under the Genetic Information Nondiscrimination Act (GINA), if employers solicit genetic information about employees from employees or from employees' family members, such information must be obtained only after written authorization is obtained. The authorization must describe the type of genetic information that will be obtained and the general purposes for which it will be used and must also describe the restrictions on disclosure of genetic information. "Genetic information" includes information about the manifestation of a disease or disorder of a family member, including a spouse or children. GINA prohibits employers from conditioning eligibility on or providing financial incentives for the provision of an employee's genetic information. Therefore, the employer cannot tie an incentive to the employee providing genetic information. However, the rules allow a narrow exception in which incentives may be offered to a spouse providing information about the manifestation of a disease or disorder of the spouse in conjunction with a wellness program so long as certain requirements are met. This exception does not extend to the employee's children; GINA rules do not allow employers to collect similar information from an employee's children.

For wellness plans that involve medical examinations, disability-related questions, or the collection of employee's genetic information, the ADA and GINA will generally apply. However, wellness rules and guidance from the EEOC have been in flux over the past decade, especially in how incentives may apply, which has made it difficult for employers to determine how to design a compliant wellness program.

General Requirements

To avoid violating the ADA or GINA rules, a wellness program that requires medical testing or disability-related questions, or asks about the current or past health status of the spouse, must comply with the following requirements set forth by the EEOC:

EEOC Wellness Program Requirements
✓ Those choosing not to participate cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation (no plan gatekeeping)
✓ The program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws
✓ Participants must be provided with a confidentiality notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential. ○ Signatures of acknowledgement are required for participating spouses. ○ Sample notice found here - https://www.eeoc.gov/regulations/sample-notice-employer- sponsored-wellness-programs
✓ Information collected may be provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
✓ A reasonable accommodation is required if a disability or medical condition prevents individuals from participating or earning an incentive
✓ Participants may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections in place under the ADA or GINA as a condition for participating or receiving an incentive
✓ Incentive limits seem to apply, but the limits are unclear. See more below

Incentive Limits

EEOC rules put an incentive limit in place effective in 2017. However, the incentive limit originally provided has been challenged, vacated, and new limits proposed since that time. Below is a timeline and a description of how the incentive limit requirements have evolved since 2017. Unfortunately, there is currently no clear guidance.

available as to what level of incentive may be tied to a wellness program involving medical examinations, disability-related questions, or the collection of an employee's genetic information.

2017

The EEOC released two separate sets of final regulations in 2016 setting forth requirements for wellness programs subject to the ADA and GINA. Plans were required to comply for plan years beginning in 2017. The final rules limited incentives to 30% of the total cost of coverage (borrowed from HIPAA wellness rules). The incentive limit applied whether the wellness program was participatory or health-contingent, and even if it was not connected to an employer's group health plan. The rules for determining the level of incentive were as follows:

Wellness Program Eligibility	Incentive Calculation
Available only to those enrolled in the employer's group health plan	30% of the total cost of single coverage for the plan in which the individual enrolled
Available whether employer's group health plan was waived or elected	30% of the total cost of single coverage under the group health plan (or of the lowest cost group health plan if there are multiple options)
Available with no group health plan offered	30% of the total cost of single coverage for the second lowest cost Silver plan available through the public Marketplace (based on employer's principal place of business)

For spouses who were allowed to participate, rather than calculating the 30% incentive limit based on the tier of coverage the employee enrolled in, the rules indicate the spouse's incentive limit was based on 30% of the single cost of coverage as well (2 x 30% of single cost of coverage when employee and spouse could both participate).

2019

Soon after the final EEOC wellness rules were released, the American Association of Retired Persons (AARP) sued the EEOC, claiming that the rules violated the ADA and GINA. The AARP argued that the 30% incentive limit (or penalty) did not meet the "voluntary" requirement of the ADA. The court ruled in favor of the AARP, stating that the EEOC did not provide adequate justification in determining that a 30% incentive limit makes a wellness program voluntary. The court ordered the EEOC to rewrite the rules or to provide additional justification to the court. When the EEOC responded with a proposed time frame that the court thought was unreasonably long, the court vacated the incentive limit rule completely. The EEOC then issued a final rule consistent with the court's order to vacate the incentive limit rule effective January 1, 2019. NOTE: This does not change any of the other wellness rules previously issued by the EEOC.

January 2021

Early in January of 2021, the EEOC released long-awaited proposed rules addressing what type of incentive can be offered for participation in a wellness program without violating the ADA or GINA. The proposed rules would have also gotten rid of the requirement for the confidentiality notice regarding the collection of medical information. The rules proposed that most wellness programs subject to the ADA or GINA would be permitted to offer only a de minimis incentive, stating that "allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty." The proposed rules indicated that a de minimis limit would permit only nominal incentives such as a water bottle or gift card, while also stating that a $50/month medical premium surcharge, reimbursement of annual gym membership fees, or free airline tickets would not be considered de minimis.

There was an exception to the de minimis incentive limit for health-contingent programs that were part of a group health plan, allowing an incentive limit of up to 30% as permitted under HIPAA wellness rules.
The factors provided by the EEOC to help determine whether a health-contingent wellness program is part of, or qualifies as, a covered entity's group health plan for purposes of the ADA include whether the program– (i) is offered only to employees who are enrolled in an employer-sponsored group health plan;
(ii) ties any incentive offered to cost-sharing or premium reductions (or increases) under the group health plan; (iii) is offered by a vendor that has contracted with the group health plan or insurer; and (iv) is a term of coverage under the terms of a group health plan. Notably, participatory wellness programs were not included in the exception, so a de minimis incentive limit may have applied to incentives tied to completion of annual physicals, biometric screenings, or health risk assessments.

There would have continued to be a small exception for the prohibition of offering incentives for genetic information for spouses responding to inquiries about their own manifestation of diseases or disorders, but the de minimis incentive (rather than 30%) would have applied.

February 2021

In February of 2021, the EEOC posted an announcement formally withdrawing the proposed rules in accordance with President Biden's order to withdraw any unpublished rules until further review and approval could be provided. Nothing further has been made available by the EEOC.

What Does This Mean for Incentive Limits?

For now, if a wellness program provides incentives (or imposes penalties) related to participating in medical testing, answering disability-related questions, or providing genetic information, it is not clear whether such a program is considered voluntary for purposes of the ADA or GINA. Although there is no guidance prohibiting such incentives, there is also no guidance currently in effect indicating that they are allowed, or to what extent. Employers offering such wellness program will need to determine how to handle incentives without clear guidance from the EEOC about what level of incentive, if any, is considered voluntary and not in violation of ADA or GINA rules.

While the EEOC is in the process of writing new rules, it seems unlikely that there will be much enforcement by the EEOC. However, there are several instances where lawsuits have been filed by employees (or organizations such as the AARP on behalf of employees). There seems to be real concern about individuals having to share medical information with an employer, especially when there is a penalty attached to not doing so. Employers who offer more aggressive incentives tied to their wellness programs involving medical testing or disability-related questions are perhaps at higher risk of employees making successful claims that the wellness program is involuntary in violation of the ADA.

Without clarity as to what is considered "voluntary," the most conservative approach would be to offer little to no (i.e., a de minimis) incentive tied to medical testing, disability-related questions, or the collection of genetic information.
However, some employers may find it defensible to comply with an incentive limit of up to 30%, following previous EEOC rules until new rules are provided, while others may feel more comfortable lowering incentive amounts a bit (e.g., incentives of 10–15%) while we wait. Another approach would be to continue to offer incentives for participating in medical testing or answering disability-related questions, but to offer a menu of options or alternatives for earning the incentive that do not involve medical testing or disability-related questions (e.g., tobacco-related incentives, exercise/diet programs, walking programs, educational courses), so that participants have an opportunity to earn the full incentive without participating in medical testing or disability-related questions.

Disease Management (or Condition Management) Programs

There is guidance indicating that an employer could incent individuals to participate in a disease management program when applicable by giving them something more that is not available to other individuals, but it is less clear that an employer could penalize or deny incentives for individuals with specific diseases or conditions (a disability) choosing not to participate without violating the ADA. There is perhaps an argument that the disease management program would be seen as a reasonable accommodation for those with a disability (similar to how it is viewed as a reasonable alternative standard under HIPAA wellness rules), but we would recommend discussing such interpretation further with counsel.

In addition, if the disease management program involves some level of medical testing or disability-related questions, it would be necessary to follow the EEOC wellness program rules outlined above. It may be possible to set up such program to comply so long as the program is reasonable, promotes health, follows confidentiality rules, and appropriately limits the incentives/penalties, but the EEOC wellness rules specifically prohibit what have come to be known as gateway/gatekeeper provisions. In other words, if the disease management involves a medical examination or responses to disability-related questions, the employer cannot make participation in the disease management program a condition of eligibility for the employer's group health plan. Similarly, such requirements could not be used to exclude employees from some of the plan options when multiple plan options are available.

If spouses with specified diseases or conditions are required to participate in the disease management program, that could be a problem as well. Under GINA, EEOC guidance clearly indicates that incentives cannot be denied for a spouse's failure to achieve a certain health outcome. Therefore, even if the requirement might be okay to impose on the employee with certain conditions, it would not seem to be permitted for the spouse. NOTE: As mentioned above, guidance indicates that employers may incent spouses to participate in disease management programs. So, while it may not be compliant to penalize them, the employer could offer something extra to those who choose to participate in the disease management program.

Tobacco Surcharges

EEOC guidance confirms that a tobacco-related wellness program that merely asks whether an individual uses tobacco does not fall under the ADA (and therefore the maximum 50% incentive under HIPAA applies). But if the program involves any medical testing to verify the presence of nicotine or tobacco, the EEOC rules would apply as described above, including the uncertain incentive limits.

Resources

EEOC final rules and links to FAQs as released in 2016 - https://www.eeoc.gov/newsroom/eeoc-issues-final- rules-employer-wellness-programs

2021 Proposed Rules

- ADA – https://www.eeoc.gov/regulations/proposed-rule-amendments-regulations-under-americans- disabilities-act
- GINA – https://www.federalregister.gov/documents/2018/12/20/2018-27538/removal-of-final-gina- wellness-rule-vacated-by-court