

Workplace Wellness Plan Design – Legal Issues

Employers that offer health benefits to their employees may decide to implement wellness plans as a way to help control health plan costs and encourage healthy lifestyles. However, there are a number of legal compliance issues that are involved with designing workplace wellness plans. Wellness plans must be carefully structured to comply with both state and federal laws. The three main federal laws that impact the design of wellness plans are:

- ✓ The Health Insurance Portability and Accountability Act (HIPAA);
- ✓ The Americans with Disabilities Act (ADA); and
- ✓ The Genetic Information Nondiscrimination Act (GINA).

These laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another. This Compliance Overview provides an overview of the requirements for wellness plans under HIPAA, the ADA and GINA. See Page 9 for a chart that compares key wellness plan requirements under these three laws.

LINKS AND RESOURCES

- HIPAA's [nondiscrimination rules](#) for wellness plans
- EEOC's [final ADA rule](#) for wellness programs that include disability-related inquiries or medical exams
- EEOC's [final GINA rule](#) regarding requesting a spouse's health information as part of a wellness program

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

HIPAA

- HIPAA's nondiscrimination rules apply to wellness plans that are offered in connection with group health plans.
- There are different rules for participatory and health-contingent wellness programs.

ADA

- Wellness programs cannot discriminate against individuals with disabilities.
- If a wellness program involves medical exams or disability-related inquiries, it must satisfy certain requirements

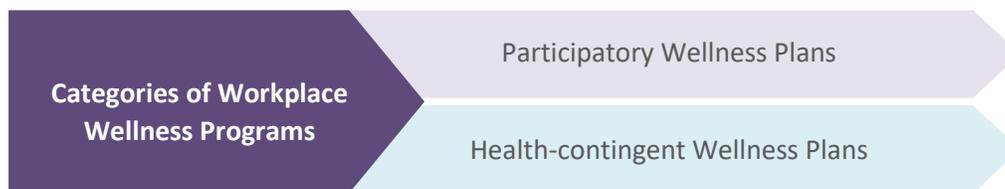
GINA

- GINA's restrictions apply to a wellness program when it requests genetic information—for example, family health history.

HIPAA REQUIREMENTS

A workplace wellness program that relates to a group health plan must comply with [HIPAA's nondiscrimination rules](#). HIPAA generally prohibits group health plans from using health factors to discriminate among similarly situated individuals with regard to eligibility, premiums or contributions. However, HIPAA includes a special rule that allows employers to provide incentives or rewards as part of a wellness program, as long as the program follows certain guidelines.

The HIPAA nondiscrimination rules were clarified by the **Affordable Care Act (ACA)**. Under these rules, workplace wellness programs are divided into two general categories: participatory wellness plans and health-contingent wellness plans. This distinction is important because participatory wellness plans are not required to meet the same nondiscrimination standards that apply to health-contingent wellness plans.



Wellness programs that are not part of group health plans (for example, standalone programs that pay health club dues) are not subject to HIPAA's nondiscrimination requirements.

Participatory Wellness Plans

Participatory wellness plans either do not require individuals to meet health-related standards in order to obtain rewards or do not offer rewards at all. Also, these plans generally do not require individuals to complete physical activities. For example, a program that provides a reward for attending a free health education seminar is a participatory wellness plan.

Participatory wellness plans comply with HIPAA's nondiscrimination requirements without having to satisfy any additional standards, as long as participation is made available to all similarly situated individuals, regardless of health status. There is **no limit on financial incentives or rewards** for participatory wellness plans under HIPAA.

Health-contingent Wellness Plans

Health-contingent wellness plans require individuals to satisfy standards related to health factors in order to obtain rewards. There are two types of health-contingent wellness plans:

- ✓ **Activity-only wellness programs** require individuals to perform or complete activities related to health factors in order to obtain rewards (for example, walking, diet or exercise programs). Activity-only wellness programs do not require individuals to attain or maintain specific health outcomes.

- ✓ **Outcome-based wellness programs** require individuals to attain or maintain certain health outcomes in order to obtain rewards (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

Health-contingent wellness plans are required to comply with the following rules:

| RULE | DESCRIPTION |
|--|---|
| Frequency of opportunity to qualify for reward | Must provide eligible individuals with an opportunity to qualify for the reward at least once per year . |
| Size of reward | <p>The total reward offered to an individual under an employer’s health-contingent wellness program cannot exceed a specified percentage of the total cost of employee-only coverage under the plan. If, in addition to employees, any class of dependents (such as spouses and dependent children) may participate in the wellness program, the reward cannot exceed the specified percentage of the total cost of the coverage in which the employee and any dependents are enrolled.</p> <p>Effective for plan years beginning on or after Jan. 1, 2014, the maximum permissible reward is 30 percent of the cost of health coverage (50 percent for wellness programs designed to prevent or reduce tobacco use).</p> <p>For health-contingent wellness programs that allow a class of dependents to participate, there are no special rules regarding apportionment of rewards among family members. Plans and issuers have the flexibility to determine whether, and how, the maximum allowed reward or incentive would be prorated based on the portion of the premium or contribution attributable to that family member, as long as the method is reasonable.</p> |
| Reasonable design | Must be reasonably designed to promote health or prevent disease. |
| Uniform availability and reasonable alternative | The full reward under a health-contingent wellness program must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances. |
| Employee notice | Must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard. |

ADA REQUIREMENTS

The ADA prohibits employers with **15 or more employees** from discriminating against individuals with disabilities. As a general rule, to comply with the ADA, covered employers should structure their wellness plans to ensure that qualified individuals with disabilities:

- Have equal access to the program's benefits; and
- Are not required to complete additional requirements in order to obtain equal benefits under the wellness program.

Reasonable Accommodations

Employers must provide **reasonable accommodations** that enable employees with disabilities to fully participate in employee health programs and to earn any rewards or avoid any penalties offered as part of those programs.

For example:

- An employer that offers an incentive for employees to attend a nutrition class must, absent undue hardship, provide a sign language interpreter for a deaf employee who needs one to participate in the class.
- An employer also may need to provide materials related to a wellness program in alternate format, such as large print or on a computer disk, for someone with vision impairment.
- An employer may need to provide an alternative to a blood test if an employee's disability would make drawing blood dangerous.

According to the EEOC, complying with HIPAA's reasonable alternative standard for a health-contingent program would generally fulfill an employer's obligation to provide a reasonable accommodation under the ADA. However, under the ADA, an employer would have to provide a reasonable accommodation for a participatory program even though HIPAA does not require these programs to offer a reasonable alternative standard, and reasonable alternative standards are not required at all under HIPAA if the program is not part of a group health plan.

Medical Exams or Health Inquiries

Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.

On May 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released a [final rule](#) that describes how the ADA applies to wellness programs that include questions about employees' health or medical examinations.

The EEOC's final rule establishes the following rules for permissible wellness program designs:

| RULE | DESCRIPTION |
|---------------------------------|---|
| Reasonable design | <p>Must be reasonably designed to promote health or prevent disease. A program that collects information on a health risk assessment (HRA) to provide feedback to employees about their health risks, or that uses aggregate information from HRAs to design programs aimed at particular medical conditions is reasonably designed. A program that collects information without providing feedback to employees or without using the information to design specific health programs is not reasonably designed.</p> |
| Voluntary/Size of reward | <p>Employees may not be required to participate in a wellness program, may not be denied health insurance or given reduced health benefits if they do not participate, and may not be disciplined for not participating. Employers also may not interfere with the ADA rights of employees who do not want to participate in wellness programs, and may not coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes.</p> <p>The final ADA rule provides that incentives offered to an employee who answers disability-related questions or undergoes medical examinations as part of a wellness program are limited to the following:</p> <ul style="list-style-type: none"> ● When the wellness program is available only to employees who are enrolled in a specific group health plan, the incentive may not exceed 30 percent of the total cost for self-only coverage of the health plan in which the employee is enrolled. ● When an employer offers only one group health plan, and does not require employees to be enrolled in the health plan in order to participate in the wellness program, the incentive may not exceed 30 percent of the total cost for self-only coverage under the health plan. ● When an employer offers more than one group health plan, and does not require employees to be enrolled in a health plan in order to participate in the wellness program, the incentive may not exceed 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan offered by the employer. ● When an employer does not offer a group health plan, and offers a wellness program that is open to employees, the incentive may not exceed 30 percent of the total cost to a 40-year-old nonsmoker purchasing self-only coverage under the second lowest cost Silver Plan available on the state or federal Exchange in the location that the employer identifies as its principal place of business. |

Employee notice

Employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential. The EEOC has provided a [sample notice](#) to help employers comply with this ADA requirement.

Reasonable accommodation

Employers must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any rewards or avoid any penalties offered as part of the programs.

Confidentiality

Medical information obtained as part of a wellness program must be kept confidential. Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees.

Also, employers cannot require employees to agree to the sale, exchange, transfer or other disclosure of their health information in order to participate in a wellness program or to receive an incentive.

The provisions of the final rule related to the incentive limits and the notice requirement apply to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after **Jan. 1, 2017**, for the health plan used to determine the level of inducement. According to the EEOC, other wellness program provisions (such as the reasonable design and confidentiality requirements) are clarifications of existing obligations.

Safe Harbor for Bona Fide Benefit Plans

The ADA also has a “safe harbor” that exempts insurers and bona fide benefit plans from the ADA's restrictions, as long as the safe harbor is not used as a way to evade the purposes of the ADA. How the safe harbor applies to employer-sponsored wellness programs has been uncertain. However, in the final rule on voluntary wellness programs, the EEOC rejects the application of the safe harbor to wellness programs. Thus, according to the EEOC, the exception for voluntary wellness programs is the only way to comply with the ADA for wellness programs that make disability-related inquiries or that require medical examinations.

GINA REQUIREMENTS

GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II). “Genetic information” means information about:

- An individual's genetic tests;
- The genetic tests of the individual's family members; and
- The manifestation of a disease or disorder in the individual's family member (that is, family medical history).

Genetic information also includes an individual's request for, or receipt of, genetic services (including genetic research, counseling regarding the genetic condition and genetic education).

GINA's restrictions apply to a wellness program when it requests genetic information—for example, **family health history**.

Wellness Programs under Group Health Plans – GINA Title I

GINA Title I applies to genetic information discrimination in health plan coverage. It prohibits a group health plan from collecting genetic information prior to or in connection with enrollment, or at any time for underwriting purposes. “Underwriting purposes” is broadly defined to include rules for eligibility for benefits and for the computation of premium or contribution amounts.

Example: A group health plan provides a **premium reduction** to enrollees who complete an HRA. The HRA, which includes questions about an individual's family medical history, is requested after enrollment. Even though the completion of the HRA has no effect on an individual's enrollment status, or on the enrollment status of members of the individual's family, this request violates GINA. This is because the assessment includes a request for genetic information (that is, the individual's family medical history) and its completion results in a premium reduction, which means that the request for genetic information is for underwriting purposes.

[Interim final regulations](#) provide the following permissible design options for wellness programs that request genetic information (that is, family medical histories) after enrollment:

- ✓ The program does not provide a reward for the completion of an HRA that collects genetic information.
- ✓ The program provides a reward for the completion of an HRA but does not collect genetic information.
- ✓ The program offers separate HRAs—one that includes rewards but does not collect genetic information and one that does not include any rewards but collects genetic information.

Wellness Programs Offered Outside of Group Health Plans – GINA Title II

Wellness programs offered outside of a group health plan are not subject to GINA Title I, but may be subject to the employment discrimination requirements of GINA Title II. Under Title II of GINA, it is illegal for covered employers (15 or more employees) to discriminate against employees or applicants because of genetic information. GINA also restricts covered employers' ability to request, require or purchase genetic information with respect to employees or employees' family members.

The prohibition on requesting genetic information is subject to several exceptions, one of which applies specifically to wellness programs. An employer may request genetic information as part of a wellness program if all of the following requirements are met:

- The employee must provide the information voluntarily;
- The employee must give voluntary, knowing and written authorization before providing genetic information;

- Individually identifiable information may be provided only to the individual (or family member) receiving genetic services and the health care professionals or counselors providing the services; and
- Individually identifiable information can be available only for the purposes of the services and may not be disclosed to the employer except in aggregate terms.

Under the EEOC's [final regulations](#), genetic information is not provided voluntarily if the individual is required to provide the information or is penalized for not providing it. However, financial incentives can be offered for completing an HRA that includes information about family medical history or other genetic information, provided that the assessment clearly states that the incentive is available regardless of whether the individual answers the questions regarding genetic information.

Spouses' Health Information

Because information about the current or past health status of a spouse or other family member is genetic information about an employee, the EEOC's final regulations could have been read as prohibiting employers from offering incentives in return for a spouse providing his or her current or past health information. On May 17, 2016, the EEOC issued a [final rule](#) that allows an employer to offer limited incentives for an employee's spouse to provide current or past health status information as part of a wellness program.

The final rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employer, including as part of a wellness program, and provides information about his or her current or past health status.

The wellness program must follow GINA's rules about requesting genetic information as part of a wellness program—for example, the spouse must provide prior, knowing, written and voluntary authorization for the employer to collect genetic information, just as the employee must do. In addition, the final rule says that any health or genetic services an employer offers must be reasonably designed to promote health or prevent disease.

The maximum incentive attributable to a spouse's participation may not exceed **30 percent** of the total cost of self-only coverage, which is the same as the incentive allowed for the employee under the final ADA rule. This means that the combined total incentive cannot be more than twice the cost of 30 percent of self-only coverage. This incentive limit applies as of the first day of the first plan year that begins on or after **Jan. 1, 2017**, for the health plan used to determine the level of inducement.

Example: An employee and his wife are both given the opportunity to participate in an employer-sponsored wellness program because they participate in the employer’s group health plan. The wellness program includes an HRA that asks about the employee’s and spouse’s health status. The employee is enrolled family coverage under the group health plan, which has a total cost (taking into account both employer and employee contributions) of \$14,000. The plan has a self-only option for \$6,000. Under GINA and the ADA, the employer may not offer more than \$1,800 to the employee and \$1,800 to the spouse for participating in the wellness program.

Also, the final GINA rule clarifies that employers may offer children the opportunity to participate in wellness programs, but may not offer inducements in exchange for current or past health status information about children. Inducements in exchange for genetic information about spouses and children (such as a spouse's or child's family medical history) are also prohibited.

COMPARISON CHART

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|--------------------------------------|---|--|--|
| Covered employers or programs | <p>Wellness plans that relate to group health plans. Wellness plans are divided into two separate categories for compliance purposes:</p> <ul style="list-style-type: none"> ● Participatory Wellness Plans: Do not require individuals to meet health-related standards in order to obtain rewards or do not offer rewards at all. Also, these programs generally do not require individuals to complete physical activities. ● Health-contingent Wellness Plans: Require individuals to satisfy standards related to health | <p>Wellness programs sponsored by employers with 15 or more employees</p> <p>All wellness programs sponsored by covered employers are prohibited from discriminating against disabled individuals.</p> <p>Additional compliance rules apply to wellness programs that include questions about employees’ health or medical examinations.</p> | <p>GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II).</p> <ul style="list-style-type: none"> ● Title I applies to wellness programs offered under group health plans ● Title II applies to employers with 15 or more employees <p>GINA’s restrictions apply to wellness programs that request genetic information—for example, family health history.</p> |

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|----------------------------|--|---|--|
| | factors in order to obtain rewards. | | |
| Reasonable design | <ul style="list-style-type: none"> ● Participatory Wellness Plans: No reasonable design requirement. ● Health-contingent Wellness Plans: Must be reasonably designed to promote health or prevent disease. | Must be reasonably designed to promote health or prevent disease. | Must be reasonably designed to promote health or prevent disease. |
| Frequency of reward | <ul style="list-style-type: none"> ● Participatory Wellness Plans: No requirement. ● Health-contingent Wellness Plans: Must provide eligible individuals with chance to qualify at least once per year. | No requirement. | No requirement. Cannot offer reward for an employee or plan participant to provide his or her own genetic information (including family medical history) as part of a wellness program. Can provide a reward for a spouse to provide his or her own health information (not the spouse's own genetic information) as part of a wellness program. |

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|---|--|---|--|
| <p style="text-align: center;">Voluntary</p> | <p>No requirement.</p> <p>*HIPAA’s rules for wellness plans are intended to ensure that every participant can receive the full amount of any reward or incentive, regardless of any health factor.</p> | <p>Participation in programs that include disability-related inquiries or medical exams must be voluntary. Employers cannot:</p> <ul style="list-style-type: none"> ● Require employees to participate; ● Deny health insurance or reduce health benefits for not participating; or ● Take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes. | <p>Employees and plan participants can provide family medical history voluntarily under wellness programs (that is, individuals cannot be required to provide information and cannot be penalized for not providing it).</p> <p>Under Title II, an employee (or his or her spouse) must provide prior, knowing, voluntary and written authorization for the collection of genetic information.</p> <p>Cannot require employees (or employees’ spouses or dependents) to agree to the sale, or waive the confidentiality, of their genetic information as a condition for receiving incentives or for participating in wellness programs.</p> |
| <p style="text-align: center;">Limit on incentives</p> | <ul style="list-style-type: none"> ● Participatory Wellness Plans: No limit on incentives. ● Health-contingent Wellness Plans: Incentives cannot exceed 30 percent of the cost of coverage (50 percent for programs that are designed to prevent | <p>Incentive limits apply to wellness plans that include disability-related inquiries or medical exams.</p> <p>Incentives cannot exceed 30 percent of the total cost of employee-only coverage (even if dependents participate*). The incentive limit applies</p> | <p>Cannot offer incentives for employees or plan participants to provide their own genetic information (including family medical history) as part of wellness plans.</p> <p>Can provide an incentive for a spouse to provide his or her own health information (not the spouse’s own genetic</p> |

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|------------------------------------|---|--|--|
| | <p>or reduce tobacco use).</p> <p>Reward limit is based on the total cost of employee-only coverage. But if dependents may participate in the wellness programs, rewards can be based on total cost of coverage in which employees and any dependents are enrolled.</p> | <p>to both participatory and health-contingent wellness plans.</p> <p>According to the EEOC, a smoking cessation program that merely asks whether an employee uses tobacco is not a disability-related inquiry. Thus, the EEOC will allow an employer to offer incentives as high as 50 percent of the cost of employee coverage for that smoking cessation program, consistent with HIPAA's requirements. However, an incentive tied to a biometric screening or medical examination that tests for the presence of tobacco is limited to 30 percent.</p> <p><i>The ADA incentive limits are effective for plan years beginning on or after Jan. 1, 2017.</i></p> <p>*The final GINA rule allows an additional incentive for a spouse to provide his or her own health information as part of a wellness program.</p> | <p>information) as part of a wellness plan. The value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage. <i>This incentive limit for spouse participation is effective for plan years beginning on or after Jan. 1, 2017.</i></p> |
| <p>Uniform availability</p> | <ul style="list-style-type: none"> ● Participatory Wellness Plans: Must be available to all similarly situated individuals. ● Health-contingent | <p>No requirement (but see the reasonable accommodation requirement below).</p> | <p>No requirement.</p> |

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|---------------------------------|--|--|--|
| | <p>Wellness Plans: Must make the full rewards available to all similarly situated individuals.</p> | | |
| Reasonable accommodation | <ul style="list-style-type: none"> • Participatory Wellness Plans: No requirement. • Health-contingent Wellness Plans: The full reward under a health-contingent wellness program must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances. | <p>Employers must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any rewards or avoid any penalties offered as part of the programs.</p> | <p>No requirement.</p> |
| Notice | <ul style="list-style-type: none"> • Participatory Wellness Plans: No requirement. • Health-contingent Wellness Plans: Must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the | <p>For wellness programs that are part of group health plans, employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.</p> <p><i>This notice requirement is</i></p> | <p>Must obtain employee authorization when a wellness program requests genetic information (family medical history).</p> <p>Authorization form must be written in an understandable way, must describe the type of genetic information that will be obtained and the</p> |

| REQUIREMENT | HIPAA/ACA | ADA | GINA |
|-------------|--|--|---|
| | possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard. | <i>effective for plan year beginning on or after Jan. 1, 2017.</i> | general purposes for which it will be used, and it must describe the restrictions on disclosure of genetic information. |