

February 25, 2016

Wellness Regulations

Presented by Benefit Comply

Wellness Regulations

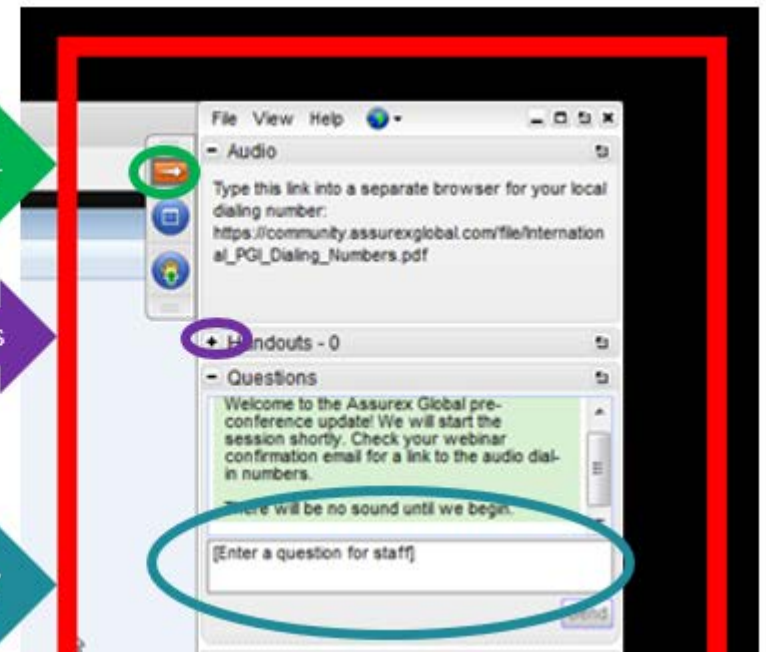
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Agenda

- Primary regulations
 - HIPAA, ADA and GINA
- Comparison of various requirements
- Wellness program common scenarios
- Other applicable laws

WELLNESS PROGRAMS

- The term "wellness program" refers to programs and activities typically offered in association with employer-provided health plans as a means to help employees improve health and reduce health care costs

HIPAA

HIPAA

- HIPAA non-discrimination rules prohibit discrimination in health plans based on health status
 - Group health plans that base health plan eligibility, cost of coverage, or benefit levels (i.e., amount of co-pay, deductible, etc.) on an individual's health factors are “discriminatory”
 - Exception for wellness programs that meet certain requirements
 - HIPAA wellness rules do not apply to wellness incentives that simply provide cash, gifts, etc., which do not impact the group health plan
- Two types of programs under HIPAA wellness rules
 - Participatory wellness programs and health-contingent wellness programs
 - Different requirements apply depending upon the type of program

HIPAA

- Participatory wellness programs
 - Reward not based on an individual satisfying a standard that is related to a health factor
 - No limit on incentives or rewards
 - Only requirement is that the program must be offered to “all similarly situated individuals”
 - Examples include:
 - a program that reimburses employees for all or part of the cost of membership in a fitness center
 - a diagnostic testing program that provides a reduced copayment for participation and does not base any part of the reward on outcomes
 - a program that provides a medical premium reduction to employees for attending a monthly, no-cost health education seminar

HIPAA

- Health-contingent wellness programs
 - Require an individual to satisfy a standard related to a health factor to obtain a reward
 - Two types of health-contingent wellness programs
 - Activity-only
 - Individual is required to perform or complete an activity related to a health factor in order to obtain a reward (e.g. walking, diet, or exercise programs), but is not required to attain or maintain a specific health outcome (e.g., walk 2 miles in 30 minutes, lose 15 lbs., complete 20 push-ups)
 - Outcome-based
 - Individual must attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward

HIPAA

- 5 requirements for health-contingent wellness programs
 1. Must be given annual opportunity to qualify for the reward
 2. Maximum reward cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs
 - Combined incentive for a program that includes both tobacco and non-tobacco related rewards may not exceed 50% (with total non-tobacco related reward components limited to 30%)
 3. Reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
 4. Reward must be available to all similarly situated individuals and individuals who qualify by satisfying a reasonable alternative
 5. Must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program
 - Model notice available

HIPAA

- More on Reasonable Alternative Standards (RAS)
 - Plans not required to establish an RAS in advance of a request
 - RAS can be the same for a class of individuals or set on an individual basis
 - Cannot refuse RAS merely because person failed last year; must continue to offer a RAS, whether the same or new
 - If RAS is completing an educational program, must make program available and pay for cost
 - Instead of offering an RAS, may always waive an otherwise applicable standard and provide reward for an entire class of individuals or on an individual-by-individual basis for those not meeting the contingency
 - Differences in requirements for reasonable alternative standards for activity-only and outcome-based wellness programs . . .

HIPAA

- Differences in requirements for Reasonable Alternative Standards
 - Activity-only wellness programs
 - Must allow an RAS for any individual for whom it is either unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the standard
 - Employer may seek verification (e.g., from physician), if reasonably appropriate
 - Outcome-based wellness programs
 - Must allow an RAS for obtaining the reward for any individual who does not meet the initial standard
 - Not allowed to require verification
 - If an activity-only wellness program is provided as an RAS, then verification may be requested with respect to the activity-only component of the program
 - If another outcome-based program is provided as an RAS –
 - Reasonable time must be given to attain a reduced level of initial standard
 - Must be given the opportunity to comply with the recommendations of the individual's personal physician as a second RAS

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ADA

ADA

- The Americans with Disabilities Act (ADA) generally restricts employers from making disability-related inquiries or requiring medical examinations of employees unless they are job-related or consistent with business necessity
 - Exception for wellness programs that are considered “voluntary”
 - Examples:
 - A health risk assessment (HRA) that includes disability-related questions (e.g., “Are you currently taking any medications?”)
 - Biometric screening programs are considered medical examinations
 - Tobacco-related programs that require medical testing to determine tobacco use
- In addition, any wellness program must provide a “reasonable accommodation”, as appropriate, to enable any disabled individual to earn incentives

ADA

- 4 court cases
 - Seff v. Broward County (11th Cir. 2012) – Court held no ADA violation because premium surcharge for not participating in HRA & biometric screening was within “bona fide benefit plan” safe harbor
 - EEOC filed 3 suits in 2014 challenging as not “voluntary”, imposing financial penalty and loss of employer medical premium subsidy for not participating in wellness programs generally involving HRA and biometric screening, along with other employer-unique wellness program mandates:
 - EEOC v. Orion Energy Systems (E.D. Wis. Filed 8/20/2014)
 - EEOC v. Flambeau, Inc. (W.D. Wis. Filed 11/24/2014)
 - EEOC v. Honeywell, Inc. (D. Minn. 2014)
- Open matters: promise of EEOC regulations; status of bona fide benefit plan exemption; GINA impact

ADA - PROPOSED

- EEOC proposed rules issued April 2015 help define “voluntary”
 - For a wellness program requiring disability-related inquiries and/or medical examinations
 - Incentive Limits: If part of a group health plan, maximum reward (or penalty) across all wellness programs for same group health plan cannot exceed 30% of the total cost of employee-only coverage
 - Applies regardless of whether the wellness program is participatory, health-contingent, or a combination of the two
 - Program requiring medical testing to determine tobacco use limits incentives to 30% instead of the 50%
 - Participation may not be required: Employees choosing not to participate cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation (whether or not program is part of a group health plan)

ADA - PROPOSED

- EEOC proposed rules issued April 2015 (continued)
 - For wellness program requiring disability-related inquiries and/or medical examinations (continued)
 - Required Notice: If part of a group health plan, employers must provide employees with a notice that includes a description of the medical information collected, who will have access to it and how it will be used and kept confidential
 - Reasonable Design: Whether or not part of a group health plan, must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws

GINA

GINA

- The Genetic Information Nondiscrimination Act (GINA) prohibits an employer from requesting, requiring or purchasing employee “genetic information”
 - Exception for health or genetic services offered as part of a voluntary wellness program if certain requirements are met
- “Genetic information” includes information about:
 - A person’s genetic tests or the genetic tests of the person’s family members
 - A person’s request for or receipt of genetic services (e.g., genetic research, counseling on a genetic condition, genetic education)
 - The manifestation of a disease or disorder in the individual's family member (i.e., family medical history or “health status”)

GINA

- Current requirements

- Employers may ask, but cannot require an employee to disclose genetic information
 - Employee must give prior, knowing, voluntary, and written authorization after getting description of the type of genetic information, its use, and restrictions on its disclosure (e.g., restricted to health professional use, not for employment decisions)
 - Questions eliciting genetic information must not be made prior to or in connection with individual's health plan enrollment
- Providing incentives to obtain genetic information is generally prohibited
 - Incentives for completing HRA that include questions about genetic information are permitted, but instructions must identify questions on genetic information and must make clear that the incentive is available regardless of responding to those questions

GINA

- EEOC proposed rules issued in October 2015
 - Confirmed an individual's "family medical history" is genetic information of that individual
 - Current or past health data about the employee, which is often collected as part of a health risk assessment (HRA), is not "genetic information"
 - Current or past health status of a spouse or child is the employee's "genetic information" because it is the employee's family history
 - No information – health status or genetic – may be requested of the employee's children (biological or non-biological)
 - [PROPOSED CHANGE] GINA does not prohibit an employer from offering incentives for providing a spouse's current and past health status as part of an HRA, provided the spouse is enrolled in the health plan and certain requirements are met

GINA - PROPOSED

- Requirements for obtaining spouse's current and past health status (other than genetic information of the spouse) under a voluntary wellness program that is part of a group health plan:
 - May not use information for employment decision on employee
 - Spouse must give prior, knowing, voluntary, written authorization
 - Notice must describe types of information requested and the applicable restrictions on the employer's use of such information
 - Program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws
 - Employers may not require employees or spouses to agree to the sale, or waive the confidentiality, of their genetic information as a condition for receiving a reward
 - Specific incentive limitations added

GINA - PROPOSED

- Incentive limitations for obtaining spouse's current and past health status information:
 - Maximum reward cannot exceed 30% of the total cost of coverage for which the employee, spouse and any dependents are enrolled
 - Maximum reward specific to the employee may not exceed 30% of the cost of employee-only coverage
 - Maximum reward specific to spouse providing health status information may not exceed 30% of the total cost of coverage for the tier of coverage in which employee and dependents are enrolled, less 30% of the cost of employee-only coverage
 - Applies to all incentives (financial and in-kind) combined with any other inducement permitted under the ADA for the employee's participation in any wellness program asking disability-related questions or requiring medical examinations (e.g., an HRA)

Comparison of Requirements

REQUIREMENTS	HIPAA #		ADA *	GINA *
	Participatory Programs	Health-Contingent Programs		
Information privacy	X	X	X	X
Voluntary participation			X	X
Frequency to qualify		X		
Incentives		X	X #	X
Reasonable design		X	X	X
Uniform availability	X	X		
Reasonable alternative		X	X	
Notice		X	X #	X
# - Applies only if part of a group health plan				
* - ADA and GINA rules apply to both participatory and health-contingent programs				

Common Plan Structures

Tobacco Surcharge

- Considered a health-contingent program under HIPAA (conditioned on status as smoker or non-smoker)
- Subject to ADA rules if medical testing is used to determine tobacco use
- Further clarification needed on how GINA rules might apply for tobacco use by a spouse
 - “...information about the manifestation of a disease or disorder in family members of an individual”

Health Risk Assessment (HRA) or Biometric Screening

- Considered a participatory program under HIPAA if the reward is not contingent upon any specific answers or results
 - Reward must be available to all similarly situated individuals
- Additional ADA rules apply if there is a medical exam or disability-related inquiries are made
- Additional GINA rules apply if genetic information (including current or past health data of the spouse) is requested
 - Will all biometrics of spouse provide information on the “manifestation of a disease or disorder”?

Fitness Club Reimbursement

- Not tied to the group health plan, so HIPAA does not apply
- ADA would require a “reasonable accommodation”, as appropriate, to enable any disabled individual to earn incentives
- GINA would not apply because no genetic information is involved

Multiple Reward Programs

- Example:
 - *One set of incentives reduces premiums if both employee and spouse respond to HRA questions eliciting information on current and past medical conditions of both employee and spouse*
 - *Second set of incentives further reduces premiums if employee participates in a walking program*
 - *Employee and spouse enrolled in medical plan tier with \$14,000 total cost, and single employee tier cost is \$6,000*

Multiple Reward Programs

- First set of incentives (HRA completion)...
 - Considered a participatory program under HIPAA if the reward is not contingent upon any specific answers or results
 - Additional ADA rules apply due to disability-related inquiries
 - Additional GINA rules apply due to collection of the current or past health data of the spouse
- Second set of incentives (walking program)...
 - Considered a health-contingent program under HIPAA
 - ADA would require a “reasonable accommodation”, as appropriate, to enable a disabled individual to earn incentives,
 - GINA would not apply because no genetic information is involved

Multiple Reward Programs

- Incentive limitations
 - Max total reward under both programs is \$4200 (30% of \$14,000)
 - Limits due to GINA due to receipt of current and past health status of the spouse
 - Max employee reward of \$1800 (30% of \$6,000)
 - Max spousal reward of \$2400 allocated to the spouse's participation
- Possible incentive structure
 - Employee incentive amount
 - \$1800 for the HRA
 - \$600 for the walking program (not limited by ADA or GINA)
 - Spouse incentive amount
 - \$1800 for the HRA

Other Applicable Laws

Other Applicable Laws

- Employers considering various wellness program components must consider HIPAA, ADA and GINA requirements, if applicable
- Don't forget about...
 - ERISA and COBRA
 - Employment discrimination laws (including specialized laws protecting smokers and other off-duty conduct or “lifestyle” nondiscrimination laws)
 - Insurance laws
 - Tax laws
 - Gambling laws (e.g. “win a lottery ticket for wellness participation”)

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Thank you.

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