



WOODRUFF
SAWYER &
COMPANY

Compliance Rules for Wellness Programs

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Wellness Programs Introduction

Wellness Programs

Introduction

What is a wellness program?

- A health promotion and/or disease prevention program offered to employees
- Usually offered as a component of the company's group health plan (because of the medical services included)

Wellness Programs

Applicable Laws

Alphabet soup of applicable laws/rules

- HIPAA
 - Nondiscrimination Rule
 - Privacy & Security Rules
- ADA
- GINA
- ACA
- ERISA
- COBRA

Wellness Programs

HIPAA/ACA vs. ADA/GINA

Health Insurance Portability and Accountability Act (HIPAA) & Affordable Care Act (ACA)

- 1996→HIPAA enacted
- 2006→DOL/IRS regulations applying HIPAA to wellness plans
- 2010→ACA turned regulations into statutory law
- 2013→DOL/IRS issue new final regulations for 2010 law

Americans with Disabilities Act (ADA) & Genetic Information Nondiscrimination Act (GINA)

- 1990→ ADA enacted
- 2008→GINA enacted
- 2014→EEOC brought landmark lawsuit against Honeywell claiming:
 - Wellness program violates ADA because not voluntary
 - Spousal HRA incentive violates GINA (family member health status)
- 2015→EEOC proposed ADA wellness and GINA spousal HRA regs
- 2016→EEOC issued final ADA/GINA regs

Wellness Programs

HIPAA Triggers

Not all wellness programs must comply

- Depends on two threshold inquiries:
 - Is it an ERISA group health plan?
 - Any disability related inquiries and/or medical exams?

HIPAA/ACA Triggered if:

- The wellness program is a **group health plan**
 - Provides “medical care” (majority of programs)
 - “Medical care” means
 - Diagnosis, cure, mitigation, treatment or **prevention** of disease, or
 - Amounts paid for the purpose of affecting any structure or function of the body.
- Examples
 - Any blood draws, biometric screenings, exams, assessments, disease management, health incentives, or counseling

Wellness Programs

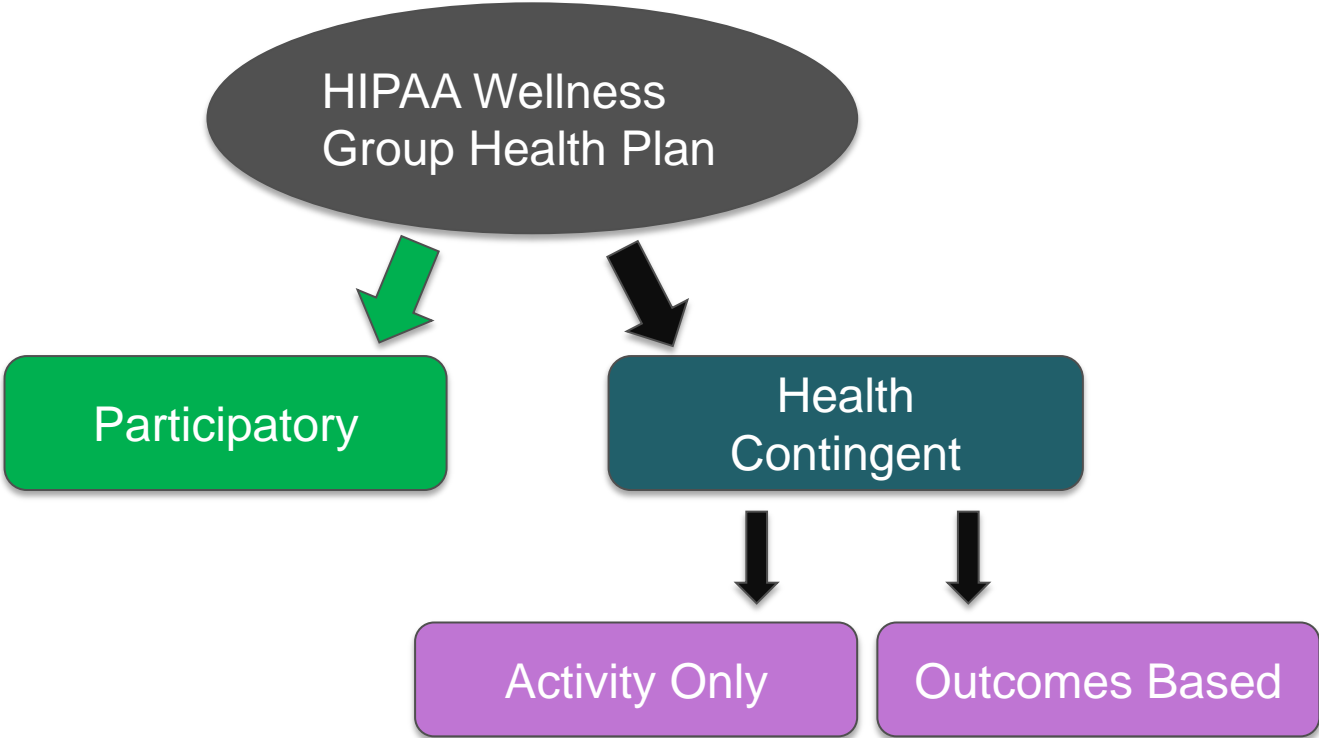
ADA Triggers

ADA Triggered if:

- There are (1) **disability related inquiries** and/or (2) **medical exams**
 - Applies to “employee health programs”
 - Regardless if offered to enrolled employees or all employees
- Examples of employee health programs:
 - HRA (health risk assessment) for risk factors
 - Biometric screening
 - Tobacco cessation, weight loss, physical activities (e.g., walking/exercises)
 - Coaching to meet employee health goals
 - Flu shots

Wellness Programs

HIPAA Wellness Program



Wellness Compliance Requirements

HIPAA Rules

Two different types of wellness programs

- A. Participatory Programs
- B. Health Contingent Programs

Why does it matter? Rewards & Compliance

- Participatory program maximum reward
 - No limits
- Health contingent program maximum reward
 - 30% of cost of participant elected coverage
 - 50% if tobacco related



Wellness Compliance Requirements

HIPAA Rules – Participatory Programs

A. Participatory Programs

- The reward isn't health related (i.e., not based on an outcome)
- Examples
 - Smoking cessation reimbursement (even if EE keeps smoking)
 - Gym membership reimbursement
 - Health education seminar attendance reward
 - HRA reward (if no further EE action is required after identifying health issues in the assessment)
 - Diagnostic testing program reward (not based on outcomes)

Wellness Compliance Requirements

HIPAA Rules – Health Contingent Programs

B. Health Contingent Programs

- Requires satisfaction of a health factor standard for the reward/incentive

Two Types of Health Contingent Programs

- Activity-only programs (complete/perform health related task)
 - Walking 10k steps/day
 - Exercises (run a marathon, climb Mt. Everest)
 - Dieting
- Outcomes-based programs (attain/maintain a health related result)
 - Quit smoking
 - Achieving certain results in the biometric screening (e.g., BMI)
 - Requiring additional steps/actions for those outside the health range (e.g., meet health coach, take fitness class or exercise program, health improvement action plan, weight loss)



Wellness Program Compliance Nine Requirements

Wellness Compliance Requirements

Participatory Programs Requirements #1 through #6

1. Similarly Situated (HIPAA/ACA)

- Make available to all similarly situated individuals regardless of health
 - Can treat groups differently if “bona-fide” classification
 - Example: FT v. PT, geographic regions, length of service, different occupations, union groups

2. Voluntary (New ADA rule effective 2017)

- Medical examinations or inquiries must be voluntary
 - Can't require participation
 - Can't deny coverage or limit coverage for non-participation (i.e., be a gateway)
 - No adverse employment actions (e.g., retaliation/coercion)
 - Provide notice to employees

Wellness Compliance Requirements

Participatory Programs Requirements #1 through #6

3. Reasonable Accommodation (New ADA rule effective 2017)

- Provide reasonable accommodation (not required under HIPAA/ACA)
 - E.g., written materials in brail, sign language interpreter, other method to earn the reward without drawing blood

4. Reasonably Design (New ADA rule effective 2017)

- Be reasonably designed to promote health or prevent disease
 - Reasonable chance of accomplishing those goals
 - Not overly burdensome or a subterfuge to violate law
 - Not highly suspect in method chosen
- Ok → use aggregate HRA info to design a program aimed at specific conditions identified in the collected data
- Not Ok → program that exists to shift costs from ER to targeted EEs
- Not Ok → program exists just to give ER info to estimate future costs

Wellness Compliance Requirements

Participatory Programs Requirements #1 through #6

5. 30% Reward Limit (New ADA rule effective 2017)

- 30% Rule
 - If reward is only for enrolled employees
 - 30% of EE-only coverage for the option taken
 - If reward is for all employees even if not enrolled
 - ER offers only 1 plan → 30% of EE-only coverage for the 1 plan
 - ER offers more than 1 plan → 30% of lowest cost plan
 - ER has no health plan → 30% of EE-only coverage under 2nd lowest cost silver plan for 40-year old non-smoker in the Exchange
 - **Beware: No increased limit for tobacco-related programs (unlike HIPAA)**
 - Can't test for presence of tobacco if wanting to use HIPAA's 50% reward limit
 - Ok to have EEs self-certify

Wellness Compliance Requirements

Participatory Programs Requirements #1 through #6

5. 30% Reward Limit (examples)

- ABC provides reward only for EEs enrolled in the ABC medical plan
 - ABC offers a PPO (\$5,000), HMO (\$4,000) and HDHP (\$3,000)
 - Rule → 30% of EE-only for the option taken
 - Jen enrolls in the HMO which has a \$4,000 annual premium
 - Max reward $\$4,000 \times 30\% = \$1,200$
- XYZ provides reward for all EEs even if not enrolled in the XYZ medical
 - XYZ offers a PPO (\$5,000), HMO (\$4,000) and HDHP (\$3,000)
 - Rule → 30% of EE-only for the lowest cost option
 - Jen enrolls in the HMO which has a \$4,000 annual premium
 - Max reward $\$3,000 \times 30\% = \900 (based on HDHP cost)

Wellness Compliance Requirements

Participatory Programs Requirements #1 through #6

6. EEOC Notice to Employees (New ADA rule effective 2017)

- Provide notice to employees about the wellness program
 - Employee is reasonably likely to understand
 - Describe the medical info that will be obtained and its purpose/use
 - Describe restrictions on how the info will be disclosed, who will see the info and the methods used to ensure the info isn't improperly disclosed
- Model notice available from the EEOC
 - <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

Wellness Compliance Requirements

Health Contingent Programs Requirements #7 through #9

Health Contingent Programs have 3 extra requirements!

7. Opportunity to Qualify (HIPAA/ACA)

- Provide opportunity to qualify for reward at least once per year
 - Not required to provide a mid-year qualification
 - E.g., an EE hired mid-year and must pay for tobacco surcharge because he didn't get to complete tobacco program at the beginning of the year

8. Reasonable Alternative Standard (HIPAA/ACA)

- Must provide a reasonable alternative standard (RAS)
- Depends on whether program is activity only or outcomes based

Wellness Compliance Requirements

Health Contingent Programs Requirements #7 through #9

8. Reasonable Alternative Standard (continued)

Activity only programs

- Provide RAS (or waiver) for obtaining reward if *unreasonably difficult* due to a medical condition to satisfy the standard
- Or if *medically inadvisable* to attempt to satisfy the standard
 - May be able to seek verification from employee's doctor (if reasonable)

Outcomes based programs

- Provide RAS (or waiver) for obtaining reward for someone who fails to meet the initial standard based on a test/screening
- There's no "unreasonably difficult" or "medically inadvisable" hurdle for the employee (unlike with activity only programs)
 - Cannot seek doctor's verification
 - But must comply with recommendations of employee's doctor (treat as a RAS)

Wellness Compliance Requirements

Health Contingent Programs Requirements #7 through #9

8. Reasonable Alternative Standard (continued)

Facts and circumstances review

- Time commitment must be reasonable
 - Mandatory attendance outside of work hours = not reasonable
- If the RAS is to complete education, the wellness plan must either make the program available or assist in finding the program for the employee
 - Cannot require employee to pay for it
- If the RAS is a diet program, the plan must pay for the membership
 - But the Employer is not required to pay for cost of food
- Provide additional time (realistic amount of time) for employee to meet the standard

Generally fulfills the ADA's reasonable accommodation requirement

- EEOC commented that providing a RAS and a notice to the employee of the RAS would “generally fulfill” the reasonable accommodation obligation under the ADA

Wellness Compliance Requirements

Health Contingent Programs Requirements #7 through #9

9. Notice of Availability of RAS

- Must disclose availability of a RAS (or waiver) in all plan materials that describe the health contingent wellness program
- Not required if the materials merely mention that a wellness program is available and doesn't describe the terms
- Model language provided from the final regulations
 - “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.”



**Wellness Program Compliance
GINA & Spousal HRAs**

Wellness Compliance Requirements

GINA

Genetic Information Nondiscrimination Act

- Prohibits plans from using genetic info to determine premiums, requiring genetic testing or using such info for underwriting purposes
- Prohibits ERs from discriminating on the basis of genetic info or purchasing genetic info for an EE or family member

What is Genetic Information?

- Genetic tests that reveal info regarding traits for disease
- Family history – manifestation of a disease/disorder in the employee's family members (not the employee himself)
 - Spouse = family member even though not genetically related to employee

Wellness Compliance Requirements

GINA

Rewards for Spousal HRAs

- Allowed under new final regulations if the
 - HRA requests info only about the spouse's manifestation of disease/disorder
 - HRA is reasonably designed to promote health or prevent disease
 - Spouse provides prior, knowing, voluntary and written authorization
 - HRA is administered in connection with the spouse's receipt of health or genetic services (e.g., the wellness program)
 - HRA incentive is limited to the same 30% standard under the ADA (i.e., 30% for employee and 30% for spouse if both can participate in the wellness program)



Wellness Program Compliance Taxation of Rewards

Wellness Compliance Requirements

Taxation

General rule → IRS wants its slice of the pie

- All forms of employer compensation is taxable income unless an exception applies

Non-taxable Incentive Examples

- **Health benefits**
 - Rewards that are §213(d) medical care
 - E.g., premium or cost-sharing reductions, medical expense reimbursement, HSA/HRA/FSA contributions
- **De minimis fringe benefits**
 - Value so small that accounting for it is unreasonable/impracticable
 - E.g., t-shirt, hat, toothbrush, snacks
 - Cash or cash equivalents are never de minimis

Wellness Compliance Requirements

Taxation

Taxable Incentive Examples

- Cash or cash equivalents (gift cards)
- Memberships (e.g., gym, health club, weight loss club)
- Massage therapy
- Activity trackers (Fitbit, Apple watch, etc.)
- Any other non-medical reward

Include with Form W-2

- Subject to wage withholding and employment taxes (FICA/FUTA)
- Do not report on a Form 1099



Wellness Program Compliance Key Takeaways

Wellness Compliance Requirements

Summary and Takeaways

Key Takeaways

- Wellness programs involve several federal agencies and various (and sometimes separate) legal schemes/rules
 - HIPAA enforced by HHS
 - ERISA enforced by DOL
 - Taxation (\$125) enforced by IRS
 - ADA enforced by EEOC (certain EEOC regional offices are more aggressive than others)
- First ask whether HIPAA applies (because of status as a group health plan)
- Then ask whether the ADA applies (because of disability related inquiries or medical examinations)
 - Compliance with HIPAA/ACA standards does not automatically mean compliance with ADA standards
- Using lowest 30% reward limit ensures compliance with the statutory limit under both schemes



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