

Ed Doherty, J.D.,
Compliance Consultant

Health & Welfare,
Cammack LaRhette
Consulting

Navigating the Wellness Program Legal Minefield

Introduction

Wellness programs face a vast array of laws and regulations. Running afoul of these rules can have different consequences, depending on the nature of the violation. The wellness program could face audits and investigations from government agencies or civil fines from lawsuits brought by employees or participants; officers of the company can even confront criminal penalties (in the most dire circumstances). With advance knowledge about the rules, however, employers can avoid running headlong into compliance problems, while providing a wellness program that promotes health in the employer's workforce and decreases health insurance costs.

This article offers a heads-up for employers about the laws and regulations that affect wellness programs. It explores how employers can structure the wellness program and how employers handle participants' private health information. To provide a complete guide on how to comply properly with all of the relevant rules, including those not discussed here, would require a thick, complicated manual. Besides, it would bore you! Contact a professional to ensure that your wellness program complies with all relevant laws and is properly designed to achieve your goals.

The Structure of the Wellness Program: HIPAA, the ADA, and More

Most of the design decisions for a wellness program involve what to give participants in exchange for their changing their behavior in a healthier manner. Employers must be careful when creating these incentives, however, because several laws and regulations place restrictions on the incentives and designs wellness programs may use.

The two laws with the most impact on the design of wellness programs are the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA). HIPAA's basic requirements are that, if the employer wishes to base the wellness program's incentives on outcomes (i.e., whether the employees actually start becoming healthier), employers cannot base the metrics for those outcomes on certain protected criteria. In a similar vein, the ADA requires employers to design their wellness programs flexibly enough so that disabled employees can fully participate and receive the incentives. In addition to HIPAA and the ADA, other federal employment protection laws have an incidental impact on the design of wellness programs.



HIPAA

Usually HIPAA prohibits employers from basing health insurance cost-sharing on the health conditions of its employee participants. The first inquiry is whether HIPAA even applies to the wellness program. In most cases it will, since wellness programs are exempt from HIPAA rules only under two scenarios: (1) the wellness program does not provide “medical care” (e.g., a gym reimbursement program or a health information seminar), or (2) the wellness program is appurtenant to a group health plan that itself is exempt from HIPAA (i.e., the group health plan has fewer than 50 people eligible for the plan). Examples of such exempt wellness programs might include a gym reimbursement program or a contest in which participants get a gift card to a sporting goods store for running certain distances.

However, when HIPAA applies to wellness programs, it carves out an exception to the normal non-discrimination rules that allows employers to provide discounts in return for “adherence to programs of health promotion and disease prevention.” HIPAA distinguishes between two types of wellness program designs: participation-only programs and standard-based programs.

Participation-only programs are those in which the participant receives the incentive/reward just for participating and that do not require the participant to meet any goals or standards to obtain the incentive. For example, a wellness program may reward a participant just for signing up with a gym or attending a health and wellness fair hosted by the employer.

When the employer has a participation-only program design, regulations promulgated under HIPAA only require that the employer offer the incentive to all similarly-situated employees. This means that when the employer offers the wellness program’s incentives to at least one person in a class of employee, then the incentive must be on offer to everyone in that same class. Classification of employees must be on a rational economic basis, and not according to anything related to their health and health conditions. To illustrate, saying that all full-time employees located in a certain office can participate may make economic sense; whereas saying that all full-time employees free from, say, scurvy, does not make economic sense in the context of this analysis.

Standards-based programs are those that require the employee to meet certain goals or standards based upon health conditions in order to receive a reward. Such a program, for example, might require employees to demonstrate that they have quit smoking for at least six months before they are rewarded with a premium discount. These types of programs make more sense from a return on investment (ROI) perspective, because they do not pay out rewards until



the employer sees solid results likely to lead to lowered health plan costs. Yet since they are also much more vulnerable to abuse against individuals suffering from health conditions, regulations under HIPAA look at such programs with increased scrutiny.

In order to comply with HIPAA regulations, a standards-based wellness program must meet five conditions:

1. Incentives cannot exceed 20%¹ of the total premium for employee-only coverage²
2. The program must be reasonably designed to promote wellness and/or prevent disease
3. The program must provide individuals the opportunity to qualify for the incentive at least once per year
4. The program's incentives must be available to all similarly-situated individuals, which includes providing alternative means for earning the incentives (more on this below) and
5. The plan must disclose that individuals can earn the incentive through reasonable alternative standards (unless the program is not described in detail)

The most challenging aspect is to provide reasonable alternative standards to those individuals for whom reaching the standards are "unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard" and for those whom "it is medically inadvisable to attempt to satisfy the otherwise applicable standard." "Medical condition" is a broad term and includes such conditions as nicotine addiction. In this case, employers cannot require employees to completely quit before they can earn the reward; instead, they must offer a reasonable alternative for those with the condition, such as participation in a tobacco-cessation program. When instituting these standards-based programs, employers are encouraged to seek legal counsel on their designs to ensure that they provide all individuals with reasonable alternative standards for earning all the program's incentives.

ADA

In addition to HIPAA regulations and requirements, the ADA, at its core, prohibits employers from discriminating against individuals with disabilities. More germane to wellness programs, the ADA also drastically limits when an employer can require employees to undergo medical examinations. Complying with the ADA requires employers instituting wellness programs to be mindful of employee disabilities and flexible in their accommodation.



Read a certain way, the ADA could be said to ban all wellness programs that provide rewards and discounts for health conditions, which would essentially destroy most wellness programs. Luckily, government agencies and the courts have thus far not interpreted the ADA's terms to lead to this result. In a recent case in the Southern District of Florida, a federal court found that the ADA does not prohibit wellness programs that are "bona fide group health programs," i.e., those that actually try to improve the health of the participants.³ Thus, wellness programs structured with the goal of improving the health of their employees need only concern themselves with the ADA's broad prohibition on discriminating against the disabled and its limitations on medical examinations for employees.

Avoiding Discriminating against Disabled Individuals

In order to avoid discriminating against disabled employees, employers must structure their wellness programs with their disabled employees in mind, so that all employees, regardless of disability, can somehow participate and earn every incentive. This could reflect HIPAA's requirement for providing reasonable alternative means towards earning incentives, for instance, by providing an alternative to running a certain distance. The point is that the requirement for earning the incentive must be achievable by everyone who is capable of working, disabled or not.

Congress recently reworked the definition of "disabled" under the ADA by enacting the ADA Amendment Act of 2008 (the ADAAA). The goal of the amendment is to shift the inquiry away from whether an employee is disabled and more towards whether the employer has somehow discriminated against a complaining individual. The impact is that employers should exercise more caution in accommodating potentially disabled people. As regards wellness programs, employers should readily adopt alternatives for earning incentives rather than focusing on whether the employee is disabled.

Medical Examinations

With respect to medical examinations in wellness programs, regulations promulgated under the ADA lay out three requirements: the wellness program must be voluntary, information gained from the program must be confidential, and the employer must not use the information to discriminate against employees. What "voluntary" means in this context has not been clearly spelled out, but employers definitely cannot require employees to take Health Risk Assessments (HRAs) or other medical examinations in order to be eligible for health insurance. It is also unclear whether too great an incentive for taking such exams would violate the ADA because the great monetary incentive is "compulsory." Once a wellness program gets information, it must be kept within the program and not given over to the employer.



Other Laws

Besides HIPAA and the ADA, employers should also watch out for a couple other employment laws that impact the possibilities for wellness program design.

The Age Discrimination in Employment Act (ADEA) prohibits discriminating against employees based upon their being older than 40. While older employees tend to have higher medical costs, a wellness program cannot base its incentives on the fact that the employees are a certain age.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, race, color, religion, or national origin, and so wellness programs with standards based upon any of these categories would be troublesome. “Sex” includes those distinctions made on the basis of a pregnancy, so employers should be mindful of the effects of pregnancy when creating incentive programs. Nondiscrimination based upon sex also precludes employers from distinguishing goals based on gender, such as different Body Mass Index (BMI) thresholds for men and women.

Handling Information Derived from the Wellness Program: HIPAA and GINA

Wellness programs can generate a lot of information about their participants, and therein lies their power. Using that information, robust disease management-style programs can effectively target those participants incurring (or about to incur) the highest costs and, through health coaching and interventions, reduce or prevent ongoing costs.

However, HIPAA and the Genetic Information Nondiscrimination Act of 2008 (GINA) protect employees from their employers knowing too much about their health conditions, with the aim of preventing abusive discrimination against those who would incur higher costs. Such protections are necessary for a health insurance system based upon employment, particularly because employers have a keen financial interest in eliminating employees who cost the employer a lot of money. HIPAA, GINA and their enabling regulations do allow for the establishment of wellness programs, so long as the programs include the proper protections and designs.

HIPAA

Under HIPAA, two broad sets of rules describe how health plans must handle the protected health information (PHI) of their participants: the Privacy Rule and the Security Rule. Broadly speaking, the Privacy Rule prohibits the employer from accessing participants’ PHI and provides for processes to



ensure that the employer never handles this information. Fully-insured plans generally do not have to worry about coming across PHI because the insurers mostly deal with the information and administration of plans. Self-insured plans, however, must take care that third-party administrators (TPAs) handle the information and, if the employer self-administers, the information is segregated from management. The Security Rule lays out requirements for processes that would protect PHI while it is being handled by insurers, plans, TPAs, and Business Associates (BAs) that provide services to the plan, such as consultants, lawyers, and accountants.

Wellness programs most likely must comply with the Privacy and Security Rules under HIPAA, assuming that HIPAA's wellness program design rules apply. Again, most wellness programs are integrated with health plans and therefore merely operate under the same set of rules as the rest of the plan.

HIPAA's Privacy and Security Rules are intimidating, but they are designed to allow group health plans – and wellness programs working within them – to operate along normal lines. Employers are recommended to seek out advice from health and welfare benefits consultants or legal counsel, who should carefully examine the privacy and security procedures in place to ensure proper compliance with these complex rules.

GINA

Broadly speaking, GINA has two effects: (1) employers cannot discriminate against employees on the basis of genetic information, and (2) genetic information includes family history. These two consequences affect both the design of the wellness program and the information that employers can retain regarding their employees.

Because employers cannot discriminate on the basis of genetic information, group health plans cannot base their premiums or employee contributions on the genetic information of employees, including family history. Thus, wellness programs cannot structure incentives or any other aspect of program design around information derived from family history. For example, under GINA a wellness program cannot provide extra premium discounts for regular physicals on the basis that the employees' parents had high blood pressure.

GINA also prohibits wellness programs from collecting family medical history information in HRAs, if completing the HRA, by itself, earns the employee an incentive/reward. Family history is genetic information, and by providing a discount for disclosing genetic information, the wellness program (and the group health plan of which it is a part) bases some of the premium/employee cost-sharing on the collection of that material. Employers can ask for family history information on HRAs only if the prompts are separated and clearly



labeled as purely optional, meaning that the participants still receive the full incentive reward even if they leave the questions completely unanswered.

Conclusion

Wellness programs can produce returns for both employers and participating employees, though they can be a bit of a nuisance to implement. Interested employers should contact their legal counsel and their health and wellness consultant professionals to determine what steps they need to take to properly set up a wellness program that brings maximum returns.

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¹ *This figure will be changing under health care reform. Starting in 2014, employers can provide incentives worth 30%, and the Department of Health and Human Services has the discretion to raise this amount up to 50% of the employee-only premium.*

² *For self-insured plans, employers can rely on the COBRA rate for employee-only coverage to determine the total premium.*

³ *Seff v. Broward County, No. 10-cv-61437 (S.D. Fla. filed Aug. 8, 2010).*