Newfront

Wellness Programs

The Employer Compliance Rules

2022 Edition

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Wellness Programs – The Big Picture

What are They?

- “Wellness program” generally refers to health promotion and disease prevention programs and activities offered to employees
- Typically (but not always) offered as a component of the employer’s group health plan

What are the Main Topics Covered?

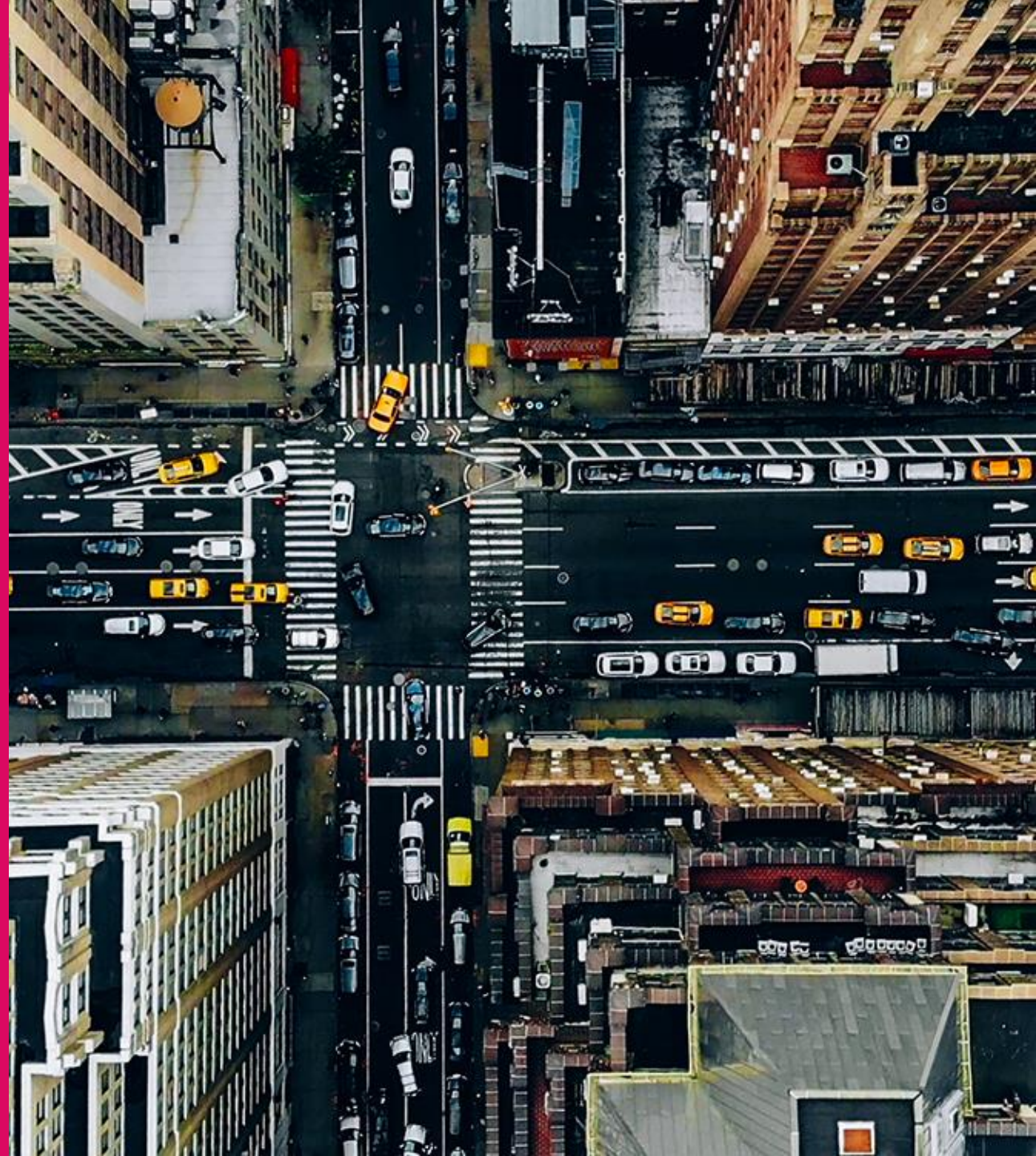
- Step-by-step review of the main compliance requirements for wellness programs
- Review includes the prior HIPAA/ACA requirements that remain unchanged by the ADA/GINA rules
- Important note that ADA/GINA rules have been vacated and currently there is uncertainty as to how ADA applies
- Emphasis on how the structure of the wellness program (e.g., participatory vs. health-contingent) dramatically affects the rules that apply

Why Do You Need to Know?

- Compliance requirements may be an important factor in how you design and enhance your organization’s wellness program
- ADA/GINA regulations had finally provided some stability in this previously unsettled area of law
- After the regulations were vacated, employers again have to be comfortable with many unanswered questions and an unclear enforcement scheme until EEOC takes action again to clarify the landscape

Background

Wellness Programs—Where Did You Come From, Where Did You Go?



Wellness Program HIPAA/ACA History

1996: HIPAA signed into law

2006: DOL/IRS/HHS regulations issued in 2006 applying HIPAA nondiscrimination rules to wellness programs

- HIPAA nondiscrimination rules generally prohibit group health plans from discriminating based on health-related factors with respect to premiums or cost-sharing
- Wellness program regulations designed as an exception to the HIPAA nondiscrimination rules for programs that meet the requirements in the regulations

2010: ACA codifies 2006 regulations into statute

- Generally without changes—except for increase to incentive limit from 20% to 30% (and 50% for tobacco cessation)
- Effective date: Plan years beginning on or after 1/1/14

2013: DOL/IRS/HHS issues new final regulations based on the ACA (which was primarily a codification of prior 2006 final regulations)

- Started with a statute (HIPAA), followed by regulations (2006), followed by codified regulations (ACA 2010), followed by regulations based on the codified regulations (2013)
- Plus, new 2013 final regulations claim application to grandfathered plans (even though the ACA specifically exempts) based on original HIPAA authority!

Wellness Program ADA/GINA History

1990: ADA signed into law

2008: GINA signed into law

2014 (Oct.): EEOC brings enforcement action against Honeywell in U.S. District Court, District of Minnesota

- Found typical wellness program design with incentives for biometrics, blood screening, and tobacco cessation (and that complied with the HIPAA/ACA rules) to violate the ADA requirement that any disability-related inquiries and/or medical examinations for employees be "voluntary"
- Also found GINA violation for spousal HRA incentive based on spouse's own current or past health status because the spouse is a "family member" (despite no genetic relation)

2014 (Nov.): Business Roundtable issues scathing letter to agencies

- Warned of "chilling effect across the country," and condemned EEOC enforcement action as "shameful"

2015 (Apr.): EEOC issues proposed ADA wellness program regulations

- Focused on defining the "voluntary" standard for wellness programs

2015 (Oct.): EEOC issues proposed GINA spousal HRA regulations

- Changed position proposing to permit incentives where certain requirements satisfied

2016 (May): EEOC issues final ADA/GINA regulations

- Applicable as of the first day of the first plan year that begins on or after January 1, 2017
- ADA/GINA rules vacated as of 1/1/19 after AARP v. EEOC court case ordered their removal

Federal Laws That May Apply to Wellness Programs

1. HIPAA Nondiscrimination (as modified by the ACA)
2. ADA
3. GINA
4. ACA Market Reforms
5. ERISA
6. COBRA
7. HIPAA Privacy/Security
8. More? (ADEA, FLSA)

Threshold Inquiries

1. ERISA Group Health Plan?
2. Disability-Related Inquiries and/or Medical Examinations?

Which Wellness Programs Must Comply?

The threshold issue for a wellness program to determine if it must comply with the nine main requirements is whether it is subject to the HIPAA/ACA and the ADA requirements.

HIPAA/ACA Threshold Question

Is the wellness program a group health plan?

- An employee welfare benefit plan is a group health plan if it provides **"medical care"**
- "Medical care" generally refers to "the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body"
- Most wellness programs will fall into this category of group health plan
- Any form of blood draws, screening, examinations, assessments, disease management, health incentives, or counseling by trained professionals likely triggers group health plan status
- Pure referral services, general information for mere promotion of good health, or basic educational sessions not customized to the employee likely are not a group health plan

ADA Threshold Question

Does the wellness program include:

1. **Disability-related inquiries;** and/or
2. **Medical Examinations**

- The ADA rules apply to any wellness program that is an "employee health program" that asks employees to respond to disability-related inquiries and/or undergo medical examinations
- Includes wellness programs that are offered only to employees enrolled in the employer-sponsored group health plan, offered to all employees regardless of whether they enrolled in the employer's plan, or offered by employers that do not offer a group health plan
- Examples of "employee health programs" that may trigger the ADA regulations include HRAs to determine risk factors, medical screening for high blood pressure/cholesterol/glucose, classes to help employees stop smoking or lose weight, physical activities (e.g., walking or daily exercise), coaching to help employees meet health goals, and/or flu shots

The Dividing Line

Two Main Types of Wellness Programs

Two Main Types of Wellness Programs: From HIPAA Nondiscrimination Rules

Which Requirements Apply?

Participatory Programs

1. Program must be available to all similarly situated individuals
2. Program must be voluntary*
3. Program must provide reasonable accommodations*
4. Program must be reasonably designed to promote health or prevent disease*
5. Program reward/incentive is generally limited to 30% of the cost of coverage*
6. ADA wellness program notice provided to employees*

Health-Contingent Programs

All six of the participatory program requirements, plus three more:

7. Program must offer individuals the opportunity to qualify for rewards at least once per year
8. Program must provide reasonable alternative standards (or waiver of standards) to obtain reward in certain situations
   - Significantly different rules apply for activity-only vs. outcome-based programs
9. HIPAA nondiscrimination wellness program notice describing reasonable alternative standards included in all plan materials describing the health-contingent wellness program

*Important Note: A federal court recently ruled in AARP v. EEOC that the EEOC wellness program rules do not meet the requirements of the ADA, and that the EEOC must issue new regulations meeting certain standards.

We feel that the best practice approach is to continue following the vacated EEOC regulations until we have new guidance specifying the ADA requirements moving forward.

Nonetheless, the HIPAA nondiscrimination rules for wellness programs do remain in effect.

1. Participatory Programs

"If none of the conditions for obtaining a reward under a wellness program is based on an individual satisfying a standard that is related to a health factor (or if a wellness program does not provide a reward), the wellness program is a participatory wellness program."

Examples

- Gym membership reimbursement
- Diagnostic testing program that rewards for participation only (and does not base any part of the reward on outcomes)
- Smoking cessation program reimbursement (without regard to whether the employee quits smoking)
- Reward for attending a health education seminar
- Health risk assessment reward—without further action required by the employee with regard to the health issues identified as part of the assessment

2. Health-Contingent Programs

"A health-contingent wellness program is a program that requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward). **A health-contingent wellness program may be an activity-only wellness program or an outcome-based wellness program."**

Activity-Only Programs

- Requires an individual to perform or complete an activity related to a health factor in order to obtain a reward
- But does not require the individual to attain or maintain a specific health outcome

Examples:

- Walking
- Diet
- Exercise

Outcome-Based Programs

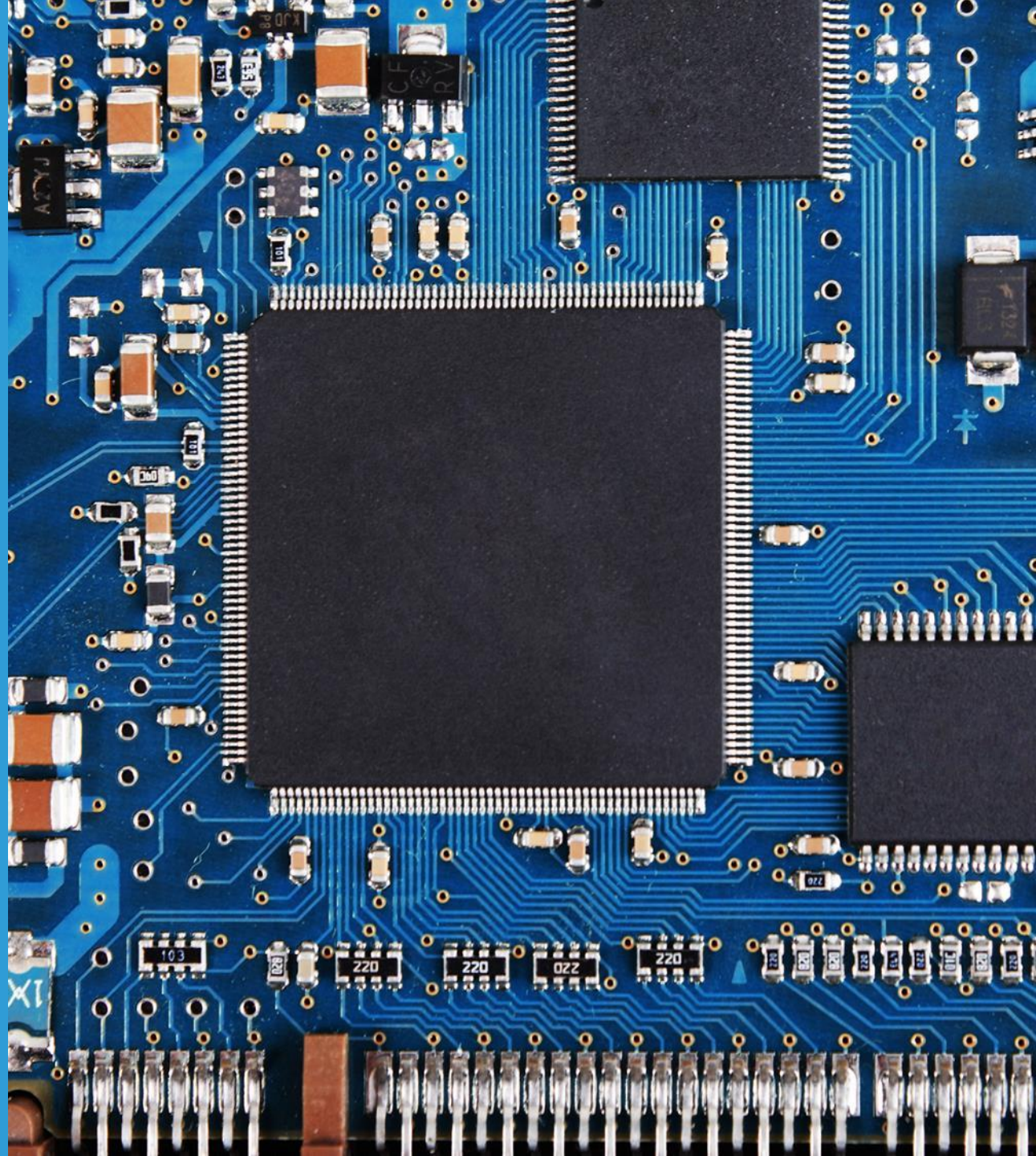
- Requires an individual to attain or maintain a specific health outcome in order to obtain a reward

Examples:

- Smoking cessation
- Attaining certain results in a biometric screening
- Requiring additional steps for individuals identified as outside health range
- Meeting with a health coach
- Taking a health or fitness course
- Adhering to health improvement action plan
- Complying with a walking or exercise program
- Complying with health provider's plan of care

Nine Main Compliance Requirements

Parts I-VI: Participatory Wellness Programs



Similarly Situated

"A participatory wellness program…does not violate the provisions of this section only if participation in the program is **made available to all similarly situated individuals**, regardless of health status."

- Means that a participatory wellness program must not be closed to individuals with certain health conditions
- Employer may treat participants as separate groups of "similarly situated individuals" where the distinction is based on a bona-fide employment-based classification consistent with the employer's usual business practice, for example:
  - Full-time vs. part-time
  - Different geographic locations
  - Membership in a collective bargaining unit (union group)
  - Length of service
  - Different occupations

Voluntary

"A covered entity may conduct **voluntary** medical examinations, including **voluntary** medical histories, that are part of an employee health program available to employees at that work site."

New ADA Voluntary Standard for Wellness

- No requirement that employees participate;
- No denial of coverage or other coverage limitations under any of the employer's group health plans for non-participation;
- No adverse employment action, retaliation against, interference with, coercion, intimidation, or threatening of employees related to participation or outcomes;
- Must comply with the incentive limits (described in a later slide); and
- A required notice to employees (described in a later slide)

Reasonable Accommodation

"[U]nder the ADA, a covered entity would have to provide a reasonable accommodation for a participatory program **even though HIPAA and the Affordable Care Act do not require such programs to offer a reasonable alternative standard…."**

Example 1	Example 2	Example 3
Employer offers financial incentive to attend a nutrition class, regardless of whether they reach a healthy weight as a result. • Employee is deaf and needs interpreter to understand information communicated in class. • Employer must provide a sign language interpreter so that employee can earn the incentive—as long as providing the interpreter would not result in undue hardship to the employer.	Employer offers financial incentive to employees who read written materials on wellness • Employee has a vision impairment and cannot read standard materials. • Employer must provide written materials in an alternate format, such as in large print or on computer disk—unless this would result in undue hardship to the employer.	Employer provides financial incentive for employees to complete biometric testing w/ blood draw. • Employee has disability that makes drawing blood dangerous. • Employer must provide an alternative test (or certification requirement) so employee can safely earn the incentive.

Reasonably Designed

"An employee health program, including any disability-related inquiries or medical examinations that are part of such program, must be **reasonably designed to promote health or prevent disease.**"

Requirements

- Has reasonable chance of improving the health of, or preventing disease in, participating employees;
- Is not overly burdensome;
- Is not a subterfuge for violating ADA or other laws prohibiting employment discrimination (or HIPAA); and
- Is not highly suspect in the method chosen to promote health or prevent disease

Reasonably Designed (Look to All Relevant Facts and Circumstances!)

Meets "Reasonably Designed" Requirements

- Asking employees to complete a HRA and/or a biometric screening for the purpose of alerting them to health risks uncovered by the process
- Use of aggregate information from HRAs by an employer to design and offer health programs aimed at specific conditions identified by the information collected

NOT Reasonably Designed

- A program consisting of measurement, testing, screening, or collecting of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees
  - To comply, the collected information would have to actually be used to design a program that addresses at least a subset of the conditions identified
- A program that exists mainly to shift costs from the employer to targeted employees based on their health
- A program that exists simply to give the employer information to estimate future health costs

V. ADA New Requirement (Applicable 2017, Vacated 2019)

Size of Reward: 30% Standard

"The use of incentives (financial or in-kind) in an employee wellness program, whether in the form of a reward or penalty, will not render the program involuntary if the maximum allowable incentive available under the program (**whether the program is a participatory program or a health-contingent program**, or some combination of the two…) **does not exceed…"**

- Prior to the ADA rules, there was no limit on the size of the reward for a participatory wellness program under the HIPAA/ACA rules
- Now the reward limit for participatory and health-contingent programs **is generally 30% of the cost of coverage**
- Final ADA rules create new rules for determining how to apply the **30% limitation** (next slide)

Size of Reward: 30% Specifics

Wellness Program Limited to Employees Enrolled in Group Health Plan	Wellness Program Offered to All Employees (Regardless of GHP Enrollment)	Employer Does Not Offer a Group Health Plan
30% of the total cost of self-only coverage (including both the employee's and employer's contribution) **of the plan option in which the employee is enrolled.**	**a. Employer Offers Only One Plan Option:** **30%** of the total cost of self-only coverage (including both the employee's and employer's contribution) **of the one plan option.** **b. Employer Offers More Than One Plan Option:** **30%** of the total cost of self-only coverage (including both the employee's and employer's contribution) **of the lowest cost plan option.**	**30%** of the cost of self-only coverage under the **second lowest cost Silver Plan for a 40-year-old non-smoker on the Exchange** of the employer's principal place of business.

Size of Reward: Examples

Employer offers incentives for employees to participate in wellness program that includes an HRA and medical examinations.

Example 1

Wellness program offered <u>only to employees enrolled in major medical</u>

- Employer offers three tiers of major medical (PPO High, HMO Medium, HMO Low)
- PPO High Annual Cost: $6,000
- Employee enrolls in PPO High

Maximum Allowable Incentive: $1,800

- $6,000 x 30% = $1,800

Example 2

Wellness program offered only to <u>all employees</u> (regardless of enrollment)

- Employer offers three tiers of major medical (PPO High, HMO Medium, HMO Low)
- HMO Low Annual Cost: $5,000
- Employee enrolls in PPO High ($6,000)

Maximum Allowable Incentive: $1,500

- 5,000 x 30% = $1,500

Size of Reward: What about Tobacco Cessation?

HIPAA/ACA Rules: 50%

- Incentive limit increased to 50% to the extent that the additional percentage is in connection with a program designed to prevent or reduce tobacco use
- For example, 50% incentive for individuals who quit smoking (but see ADA rules in right column re examination limitations)
- Must be cautious to ensure that the incentives not related to tobacco use remain capped at 30%

ADA Rules: 30%

- No exception to the standard 30% limitation for tobacco use
- This means that a wellness program subject to the ADA must comply with the lower 30% limit (despite the HIPAA/ACA 50% threshold)
- **Means that the program cannot implicate the disability-related inquiries or medical examinations provision of the ADA to rely on the 50% threshold**
- Any biometric screening or other medical examination (e.g., cheek swab) that tests for the presence of nicotine or tobacco is a medical examination that would impose the lower 30% ADA threshold

ADA Notice Provided to Employees

Requirements

- The employee is reasonably likely to understand;
- Describes the medical information that will be obtained and the specific purposes for its use; and
- Describes the restrictions on the disclosures of the employee's medical information, the parties with whom it will be shared, and the methods that will be used to ensure the medical information is not improperly disclosed (including the HIPAA PHI standards)

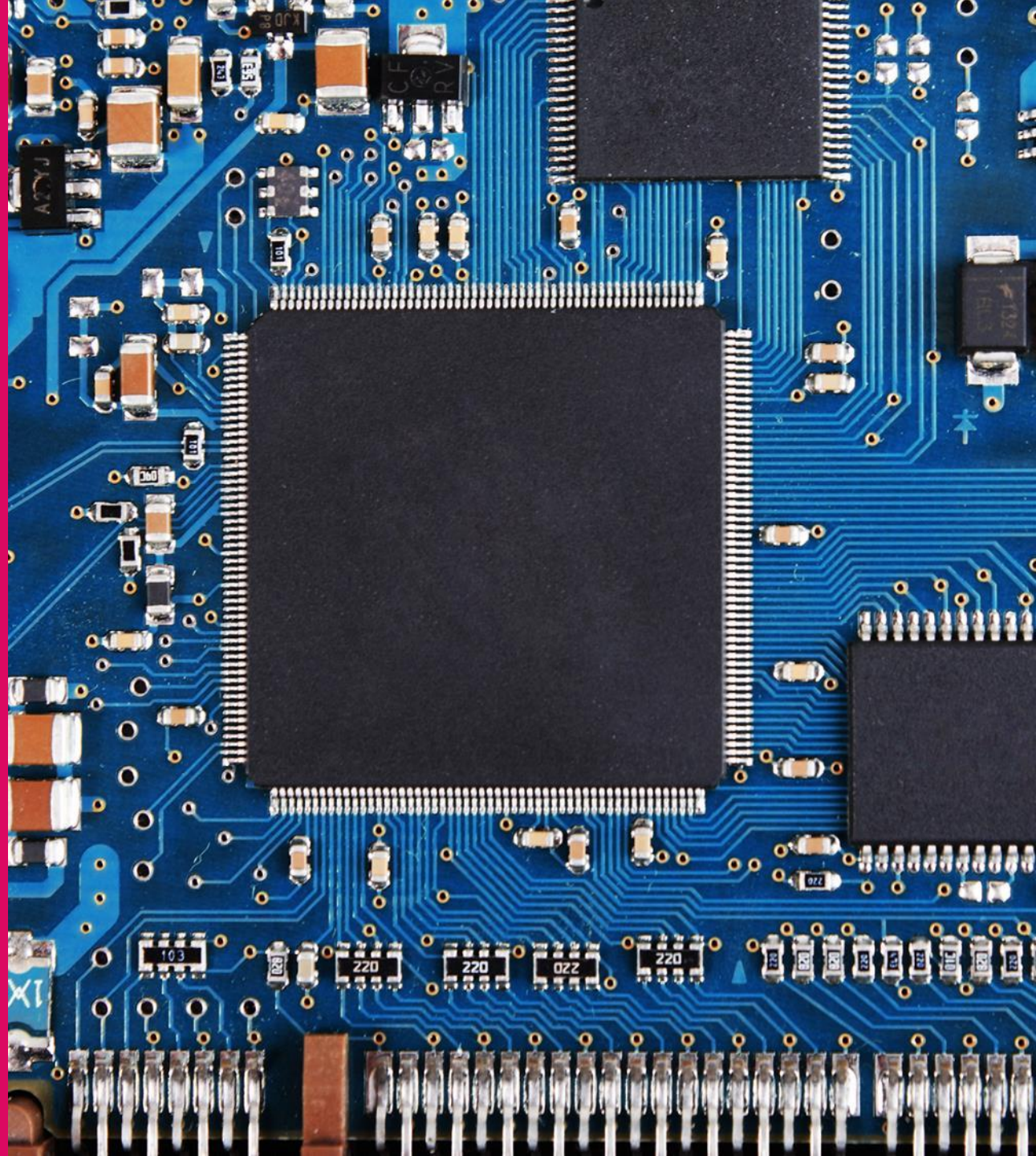
EEOC Model Notice

Available here: https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

Nine Main Compliance Requirements

Parts VII-IX: Health-Contingent Wellness Programs

All the Participatory Program Requirements, **Plus Three More!**



Frequency of Opportunity to Qualify

- The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year
- FAQ XXVIII clarifies that the program needs to offer the reasonable opportunity to enroll and qualify for the reward only at the beginning of the year—no requirement for mid-year enrollment

Example	Result
• Employee declines the opportunity to participate in wellness program at the beginning of the year, but joins in the middle of the year.	• Plan imposes tobacco premium surcharge for employees who do not complete the wellness program's tobacco cessation educational program. • Plan is not required to provide employee the opportunity to avoid the tobacco premium surcharge until the subsequent plan year (because he joined the wellness program mid-year).

Reasonable Alternative Standards (RAS)

Activity-Only Programs

a. RAS (or waiver of standard) for obtaining the reward for any individual for whom, for that period, it is **unreasonably difficult due to a medical condition to satisfy the standard**; or

b. RAS (or waiver of standard) for obtaining the reward for any individual for whom, for that period**, it is medically inadvisable to attempt to satisfy the standard**

- If reasonable under the circumstances, employer may seek verification from individual's personal physician

Outcome-Based Programs

- RAS (or waiver of standard) for obtaining reward for any individual who does not meet the initial standard based on the measurement, test, or screening
- Must be available regardless of whether it was unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the standard
- Never reasonable to seek verification (including from individual's personal physician)

Reasonable Alternative Standards (RAS)

All the Facts and Circumstances Considered, Including:

- If the RAS is completion of an educational program, the plan must make the program available or assist in finding the program (instead of requiring the individual to find a program unassisted), and may not require the individual to pay for the cost
- The time commitment required must be reasonable (requiring attendance nightly at a one-hour class would be unreasonable)
- For an RAS that is a diet program, the plan is not required to pay for the cost of food, but must pay any membership or participation fee (e.g., Weight Watchers)
- If the individual's personal physician states that a standard is not medically appropriate for that individual, the plan must provide an RAS that complies with the recommendations of the physician

EEOC Commentary re: ADA Reasonable Accommodation

"Providing a reasonable alternative standard and notice to the employee of the availability of a reasonable alternative under HIPAA and the Affordable Care Act as part of a health-contingent program **would generally fulfill** a covered entity's obligation to provide a reasonable accommodation under the ADA." (Note: Proposed regulations said "would likely fulfill")

Reasonable Alternative Standards (RAS)

A RAS That Itself Is Health-contingent Raises Special Rules

- **RAS that is activity-only (e.g., complete a walking program):**
  - Plan must offer a RAS for the RAS!
- **RAS that is outcomes-based (e.g., meet a certain BMI):**
  - RAS cannot be requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances
    - E.g., Initial standard is 30 BMI. RAS can't be 31 BMI on same date—would have to be over a realistic period of time, such as within a year
  - Individual must have opportunity to comply with recommendations of personal physician as a second RAS if the physician joins in the request

Notice of Availability of Reasonable Alternative Standard (RAS)

- Plan must disclose in all plan materials describing the health-contingent wellness program the availability of a RAS (or waiver) to qualify for the reward
- Plan materials that merely mention that the health-contingent wellness program is available (without describing its terms) do not need this notice

Model Language

"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."

Covid Vaccine Premium Incentives and Surcharges

Full Details: https://www.theabdteam.com/blog/covid-vaccine-premium-incentives-and-surcharges/

Four Main Compliance Considerations

- **No Employer Role in Vaccine Administration:** Employers should not administer the vaccine by directly providing it to employees either through its own workforce or agents (e.g., third-party vendors) acting on the employer's behalf. Employees should receive the Covid vaccine from a pharmacy, public health department, or any other health care provider in the community not tied to the employer to avoid strict limitations on the incentive or surcharge under the ADA and GINA
- **HIPAA/ACA Wellness Program Rules Apply:** These rules limit the Covid vaccine incentive or surcharge to 30% of the total cost of the coverage. They treat this as an "activity-only" health-contingent wellness program that requires the employer to offer reasonable alternative standards (including notice of availability) for employees to receive the incentive or avoid the surcharge for any individual for whom it is a) unreasonably difficult to receive the vaccine due to a medical condition, or b) medically inadvisable to receive the vaccine
- **Incentive/Surcharge Affects ACA Affordability:** The employer's lowest-cost plan option cost is determined without regard to any discount the employee may have received for being vaccinated, and including the amount of the surcharge the employee may have avoided by being vaccinated. This can cause employers to inadvertently move out of the automatic passing grade offered through the federal poverty line affordability safe harbor (and the associated streamlined reporting through the qualifying offer method). It may also cause the offer of coverage to fail to meet the rate of pay safe affordability safe harbor, potentially triggering unexpected "B Penalties"
- **Religious Accommodations:** Where employees express that a sincerely held religious belief, practice, or observance prevents them from getting a Covid vaccine, Title VII of the Civil Rights Act requires the employer to provide a reasonable accommodation unless it would pose an undue hardship. Employee notifications of a religious objection may require consultation with employment counsel to determine the appropriate accommodation

GINA

Structuring an HRA to Comply with Genetic Information Restrictions

Genetic Information Nondiscrimination Act

GINA Title I: Prohibits group health plans from using genetic information to determine premiums, requesting or requiring genetic testing, or using genetic information for underwriting purposes

GINA Title II: Prohibits employers from discriminating against employees on the basis of genetic information or purchasing genetic information with respect to an employee or family member

Health Risk Assessments – GINA Title I

- HRA completion reward for employee's own medical history (not family medical history) does not present GINA issues
- HRA that includes genetic information cannot be required prior to enrollment
- HRA rewards conditioned on the employee providing genetic information (e.g., genetic test results, family medical history) also violates GINA's prohibition of against collecting genetic information for underwriting purposes
- However, HRA can be "bifurcated" to condition reward only on the employee completing information about him/herself—regardless of whether employee completes family medical history section
- Instructions must be clear that the second assessment is not required to receive reward

Spousal Health Risk Assessments Background: GINA Title II

- GINA Title II prohibits offering financial inducements to acquire an employee's genetic information
- Genetic information includes medical history of an employee's "family member"
- Definition of family member appeared to include spouse
- Therefore, it previously appeared that offering an incentive for a spouse to complete a health risk assessment or undergo biometrics might violate GINA—because the spouse's medical information was considered the employee's family medical history

Enforcement Background: Honeywell Action

Honeywell offered incentive for spouses to complete biometrics.

- "Medical information relating to manifested conditions of spouses is family medical history – or genetic information – under GINA."
- "Honeywell is offering an inducement to its employees to acquire genetic information in violation of GINA."

GINA –Spousal HRA Incentives

New final regulations provide that GINA Title II does not prohibit employers from offering an incentive to complete a HRA, provided that:

1. The HRA requests information only about the spouse's manifestation of disease or disorder (previously referred to as requesting the spouse's own current or past health status);
2. The HRA is reasonably designed to promote health or prevent disease (same as ADA rules);
3. The spouse provides prior, knowing, voluntary, and written authorization—and the authorization form describes the confidentiality protections and restrictions on genetic information;
4. The HRA is administered in connection with the spouse's receipt of health or genetic services offered by the employer (including wellness program); and
5. The HRA incentive is limited to the same 30% standards applicable under the ADA.
   - **The 30% ADA limitation is a significant change from the prior limitation structure set forth in the EEOC's proposed regulations last year.**

Final GINA regulations applicable as of **the first day of the first plan year that begins on or after January 1, 2017.**

- **Important Note: Vacated as of 1/1/19**

The ACA Market Reforms

Potential Eligibility Issues for Wellness Programs

How Do the ACA Market Reforms Apply to Wellness Programs?

The application of the ACA market reform provisions to wellness programs is a controversial topic. However, no exception will apply for most wellness programs.

The Market Reforms

- The ACA applies its market reform provisions to "group health plans"
- Most wellness programs qualify as a group health plan (see slide 8)
- **Unless the group health plan qualifies as an "excepted benefit," it must comply with the market reform provisions**
- Stand-alone wellness programs generally cannot comply with these requirements, including:
  - Prohibition of lifetime and annual dollar limits on essential health benefits
  - Requirement to provide preventive care without cost-sharing

Wellness Programs Generally Are Not Excepted Benefits

- The preamble to the recently finalized excepted benefits regulations specifically refuses to classify wellness programs as excepted benefits
  - "Some comments requested that EAPs be allowed to provide wellness and disease management programs, provided such programs do not provide significant benefits in the nature of medical care."
  - **"However, treating wellness programs as excepted benefits by including them in an EAP would circumvent consumer protections contained in the statutory standards for wellness programs under section 2705(j) of the PHS Act as enacted by the Affordable Care Act. This suggestion is not adopted in these final regulations."**

General ACA Integration Rules

The ACA prohibits stand-alone HRAs because they cannot satisfy the ACA market reform provisions. For example, they impose annual or lifetime dollar limits on essential health benefits, and they do not provide preventive services and items without cost-sharing. **The HRA integration rules below should apply in the same manner to wellness programs.**

MV Integration Requirements

- Employer offers major medical that **provides minimum value (MV)** to the employee
- Employee covered by HRA is also enrolled in a group major medical plan **that provides MV**—whether through that employer or a spouse/DP/parent
- HRA is available only to employees enrolled in a group major medical plan **that provides MV**—whether through that employer or a spouse/DP/parent
- Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Non-MV Integration Requirements

- Employer offers **non-MV** major medical to the employee
- Employee covered by the HRA is also enrolled in group major medical—whether through that employer or a spouse/DP/parent
- HRA is available only to employees enrolled in a group major medical plan—whether through that employer or a spouse/DP/parent
- **HRA reimburses only cost-sharing amounts under the major medical and/or non-essential health benefits**
- Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Avoiding Potential §4980D Penalties

Stand-Alone Wellness Programs Potentially Violate ACA

- IRC §4980D imposes $100/day/employee penalty for ACA market reform violations ($36,500 annually per employee)
- Stand-alone wellness programs generally will not comply with prohibition of annual or lifetime dollar limits, or (non-GF only) requirement to provide preventive care without cost sharing

Restricting Eligibility is Simplest Preventive Measure

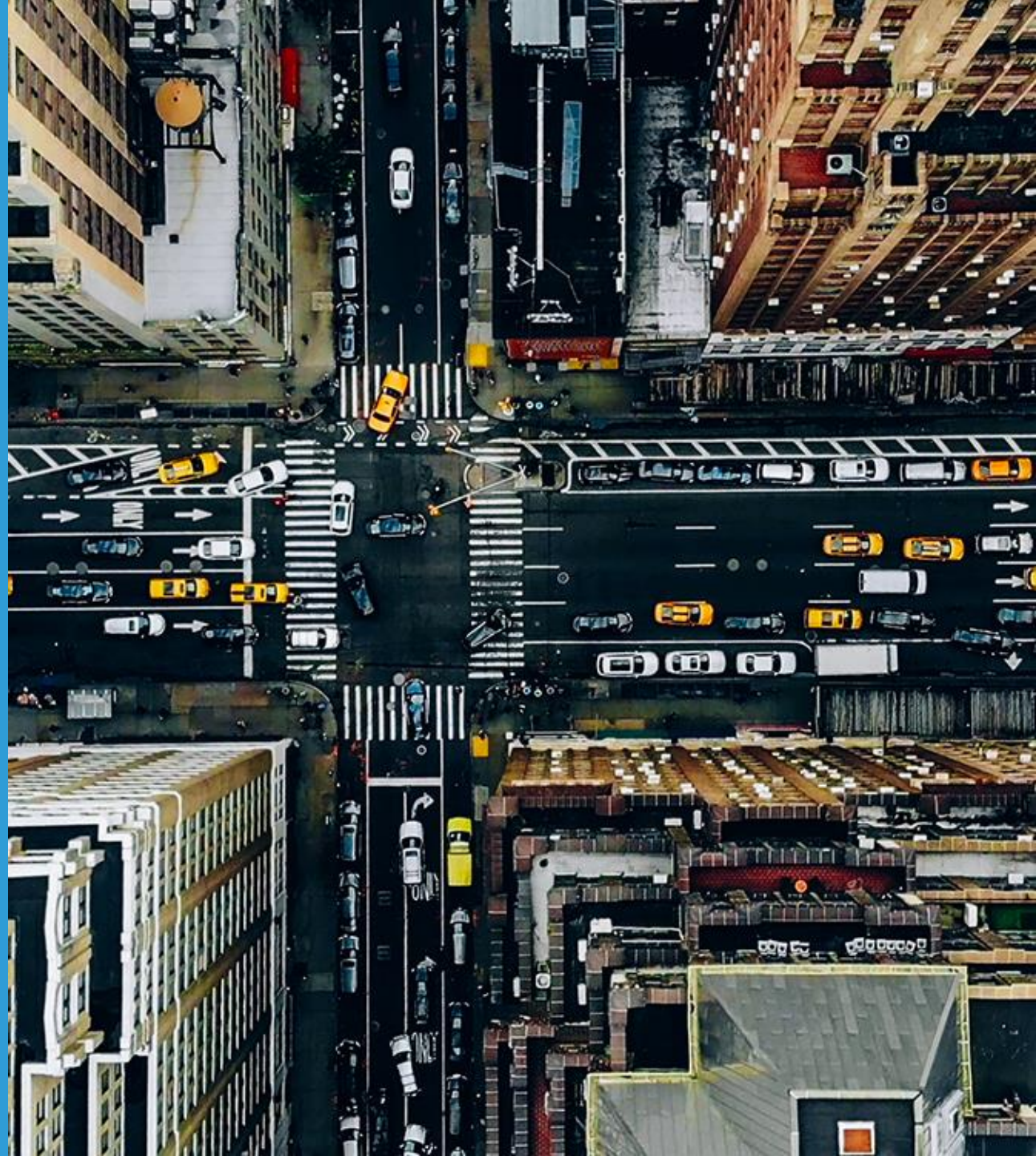
- A wellness program can rely on the “integration” rules usually applied to HRAs to ensure that it avoids potential ACA market reform provision issues
- This will generally require employee to also be enrolled in employer’s major medical plan to be eligible for the wellness program (or potentially another group plan)

Recognizing Reality

- The reality is that many, if not most, wellness programs are non-excepted group health plans that do not restrict eligibility to those enrolled in the major medical
- Until the Tri-Agencies (DOL/IRS/HHS) issue clear guidance on this issue, it is difficult to foresee significant enforcement activity against these stand-alone wellness programs

Taxation

Wellness Program Incentives May Be Taxable



Which Incentives Are Taxable?

Generally, all forms of employer compensation are taxable income to the employee unless an exception applies.

IRS guidance confirms in Chief Counsel Advice 201622031: https://www.irs.gov/pub/irs-wd/201622031.pdf

Common Non-Taxable Incentives

Health Benefits:

Health benefits are rewards that qualify as §213(d) medical expenses and therefore are excluded from income under §105(b)

- Common examples include:
  - Premium reductions
  - Cost-sharing reductions
  - Medical expense reimbursement
  - HSA, HRA, FSA contributions

De Minimis Fringe Benefits:

Any property or service so small as to make accounting for it unreasonable or administratively impracticable

- Common example is a t-shirt
- Never includes cash or cash equivalents (e.g., gift cards), no matter how small!

Common Taxable Incentives

- Cash rewards
- Cash equivalents (e.g., gift cards)
- Health club/gym membership
- Massage therapy
- Weight-loss club membership (e.g., Weight Watchers)
- Fitbit or other activity tracking devices
- Any other non-medical rewards that are not “de minimis”
- Remember that taxable rewards are subject to wage withholding and employment taxes, and reported by the employer on the Form W-2 (not Form 1099,even if provided by wellness vendor)
  - See ABA/JCEB IRS Q/A-2: https://www.americanbar.org/content/dam/aba/events/employee_benefits/technicalsessions/irs_treas_2008.pdf

Wrap-Up

Key Points

Takeaways from the Complicated Legal Landscape

1

Wellness program compliance is tricky because wellness programs vary dramatically, and every variation could implicate a separate legal scheme. Although most of us are fairly familiar with the HIPAA/ACA requirements at this point, the addition of ADA requirements adds another layer of complexity.

2

The first major issue to address is whether the HIPAA/ACA requirements apply (i.e., is the wellness program a group health plan), and whether the ADA requirements apply (i.e., are there disability-related inquiries and/or medical examinations). For wellness programs subject to both, the main compliance dividing line is whether the program is participatory or health-contingent.

3

Don’t forget that a federal court recently ruled that the EEOC wellness program regulations do not meet the requirements of the ADA or GINA. The EEOC has formally removed those regulations as of 1/1/19. Therefore, it is not clear now how the EEOC is currently enforcing these requirements. We feel that the best practice approach is to continue following the vacated EEOC regulations until we have new guidance specifying the ADA and GINA requirements going forward.

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Wellness Program Compliance for Employers

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Thank You!

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