

COMMERCIAL INSURANCE

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Q&A FROM ASSUREX GLOBAL WEBINAR

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WELLNESS PLAN REGULATIONS UPDATE

Q. Can there be a base plan that is available to all and additional plan options available only if you participate in a wellness program?

A. The EEOC final rules specifically prohibit a gateway or tiered plan approach. If disability-related questions or medical testing are involved (which would require application of the EEOC final rules), participation in the wellness program cannot affect eligibility for the group health plan(s). In other words, regardless of whether the employer offers one plan or multiple plan options, participation in the wellness program cannot determine whether or not the individual is eligible for the plan(s).

Q. Can we use a plan with a higher deductible if an employee chooses to not complete the HRA or the biometric screening?

A. So long as individuals are eligible to enroll in the group health plan, regardless of whether the individual participates in the wellness program, the plan may alter the deductible (e.g. offer a higher deductible) for those who do not participate in or satisfy the standards of the wellness program.

Q. Can you give an example of why an employer would ask for genetic information as part of a wellness program? Can you provide examples of Health Risk Assessment (HRA) questions that would trigger GINA?

A. Historically a group health plan may have asked questions about genetic information in HRAs to identify individuals who could benefit from disease management, health coaching or other wellness programs, but GINA prohibits group health plans from collecting such information and tying it in any way to eligibility for a group health plan or program, or tying such information to a reward or incentive. Therefore, such information may not be used to determine eligibility for a disease management program, but could be requested to determine medical appropriateness for those who voluntarily choose to participate.

An employee's genetic information includes information about (1) an employee's genetic tests, (2) the genetic tests of family members of such employee, and (3) the manifestation of a disease or disorder in family members of such employee (family medical history or current or past health status).



- Q.** Can you give the discount to family members also?
- A.** Generally, yes. So long as the applicable HIPAA and/or EEOC rules are followed, incentives may also be offered to spouses and children. However, keep in mind that asking children information about their current or past health status would be considered genetic information (family medical history) about the employee and is prohibited under GINA; so, for example, an HRA or biometric screening may pose issues if a child is requested to participate.
- Q.** Can you provide the link to the EEOC website with the required notice template?
- A.** <https://www.eeoc.gov/eeoc/newsroom/release/6-16-16.cfm>
- Q.** Does the incentive of lowering group health premiums last for the plan year or just the months that the program is going?
- A.** That is up to the employer and how they design the incentive.
- Q.** I just want to clarify. As an employer are we required to offer a health wellness program? We offer health benefits, but do NOT offer a health wellness program.
- A.** Employers are not required to offer any type of wellness program. For those employers who choose to offer a wellness program, depending upon the requirements and incentives involved, it will be necessary to follow the applicable HIPAA and EEOC regulations.
- Q.** Is the HIPAA model notice different from the new EEOC model notice?
- A.** Yes, the two notices are different, but it is possible to combine them into one notice.
- Q.** In terms of the reasonable alternative standard (RAS), can you set deadlines to enroll in program or to complete the program?
- A.** Yes, it would be up to the employer and how they design the program and associated incentive.
- Q.** Should the notice be a part of the summary plan document (SPD)? Where does this notice need to live?
- A.** A notice of reasonable alternative standard as required under HIPAA for health-contingent program must be described with the wellness program description itself (e.g. in the SPD). Or it could be included in the wellness program documentation itself (e.g. in the health risk assessment (HRA)). In other words, it is not typically a stand-alone notice, but rather a notice that should be included wherever the wellness program itself is being described. The confidentiality notice required for wellness programs subject to the EEOC rules is not required to follow any particular delivery method or formatting, but the employer must be confident the method of delivery will reach all those who participate and it must be provided prior to providing any health information. See more information in EEOC FAQ at <https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm>.
- Q.** So spouse participation, regardless of what it is, it is GINA? Biometrics where we don't see results?
- A.** Yes. If the spouse is required to provide responses to disability-related questions or participate in medical testing in order to earn an incentive, the EEOC rules for GINA apply.



Q. So when calculating the 30% on all of these wellness programs, it would always apply to the employee only plan (lowest option) even if they are enrolled in a family plan.

A. The rules are different depending upon whether the HIPAA or EEOC rules apply...

- Under HIPAA, the incentive cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs. If only the employee may participate, the incentive cannot exceed 30% (50%) of the employee-only cost of coverage; but if the employee, spouse and even dependents may participate, the incentive is calculated based on the cost of coverage for the tier in which the employee, spouse and dependents are enrolled (e.g. family coverage).
- Under the EEOC rules, the incentive cannot exceed 30% of the total cost of employee-only coverage. If both the employee and spouse may participate, the limit would be 2x 30% of the cost of employee-only coverage.

Q. we have option for incentive to go into HSA for those HDHP enrolled, is that appropriate? They can elect this option, otherwise, all incentives are taxable.

A. Yes, so long as the employer contributions are handled through a cafeteria plan. Comparability rules for HSAs generally require uniform employer contributions for all HDHP participants, but when contributions are made through a cafeteria plan, the comparability requirements do not apply and the employer has more flexibility in regard to differing contribution amounts (e.g. due to participation in a wellness program). Keep in mind, such contributions made through a cafeteria plan would be subject to Section 125 nondiscrimination rules instead.

Q. What about a gift card incentive given by a fully-insured carrier to your employees? Is the employer responsible for taxing the employee?

A. Even when the incentive is being provided by someone other than the employer, the employer is still generally sponsoring the incentive as it is part of the product purchased through the insurance carrier (i.e. part of the overall plan), and therefore should include such incentives as taxable. If the employer would like to assume otherwise, it would be advisable to work with tax counsel.

Q. What exactly counts toward the "incentive limits"? If we offer a premium discount that is close to the percentage maximum, and then an employee wins "prizes" throughout the year such as gift cards, workout devices, shirts, water bottles, etc.-- does the value of these items count and possibly bump them up over the percentage threshold?

A. Potentially yes. If the program is subject to HIPAA incentive limits (i.e. health-contingent programs) or EEOC incentive limits (i.e. involves disability-related questions or medical testing), then any incentives for participation in such programs may need to be valued and included in the amount used for determining whether the total is within the required incentive limit(s). NOTE - generally HIPAA incentive limits include only those incentives directly linked to the group health plan while EEOC incentive limits apply more broadly to any incentives provided upon answering disability-related questions or participating in medical testing.



- Q.** What is the reasoning that the GINA rules only apply when the wellness program is extended to the spouse?
- A.** The GINA rules apply any time genetic information is requested, and such rules generally do not allow genetic information to be tied to eligibility for group health plans or any type of incentives. However, there is an exception when information is requested from spouses, so long as the EEOC rules are followed.
- Q.** When it says the reward cannot exceed 30% of the total cost of coverage does that mean the premium cost for their health insurance?
- A.** Yes. It is the total cost, including both the employee and employer contribution toward the insurance premium.
- Q.** Does the notice need to be given out annually?
- A.** The new EEOC notice describing confidentiality standards for medical information collected must be provided prior to the collection of such medical information. Therefore, it will depend upon the administration of the program and how often such medical information is collected.
- Q.** Under GINA - is it now required to have a signed consent from the spouse - please explain.
- A.** For spouses who are allowed to participate in the wellness program, if they are asked to provide information about the manifestation of a disease or disorder (i.e. current or past health status), then GINA rules apply, which require not only that the confidentiality notice be provided prior to collecting such information, but also that the spouse provide written consent after being provided with the notice.
- Q.** Spouses choosing not to participate cannot be denied employer health coverage. Can they be denied a discount for coverage however? Participation in the HRA gives our employees a discount, Can we request the employee AND spouse to participate for the discount if it's a family plan?
- A.** Yes. So long as the program follows the HIPAA and/or EEOC rules as applicable, the spouse may be asked to participate in the wellness program and an incentive (reward or penalty) may be tied to the spouse's participation.
- Q.** So if the employee 30% wellness difference is \$30 but the employee has to pay \$10.00 with the wellness incentive - would it be \$40.00 each?
- A.** If 30% of the total monthly cost of coverage (premium including both employer and employee cost) is \$30, then yes, it would be compliant to charge those who participate \$10/month while charging those who do not participate \$40/month. Said differently, the difference between the wellness employee contribution and the non-wellness employee contribution cannot exceed 30% of the total cost of coverage.

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Q. In our current wellness program, if an employee covers their child in the medical program they can take a Kids Health Assessment to earn points. Will that no longer be true under GINA?

A. Under GINA, the employer may not ask information about the manifestation of a disease or disorder in the employee's children and tie such information in anyway to the enrollment in the group health plan or incent the employee for providing such information because the information is considered genetic information about the employee. Depending on the type of information being collected in the Kids' Health Assessment, there may be a violation of GINA requirements.

Q. Does the company have to pay for smoking cessation classes?

A. If the employer offers smoking cessation classes as a reasonable alternative standard for those who are tobacco users, then yes, the employer must pay for the cost of such classes to comply with HIPAA wellness program rules.

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