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WELLNESS PROGRAMS: A LEGAL WEB FOR THE UNWARY

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EXPAND YOUR EXPECTATIONS™

ROADMAP

- History and background
- Legal compliance concerns
- Comparison of regulations
- Cost benefit analysis
- Practical tips



HISTORY AND BACKGROUND

According to the Centers for Disease Control and Prevention, a “workplace health program” is a “coordinated and comprehensive set of health promotion and protection strategies implemented at the worksite that includes programs, policies, benefits, environmental supports, and links to the surrounding community designed to encourage the health and safety of all employees.”



HISTORY AND BACKGROUND

COMMON COMPONENTS

- Health risk assessments
- Health screenings
- Workshops on wellness issues/Health Fairs
- Exercise groups/physical activity breaks
- Health and fitness classes
- Smoking cessation classes
- Participation incentives



HISTORY AND BACKGROUND

Q: What Percentage Of Employers Offer Wellness Programs?

A:

- 20%
- 35%
- 50%
- 70%



HISTORY AND BACKGROUND

- 70% of U.S. employers currently offer wellness programs (*2015 Employee Benefits Study, SHRM*)
- 58% increase in the number of wellness programs since 2008
- 75% of U.S. employees have access to workplace wellness programs (2013 RAND Employee Study)

HISTORY & BACKGROUND

REASONS FOR THE RISING POPULARITY

- Increasing Health Care Costs
 - According to the CDC, health insurance premiums for a family of four have increased by 114% since 2000
 - In 2014, average health care costs at large companies were approximately \$11,176 per employee
- ACA
- “Must Have” Benefit

LEGAL COMPLIANCE

- **Which of the Following Laws Do Not Apply to Employer-Sponsored Wellness Programs?**
- A. HIPAA
- B. COBRA
- C. ACA
- D. GINA
- E. SARBANES-OXLEY
- F. ADA



LEGAL COMPLIANCE

HIPAA

ADA

ACA

GINA

COBRA

ERISA

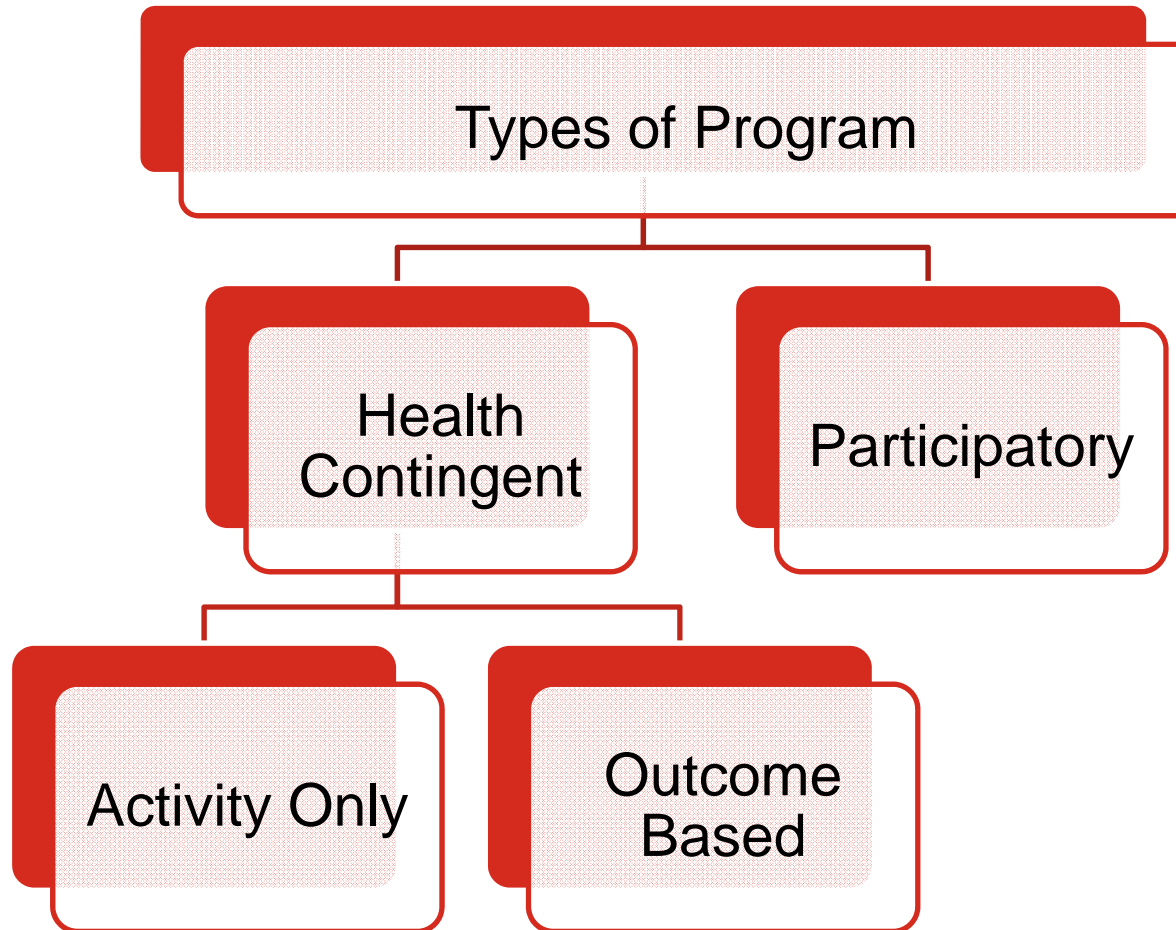
State
Laws

LEGAL COMPLIANCE: HIPAA

- HIPAA prohibits group health plans and insurers from discriminating against participants as to eligibility, benefits or premiums based on a health factor
- 2006 HIPAA regulations created an exception for participation in wellness programs
- ACA amended and expanded the HIPAA nondiscrimination and wellness provisions



LEGAL COMPLIANCE: HIPAA



LEGAL COMPLIANCE: HIPAA

Participatory

- Do not provide a reward, or do not include any conditions for obtaining a reward that are based on satisfying a standard related to a health factor
- Examples: gym membership reimbursements or diagnostic testing that rewards participation but does not base any part of the reward on the outcome
- Little regulation
 - No cap on incentive

Health Contingent

- Require an individual to satisfy a standard related to a health factor in order to obtain a reward
 - *Activity only* - must perform or complete an activity related to a health factor to obtain a reward
 - *Outcome-based* - must attain or maintain a specific health outcome, e.g., certain results on a biometric test
- Must comply with 5-factor test
 - Cap on incentive

LEGAL COMPLIANCE: HIPAA

1. Annual opportunity to qualify for reward

2. Limits on size of reward

3. Reasonably designed to promote health or prevent disease

4. Uniform availability and reasonable alternatives

5. Notice of reasonable alternatives

LEGAL COMPLIANCE: HIPAA

Limits On Rewards for Health Contingent Plans

- Must not exceed 30 percent of the cost of employee-only coverage.
- Must not exceed 50 percent of the cost of total coverage for programs designed to prevent or reduce tobacco use.
- If dependents (such as spouses and/or dependent children) may participate in the wellness program, the reward must not exceed 30 percent (or 50 percent) of the cost of the coverage in which an employee and any dependents are enrolled.

LEGAL COMPLIANCE: HIPAA

The annual premium for employee-only coverage under a group health plan is \$6,000, of which the employer pays \$4,500 and the employee pays \$1,500. The plan offers a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol and blood pressure, with a reward of \$600.

In addition, employees who have used tobacco in the past 12 months are charged a \$2,000 premium surcharge in addition to their contribution to coverage.

Does this reward exceed HIPAA's limits for health contingent wellness programs?

LEGAL COMPLIANCE: HIPAA

No.

Since the total of all rewards (including absence of a surcharge for participating in the tobacco program) is \$2,600 (i.e., \$600 + \$2,000 = \$2,600), the reward does not exceed 50 percent of the total annual cost of employee-only coverage (i.e., \$3,000).

In addition, when tested separately, the \$600 reward for a wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage (\$1,800). Thus, the rewards comply with the wellness program reward limits.

LEGAL COMPLIANCE: HIPAA & ACA

REASONABLE ALTERNATIVE STANDARDS

Activity Based:

- Must be offered to any individual for whom it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard
- Plans can seek physician verification for a request for a reasonable alternative standard unless the need for an alternative is readily apparent

Outcome Based:

- Must be offered to any individual who does not meet the initial standard based on the measurement, test or screening
- If reasonable alternative is another outcome-based wellness standard, the reasonable alternative must allow additional time to comply that takes into account the individual's circumstances
- Must be given the opportunity to comply with the recommendations of their personal physician as a second reasonable alternative standard
- Cannot request physician verification

LEGAL COMPLIANCE: HIPAA

- **ABC Company has a health-contingent wellness plan that provides a 20 percent surcharge on health insurance premiums for tobacco users. Patty Puffer is a long-time smoker who fails the tobacco screening test. The employer should do which of the following:**
 - A.** Charge Patty the 20 percent surcharge because she chooses to smoke
 - B.** Waive the 20 percent surcharge if Patty provides a doctor's excuse which states she is addicted to nicotine
 - C.** Notify Patty of a reasonable alternative, which is her attendance at a 1-hour smoking cessation webinar at no cost to her
 - D.** Waive the 20 percent surcharge only if Patty successfully completes a smoking cessation program that meets nightly for 2 hours for 7 days in a row

LEGAL COMPLIANCE: ADA

If an employer-sponsored wellness program complies with HIPAA and the ACA, the plan also automatically complies with the ADA. **True or false?**



LEGAL COMPLIANCE: ADA

- **False.** The ADA prohibits disability-related inquiries or medical examinations that are not consistent with business necessity. The federal guidance on HIPAA notes that compliance does not necessarily mean the plan does not violate the ADA or other federal laws.
- **EXCEPTION!!** The ADA permits “voluntary” wellness programs that do not require employer participation or penalize employees who do not participate. However, until recently, neither the statute nor the EEOC’s regulations addressed the extent to which incentives might make a program involuntary.

LEGAL COMPLIANCE: ADA

- On April 16, 2015, the EEOC issued a notice of proposed rulemaking to address how the ADA applies to wellness programs
 - 5 key factors
 - Apply only to wellness programs offered as part of a group health plan (both insured and self-insured)
- Comment period ended on June 19, 2015
- The final rule has not been issued

LEGAL COMPLIANCE: ADA

1. Reasonably Designed – not overly burdensome, not pretext for discrimination

2. Voluntary – no requirement to participate, no coverage denial/discrimination, or retaliation for non-participation

3. Maximum incentive – 30 percent of total cost of employee-only coverage

4. Notice and confidentiality requirements – detailed disclosure required

5. No discrimination against disabled employees – must provide reasonable accommodations

LEGAL COMPLIANCE: ADA

HIPAA	ADA
<p>Maximum Incentive:</p> <ul style="list-style-type: none">• 30 percent of total cost of coverage; or• 50 percent to the extent the additional percentage is related to tobacco prevention or reduction• Applies only to health-contingent plans	<p>Maximum Incentive:</p> <ul style="list-style-type: none">• 30 percent of total cost of employee-only coverage• No increase up to 50 percent allowed for tobacco cessation (Note: Mere inquiry about tobacco use allowed)• Applies to health-contingent <u>and</u> participatory plans
<p>Notice:</p> <ul style="list-style-type: none">• Need only disclose the availability of reasonable alternative standard	<p>Notice:</p> <ul style="list-style-type: none">• Clearly explain (i) what medical info will be provided, (ii) who will receive the information, (iii) how the info will be used, (iv) restrictions on disclosure and (v) methods to prevent improper disclosure

LEGAL COMPLIANCE: ADA

Wellness Plan Litigation

- *EEOC v. Honeywell*. EEOC filed a lawsuit in 2014 for ADA and GINA violations based on Honeywell's wellness program.

The EEOC's proposed rule does not address GINA concerns

EEOC says it will address GINA at unknown date in the future

LEGAL COMPLIANCE: ADA

ADA Safe Harbor

-ADA does not prohibit an employer from having bona fide benefit plan based on underwriting risks, classifying risks or administering such risks that are based on or not inconsistent with state law

-11th Circuit held the employer's wellness program fit within ADA "safe harbor" for "bona fide benefit plans"

-EEOC's position: only "clear" safe harbor for wellness program is "voluntary" exception

-EEOC disagrees with *Seff*. It argues reading safe harbor as exempting wellness programs would render the voluntary provision "superfluous"

EEOC'S Proposed Rule

LEGAL COMPLIANCE: GINA

- Prohibits plans and insurers from collecting genetic information for the purpose of "providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program."

Title I of GINA -
applies to health
plans and insurers



- **Wellness Plan Exception.** Employers may collect genetic information as part of a wellness program if **(1)** the employee provides prior, knowing, voluntary and written authorization; **(2)** no penalty for not participating in part of program seeking genetic information; **(3)** only the employee and licensed health care professional or counselor receive individually identifiable information concerning the results of such services; and **(4)** genetic information cannot be disclosed to the employer except in aggregate terms.

Title II of GINA -
applies to employers



LEGAL COMPLIANCE: ERISA

ERISA only applies if wellness program rises to level of “group health plan”

- Group health plan – “an employer-sponsored welfare benefit plan to the extent that the plan provides medical care (...including items and services paid for as medical care) to employees or their dependents directly or through insurance or otherwise.”

Common wellness plan components which may bring plan under “group health plan” umbrella

- Health risk assessments that provide advice and counseling
- Employer-paid immunizations (e.g., flu shots) or employer-paid biometric screenings (e.g., blood pressure screening, BMI, etc.).
- Rewarding employees for participation with a premium discount, or lower cost-sharing (deductible, coinsurance, co-pays, etc.)

LEGAL COMPLIANCE: ERISA

- ERISA's requirements for wellness programs that qualify as group health plans:
 - Plan document
 - Summary plan description and claims procedure
 - Form 5500 filing requirements.
 - NOTE: ERISA requirements are usually satisfied by incorporating the wellness program into an existing plan document for the employer's medical plan, or by creating a separate plan document for the wellness program that incorporates by reference key provisions from the medical plan.


LEGAL COMPLIANCE: COBRA

- **Only applies if wellness programs is a “group health plan”**
- **Issues to consider:**
 - On-site access to program at employer's facilities
 - Evaluation of wellness program for COBRA premium purposes
- **Possible solutions:**
 - Direct access through vendor or third party medical provider
 - Wellness program bundled with insurance plan

LEGAL COMPLIANCE: OTHER LAWS

- ABC Company offers a health-contingent wellness program. The required biometric screening is only offered during the employees' lunch break. Pregnant Polly fails the cholesterol screening, but cannot participate in the reasonable alternative walking program. Older Edmund fails the blood pressure test. His arthritis prevents him from participating in the reasonable alternative walking program.
- **With which laws should the employer be concerned?**

LEGAL COMPLIANCE: OTHER FEDERAL LAWS



ADEA – disparate impact on older employees
Title VII – pregnancy and other protected classes for whom disparate impact health issues apply
FLSA – time spent completing assessments and participating in other wellness program activities
NLRA – wellness programs involve issues subject to collective bargaining

LEGAL COMPLIANCE: STATE LAWS

- Lifestyle Anti-Discrimination Statutes
 - Tobacco protection laws
 - Obesity protection laws
 - Marijuana anti-discrimination laws
- State and Local Anti-Discrimination Laws
- State-supportive Wellness Program Laws
- Federal Preemption
 - Non-ERISA plans

LEGAL COMPLIANCE: RECAP

LAWS	GROUP HEALTH PLAN	NON-GROUP HEALTH PLAN
ACA	X	
HIPAA	X	
ERISA	X	
COBRA	X	
ADA	X	X
GINA	X	X
ADEA	X	X
TITLE VII	X	X
FLSA	X	X
NLRA	X (if unionized)	X (if unionized)
STATE LAWS	Depends on preemption	X

COST BENEFIT ANALYSIS

YOU BE THE JUDGE:

ARE WELLNESS PROGRAMS WORTH
THE TIME, MONEY AND COMPLIANCE
HEADACHES?



COST BENEFIT ANALYSIS

- Wellness Programs = \$6 Billion Dollar Industry – Estimated 500 Vendors
- Less than half of employees who have access to wellness programs participate in them
- Majority of employers believe they are successful. According to RAND's study, only 44 percent have conducted evaluation of program.
- RAND study challenges commonly cited statistic of \$3 ROI for every \$1 spent on wellness program. Study found participation over 5-year period was associated with lower health care costs, but that the annual difference of \$157 was not statistically significant.

COST BENEFIT ANALYSIS

- Statistically significant cost savings from disease management parts of wellness programs
- Not enough studies or data to determine overall effectiveness
- Other benefits of wellness programs
 - Productivity
 - Engage employees in management of care
 - Employee satisfaction
 - Recruitment
 - Corporate image



PRACTICAL TIPS

- Utilize third party vendor, assess whether vendor is a business associate under group health plan
- Offer incentive
- Consider eliminating family health history questions from HRAs
- Consider waiver instead of imposing a reasonable alternative for health-contingent plans
- Until EEOC issues final rule on ADA, cap reward at 30 percent of cost of employee-only coverage

QUESTIONS?

