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Wellness Programs



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Wellness Programs

Employers often consider sponsoring a wellness program to promote better health and higher morale among employees, and with the hope that helping employees embrace a culture of health will lead to increased performance, less absenteeism, and lower health-related costs.

Federal Nondiscrimination Laws

Federal laws that are designed to prevent discrimination can affect the employer's options in designing a workplace wellness program. The three laws that usually come into play are the following:

- The Health Insurance Portability and Accountability Act (HIPAA) applies to all wellness programs that are made part of a group health plan or are themselves a group health plan;
- The Affordable Care Act (ACA) applies to program design, availability, and notice requirements; and
- The Americans with Disabilities Act (ADA) generally applies only to programs that include medical exams/screenings or disability-related inquiries.

The Genetic Information Nondiscrimination Act (GINA) applies if family members or the employee's family medical history is included. HIPAA is regulated and enforced by the Department of Labor (DOL), while the ADA and GINA are under the regulatory authority of the Equal Employment Opportunity Commission (EEOC). Employers with fewer than 15 workers are exempt from most ADA and GINA requirements

ACA and HIPAA Rules

ACA and HIPAA prohibit health plans from basing eligibility, benefits, or contributions on an individual's health factors, but make an exception for wellness programs that meet certain design, disclosure, and administration requirements. HIPAA rules for group health plans define two types of wellness programs:

- **Participatory-only program.** The program is offered to all similarly situated employees, and any incentives are based solely on participating. Examples include health education classes and health risk assessments, but without regard to any results and without requiring any follow-up steps. There are no caps on the incentive amounts that can be offered under participatory-only programs. A program that provides an incentive simply for tracking and reporting hours of sleep, regardless of results, would be participatory only.
- **Health-contingent program.** The program may be based on activity only (e.g. completed a walking program) or outcome based (e.g. stopped using tobacco). Health-contingent programs that offer an incentive based either on meeting an initial health standard (e.g., satisfactory health screenings) or, if failing to meet the initial health standard, on meeting a reasonable alternative standard (e.g., participating in an educational program or exercise program). A program that provides an incentive based on attaining an optimal BMI would be a health-

contingent program. Health-contingent programs must comply with extensive design and administration criteria under the HIPAA rules, including all of the following:

- The program is reasonably designed to promote health and prevent disease;
- Employees are given an opportunity to qualify for the incentive at least once per year;
- The incentive is not more than 30% of the group health plan cost (or up to 50% for programs designed to prevent or reduce tobacco use);
- Employees who do not meet the initial health standard are offered a reasonable alternative standard (e.g., attending an educational class or attempting a smoking cessation program, whether or not the employee succeeds in meeting the health standard); and
- Plan materials describe the availability of a reasonable alternative standard to qualify for the incentive.

Plan cost, on which the maximum allowable incentive is based, generally is defined as the COBRA rate (without admin fee) of the plan in which the employee is enrolled. That is, the self-only COBRA rate if the wellness program is limited to employees. (See Tax Issues, below.) The incentive may be structured as a reward or as a penalty (surcharge), although employees can never be required to pay more than 100% of the insurer's premium rate (or the self-funded plan's equivalent-premium rate).

The requirement to offer a "reasonable alternative standard" (RAS) is an important component of the HIPAA rules for a health-contingent wellness program. This comes up from time to time with weight reduction programs or exercise programs. Note that the employer may be required to make a second alternative standard available if the employee's physician recommends that the first alternative standard is medically inappropriate.

Specifically:

- A program that offers an incentive based on the individual's health factors or meeting health standards is required to automatically offer a RAS.
- A program that offers an incentive based on the individual participating in health-related activities is required to provide a RAS but only if the individual requests.
- A program that offers an incentive based on the individual participating in general activities is not required to provide a RAS.

ADA and GINA

The ADA and GINA, as mentioned above, are regulated and enforced by the EEOC and not by the DOL. Over the years, the EEOC has issued several sets of rules about wellness programs. The EEOC rules once imposed a 30% cap on incentives if the wellness program included any health exams, screenings, or inquiries. The cap was based on "plan cost," but used a different definition than the HIPAA definition referring to the COBRA rate.

In recent years, however, the EEOC rules regarding incentives were challenged in court and then nullified, which meant that any incentive amount could be impermissible. Now, finally, the EEOC is considering new regulations that would allow certain types of wellness program incentives along the lines of the HIPAA provisions. Until specific regulations are issued, however, employers should work carefully with legal counsel before offering employees incentives to submit to medical exams or screenings.

Next, a word regarding extending a wellness program to spouses of employees. Employers often are cautioned to avoid doing so, particularly if the program would include individual medical information such as health risk assessments. The ADA pertains only to employees, not spouses, so that is not an issue. The rules under GINA, however, can become complex and employers that want to offer wellness programs to spouses are advised to work with legal counsel that offers expertise in these matters. Also, as a practical matter, employers generally do not want spouses to come onto the employer's premises, which could be an issue if health screenings or wellness program activities are conducted onsite.

Tax Issues

When incentives are offered, the employer also must consider potential tax issues. Generally, employers are advised to provide any incentives "inside" the group health plan, so the amount is exempt from income and payroll taxes. Examples include reduced contributions (payroll deductions) for group medical plan coverage and/or reduced deductibles or copays under the group medical plan. (Either reduced contributions or reduced (or waived) deductibles are allowed, although employees tend to prefer reduced contributions since deductibles and copays only matter if they incur expenses for non-preventive care.) Providing cash, gift cards, or in-kind incentives, on the other hand, should be avoided since the amounts would be subject to taxes.

Summary

As employers compete to recruit and retain qualified employees, wellness programs present an opportunity to communicate a message of commitment to the well-being of employees. A sustained program may lead to healthier employees and higher productivity with lower health-related costs.

As we've seen, employers also need to consider several federal laws in designing a wellness program. HIPAA applies to wellness programs that are part of a group health plan or are themselves a group health plan. Depending on the program's design, additional laws such as the ADA and GINA may apply. Employers are encouraged to work with legal counsel offering expertise in these matters since the issues and rules can be complex, particularly since the EEOC has not yet released new guidance on the ADA.



Official Guidance

- [EEOC Genetic Information and Nondiscrimination Act](#)
- [HIPAA and Workplace Wellness Programs](#)
- [HIPAA and the Affordable Care Act Program Requirements](#)



Wellness Program Notice

[This sample notice is similar to the sample provided by the EEOC, and may be used by employers that sponsor a wellness program. Information in orange brackets must be customized; delete this introductory text before using.]

[Name of wellness program] is a voluntary wellness program available to all employees. The program is administered according to federal rules permitting employer-sponsored wellness programs that seek to improve employee health or prevent disease, including the Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act of 2008, and the Health Insurance Portability and Accountability Act, as applicable, among others. If you choose to participate in the wellness program, you will be asked to complete a voluntary health risk assessment or "HRA" that asks a series of questions about your health-related activities and behaviors and whether you have or had certain medical conditions (e.g., cancer, diabetes, or heart disease). You will also be asked to complete a biometric screening, including a blood test for [be specific about the conditions for which blood will be tested.] You are not required to complete the HRA or to participate in the blood test or other medical examinations.

Employees who choose to participate in the wellness program will receive an incentive of [indicate the incentive] for [specify criteria]. Although you are not required to complete the HRA or participate in the biometric screening, only employees who do so will receive [the incentive].

Additional incentives of up to [indicate the additional incentives] may be available for employees who participate in certain health-related activities [specify activities, if any] or achieve certain health outcomes [specify particular health outcomes to be achieved, if any]. If you cannot participate in any of the health-related activities or perform any of the health outcomes required to earn an incentive, you may be entitled to a reasonable accommodation or an alternative standard. You may request a reasonable accommodation or an alternative standard by contacting [name] at [contact information].

The information from your HRA and the results from your biometric screening will provide information to help you understand your current health and potential risks and may also be used to offer you services through the wellness program, such as [indicate services that may be offered]. You are also encouraged to share your results or concerns with your doctor.

Protections from Disclosure of Medical Information

We are required by law to maintain the privacy and security of your personally identifiable health information. Although the wellness program and [name of employer] may use aggregate information it collects to design a program based on identified health risks in the workplace, [name of wellness program] will never disclose any of your personal information either publicly or to the employer, except as necessary to respond to a request from you for a reasonable accommodation needed to participate in the wellness program, or as expressly permitted by law. Medical information that personally identifies you in connection with the wellness program will not be provided to your supervisors or managers and may never be used to make decisions regarding your employment.

Your health information will not be sold, exchanged, transferred, or otherwise disclosed except to the extent permitted by law to carry out specific activities related to the wellness program, and you will



not be asked or required to waive the confidentiality of your health information as a condition of participating in the wellness program or receiving an incentive. Anyone who receives your information to provide you services as part of the wellness program will abide by the same confidentiality requirements. The only individual(s) who will receive your personally identifiable health information is (are) [indicate who will receive information such as "a registered nurse," "a doctor," or "a health coach"] to provide you with services under the wellness program.

In addition, all medical information obtained through the wellness program will be maintained separate from your personnel records, information stored electronically will be encrypted, and no information you provide as part of the wellness program will be used in making any employment decision. [Specify any other or additional confidentiality protections if applicable.] Appropriate precautions will be taken to avoid any data breach. We will notify you immediately if a data breach occurs involving information you provide in connection with the wellness program.

You may not be discriminated against in employment because of the medical information you provide as part of participating in the wellness program. You will not be subjected to retaliation if you choose not to participate.

If you have questions or concerns regarding this notice or protections against discrimination and retaliation, please contact [insert name of appropriate contact] at [contact information].

**Let Tilson get to work
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email: info@tilsonhr.com

call: 1(800) 276-3976

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Wellness Programs Checklist

Designing an employer-sponsored wellness program requires considerable thought and planning to achieve the desired outcome. Gathering the feedback garnered from this checklist will help you select a program that fits with your organization's strategies for the desired outcome while providing a valuable benefit to employees.

Steps to consider when deciding whether to sponsor a wellness program include the following:

- Decide what outcomes are most important, such as improving safety, reducing healthcare costs, decreasing absenteeism, or increasing employee morale, to name a few.
- Consider surveying employees to determine areas of interest.
- Collaborate with stakeholders on how a wellness program may fit in with the organization's goals and the value it may bring to the company.
- Establish a budget for funding a program.
- Consider common wellness program types, such as those promoting weight loss, smoking cessation, better nutrition, health screenings, or exercise programs.
- Decide whether offering incentives or rewards to employees are warranted and the proper ways to communicate the details of the program to everyone.

Once your program is in place, keep in mind the following benefits and considerations:

- Gathering feedback from the steps above should help you select a program that fits with your organization's strategies for the desired outcome while providing a valuable benefit to employees.
- Meeting your outcome goals will require employee participation in the program.
- Employee engagement and participation are important in achieving an organization's desired outcomes.
- Organizational involvement in the planning process may be needed to obtain leadership support.
- A wellness program that meets the organization's or employees' needs may positively affect the overall goals and budget.
- Consider reviewing metrics to help determine if the right program is in place.
- Review requirements under the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), Affordable Care Act (ACA), and Health Insurance Portability and Accountability Act (HIPAA) to make sure your program complies with various federal laws.



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