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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. 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)
- The Genetic Information Nondiscrimination Act (GINA)

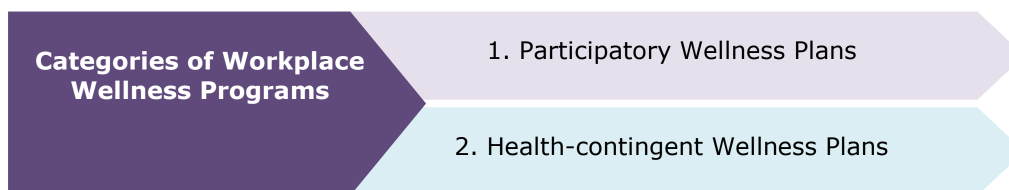
These laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another.

This Legislative Brief provides an overview of the requirements for wellness plans under HIPAA, the ADA and GINA. See Page 7 for a chart that compares key wellness plan requirements under these three laws.

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	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. 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**).

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	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 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.
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.

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 Braille, 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.

Also, 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**.

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Proposed Rule for Voluntary Wellness Programs

On April 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) released a **proposed rule** that describes how the ADA applies to wellness programs that include questions about employees' health or medical examinations. While employers are not required to comply with the proposed rule before it is finalized, they may choose to do so. According to the EEOC, it is unlikely that a court or the EEOC would find an ADA violation where an employer complied with the proposed guidance until a final rule is issued.

Important: If a wellness program does not involve a disability-related inquiry or a medical examination, the ADA's proposed rule for voluntary wellness programs would not apply. For example, a wellness program that only involves attending nutrition, weight-loss or smoking-cessation classes does not involve disability-related inquiries or medical examinations, and thus would not be subject to this aspect of the ADA.

The EEOC's proposed rule would establish the following rules for permissible wellness program designs:

RULE	DESCRIPTION
Reasonable design	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.
Voluntary/Size of Reward	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. Also, for wellness programs that are part of **group health plans**, employers may offer limited incentives for employees to participate in the programs or to achieve certain health outcomes. The incentive may not exceed **30 percent of the total cost of employee-only coverage**. For example, if the total cost of coverage paid by both the employer and employee for self-only coverage is $5,000, the maximum incentive for an employee under that plan is $1,500. The EEOC has requested comments on whether future regulations should address incentives under wellness programs that are not part of group health plans.
Employee Notice	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.

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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.

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 proposed rule on voluntary wellness programs, the EEOC rejects the application of the safe harbor to wellness programs. Thus, the EEOC's position appears to be that 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 the computation of premium or contribution amounts.

Consequently, wellness programs offered under group health plans that provide rewards for completing HRAs that request genetic information, including family medical history, violate the prohibition against collecting genetic information for underwriting purposes. This is the case even if rewards are not based on the outcome of the assessment.

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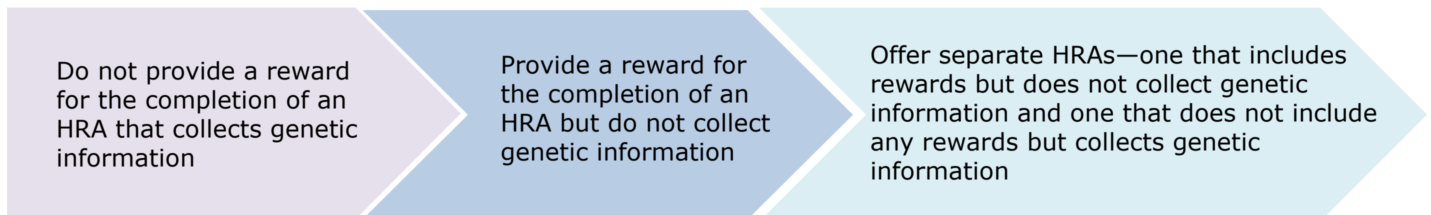
> ***Example:*** A group health plan provides a **premium reduction** to enrollees who complete an HRA. The HRA, which includes questions about an individual's family medical history, is requested after enrollment. Even though the completion of the HRA has no effect on an individual's enrollment status, 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:



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.

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New Proposed Rules

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 be read as prohibiting employers from offering incentives in return for a spouse providing his or her current or past health information. On Oct. 30, 2015, the EEOC issued a proposed rule that would allow 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 proposed rule would clarify that an employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse:

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

The total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that collects information about current or past health status may not exceed **30 percent** of the total cost of the plan in which the employee and any dependents are enrolled. The incentive may be financial or in-kind (for example, time-off awards, prizes and other items of value). The maximum portion of an incentive that may be offered to an employee alone may not exceed 30 percent of the total cost of the employer's self-only coverage.

COMPARISON CHART

REQUIREMENT	HIPAA/ACA	ADA	GINA
Covered employers or programs	Wellness plans that relate to group health plans. Wellness plans are divided into two separate categories for compliance purposes: • **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	Wellness programs sponsored by employers with **15 or more employees** All wellness programs sponsored by covered employers are prohibited from discriminating against disabled individuals. Additional compliance rules apply to wellness programs that include questions about employees' health or medical examinations.	GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II). • Title I applies to wellness programs offered under group health plans • Title II applies to employers with **15 or more employees** GINA's restrictions apply to wellness programs that request genetic information—for example, family health history.

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REQUIREMENT	HIPAA/ACA	ADA	GINA
	standards related to health factors in order to obtain rewards		
Reasonable design	• **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 *(proposed requirement)*	Must be reasonably designed to promote health or prevent disease *(proposed requirement)*
Frequency of reward	• **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 (*proposed rule)*
Voluntary	No requirement *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.	Participation in programs that include disability-related inquiries or medical exams must be voluntary. Employers cannot: • 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 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) Under Title II, an employee (or his or her spouse) must provide prior, knowing, voluntary and written authorization for the collection of genetic

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REQUIREMENT	HIPAA/ACA	ADA	GINA
		employees to get them to participate or achieve certain health outcomes. *(Proposed requirement)*	information 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 (*proposed requirement)*
Limit on incentives	• **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 or reduce tobacco use). 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.	Incentive limits apply to wellness plans that include disability-related inquiries or medical exams. For wellness programs that are part of group health plans, employers may offer limited incentives for employees to participate in the programs or to achieve certain health outcomes. Incentives cannot exceed **30 percent** of the total cost of employee-only coverage (even if dependents participate). Incentive limit applies to both participatory and health-contingent wellness plans. According to EEOC, a smoking cessation program that merely asks whether an employee uses tobacco is not a disability-related inquiry. Thus, the EEOC would 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	Cannot offer incentives for employees or plan participants to provide their own genetic information (including family medical history) as part of wellness plans Can provide an incentive for a spouse to provide his or her own health information (not the spouse's own genetic information) as part of a wellness plan (*proposed rule)* Under the proposed rule, the total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that collects information about current or past health status may not exceed **30 percent** of the total cost of the plan in which the employee and any dependents are enrolled.

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<table>
<tr><th>REQUIREMENT</th><th>HIPAA/ACA</th><th>ADA</th><th>GINA</th></tr>
<tr><td></td><td></td><td>examination that tests for the presence of tobacco would be limited to 30 percent.

(Proposed requirement)</td><td></td></tr>
<tr><td>Uniform availability</td><td>• Participatory Wellness Plans: Must be available to all similarly situated individuals
• Health-contingent Wellness Plans: Must make the full rewards available to all similarly situated individuals</td><td>No requirement (but see the reasonable accommodation requirement below)</td><td>No requirement</td></tr>
<tr><td>Reasonable accommodation</td><td>• 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.</td><td>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.</td><td>No requirement</td></tr>
<tr><td>Notice</td><td>• 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 possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-</td><td>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.

(Proposed requirement)</td><td>Must obtain employee authorization when a wellness program requests genetic information (family medical history).

Authorization form must be written in an understandable way, must describe the type of genetic information that will be obtained and the general purposes for which it will be used, and it must describe the restrictions on</td></tr>
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REQUIREMENT	HIPAA/ACA	ADA	GINA
	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.		disclosure of genetic information.

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