COMPLIANCE OVERVIEW

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 8 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
- Interim final regulations under GINA regarding permissible wellness plan designs

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.
- Health-contingent wellness programs require individuals to meet a requirement related to a health factor to obtain a reward.

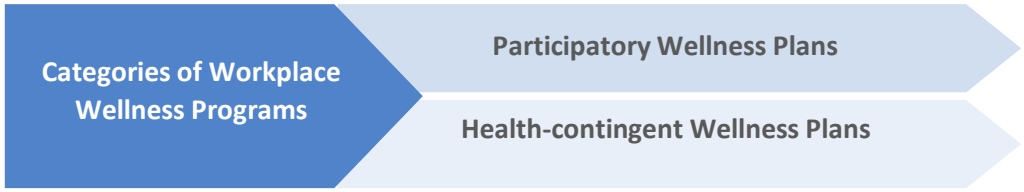
ADA and GINA

- Under the 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 under the ADA.
- 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).

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

HIPAA 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. The maximum permissible reward is **30%** of the cost of health coverage (**50%** for wellness programs designed to prevent or reduce **tobacco use**). 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.
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**.

A final rule issued by the U.S. Equal Employment Opportunity Commission (EEOC) 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:

ADA 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	Employees' participation in a wellness program must be voluntary to comply with the ADA. This means that: • Employees cannot be required to participate in the program; • Employers cannot deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program; and

ADA RULE	DESCRIPTION
	• Employers cannot take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer disability-related questions or undergo medical exams. The EEOC's final rule provides that, in order to comply with the ADA's voluntary requirement, the incentives for participating in a wellness program cannot be so substantial as to be coercive. The rule also established a **30% limit** on permissible incentives. That incentive limit was removed from the final rule due to a court ruling that invalidated the limit. The EEOC has indicated that it plans to issue a new proposed rule on wellness programs in the future; however, it is not clear when this proposed rule will be released. For now, due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that collect health information.
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.

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.

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.

> ***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

On May 17, 2016, the EEOC issued a final rule that allowed 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. This rule was effective for plan years beginning on or after Jan. 1, 2017. Under the final rule, the maximum incentive attributable to a spouse's participation could not exceed 30% of the total cost of self-only coverage, which was the same as the incentive allowed for the employee under the final ADA rule. However, the EEOC removed the provision for limited incentives for spouses from its final rule, effective Jan. 1, 2019.

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Comparison Chart

REQUIREMENT	HIPAA	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 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 factors to obtain rewards.	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.
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.	Must be reasonably designed to promote health or prevent disease.
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.

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REQUIREMENT	HIPAA	ADA	GINA
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 to get them to participate or achieve certain health outcomes.	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 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.
Limit on incentives	• **Participatory Wellness Plans**: No limit on incentives. • **Health-contingent Wellness Plans**: Incentives cannot exceed 30% of the cost of coverage (50% 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	To comply with the ADA's voluntary requirement for wellness programs that collect health information, the incentives cannot be so substantial as to be coercive. Because the EEOC has removed its 30% incentive limit (based on a court ruling), there is no established incentive limit for ADA compliance.	Cannot offer incentives for employees or plan participants to provide their own genetic information (including family medical history) as part of wellness plans.

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REQUIREMENT	HIPAA	ADA	GINA
	may participate in the wellness programs, rewards can be based on total cost of coverage in which employees and any dependents are enrolled.	For now, due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that include disability-related inquiries or medical exams. According to the EEOC, a smoking cessation program that merely asks whether an employee uses tobacco is not a disability-related inquiry. Thus, an employer may be able to offer incentives as high as 50% 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%.	
Uniform availability	• **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.	No requirement (but see the reasonable accommodation requirement below).	No requirement.
Reasonable accommodation	• **Participatory Wellness Plans**: No requirement. • **Health-contingent Wellness Plans**: The full reward under a health-	Employers must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any rewards or	No requirement.

REQUIREMENT	HIPAA	ADA	GINA
	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.	avoid any penalties offered as part of the programs.	
Notice	• **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-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.	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.	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 disclosure of genetic information.