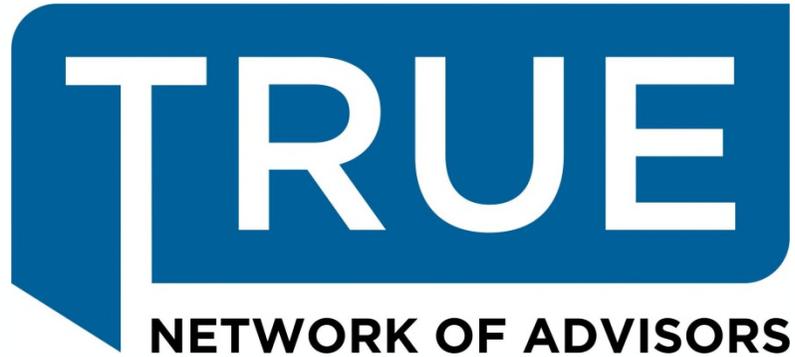


# What's Up with Wellness?

## Compliance Considerations for Wellness Programs

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# AGENDA



- ▼ **HIPAA & ACA Rules for Wellness Programs**
- ▼ **Health-Contingent Wellness Programs**
- ▼ **EEOC Rules**
- ▼ **Additional Compliance Considerations**

# Introduction

- ▼ A wellness program is any program designed to promote health or prevent disease. It may offer only limited benefits (e.g., informational brochures or educational sessions), or it may offer a wide range of benefits (e.g., education, preventive care, and wellness rewards).
- ▼ Stand-alone wellness programs vs. wellness programs tied to group health plans
- ▼ Federal laws that regulate wellness programs:
  - ▼ **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**
  - ▼ **Affordable Care Act (ACA)**
  - ▼ **Americans with Disabilities Act of 1990 (ADA)**
  - ▼ **Genetic Information Nondiscrimination Act of 2008 (GINA)**
  - ▼ Employee Retirement Income Security Act of 1974 (ERISA)
  - ▼ Age Discrimination in Employment Act of 1967 (ADEA)
  - ▼ Title VII of the Civil Rights Act of 1964
  - ▼ Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
  - ▼ Internal Revenue Code (Code)

# Taxation and Wellness Programs

- ▼ Health benefits provided under the wellness program itself (e.g., diagnostic tests) are likely to be tax-free
- ▼ Some rewards—such as lower health plan premiums or additional employer contributions to a health FSA, HRA, or HSA—would be excluded from an employee’s income under Code §§105 and 106 and would not be subject to wage withholding or employment taxes, provided that applicable nondiscrimination requirements are satisfied
- ▼ Other rewards, however—such as cash or cash equivalents (e.g., gift cards or gift certificates)—would be includible in an employee’s income and be subject to wage withholding and employment taxes

# Code-Based Nondiscrimination Rules

- ▼ Rewards that take the form of increased benefits under a major medical plan could raise discrimination issues under Code §105(h)
- ▼ Similarly, rewards that take the form of ER contributions to health FSAs, HRAs, or HSAs could create discrimination or comparability problems
- ▼ Employer contributions made to:
  - ▼ Health FSA or HRA → Discrimination rules under Code §105(h)
  - ▼ Health FSA or HSA offered under a cafeteria plan → Cafeteria plan nondiscrimination testing
  - ▼ HSA offered outside of a cafeteria plan → Subject to comparability requirements.

# Code-Based Nondiscrimination Rules

- ▼ **Consequences of failing various Code-based nondiscrimination requirements:**
  - ▼ **If employer contributions fail cafeteria plan nondiscrimination tests → Certain HCEs or key EEs under the cafeteria plan would be subject to tax**
  - ▼ **If employer contributions fail health FSA/HRA nondiscrimination tests under Code §105(h) → Certain HCEs would be subject to tax**
  - ▼ **If employer contributions made to HSAs outside of a cafeteria plan fail to meet the comparability requirements → Employer would be subject to a 35% excise tax**

# HIPAA/ACA Nondiscrimination Rules

- ▼ HIPAA generally prohibits group health plans from discriminating against participants and beneficiaries as to eligibility, benefits, or premiums based on a health factor
- ▼ Wellness program rules provide exceptions to the HIPAA nondiscrimination requirements if:
  - ▼ The wellness program is provided to similarly situated individuals; and
  - ▼ It is either not related to a health plan, or related to a health plan and the reward is not conditioned on the individual satisfying a standard relating to a health factor.
- ▼ Participatory vs. Standard-Based (“Health-Contingent”) Wellness Programs

# HIPAA/ACA Nondiscrimination Rules

- ▼ **Participatory Wellness Programs**
  - ▼ Either does not provide a reward for participation, or offers a reward, but does not condition the reward on an individual satisfying a standard that is related to a health factor
  - ▼ Participatory wellness programs are permitted under HIPAA nondiscrimination rules as long as they are available to all similarly situated individuals regardless of health status
- ▼ **Health-Contingent Wellness Programs**
  - ▼ Requires that an individual “satisfy a standard related to a health factor to obtain a reward.”
  - ▼ Reward = Obtaining a reward or avoiding a penalty

# HIPAA/ACA Nondiscrimination Rules

## ▼ Five Requirements for Health-Contingent Wellness Programs:

1. Frequency of Opportunity to Qualify
2. Maximum Reward
3. Reasonable Design
4. Uniform Availability
5. Notice Requirement

## ▼ 2013 Regulations also divided health-contingent wellness programs into two subcategories subject to different requirements:

1. Activity-Only
2. Outcome-Based

# Health-Contingent Wellness Programs

- ▼ **Two Categories of Health Contingent Wellness Programs:**
  1. **Activity-Only** → Provides a reward if an individual performs or completes an activity related to a health factor, but it does not require the individual to satisfy any specific health outcome
    - ▼ **Examples:** walking or exercise programs in which a reward is provided just for participation, or rewards for taking a health risk assessment without requiring any further action
  2. **Outcome-Based** → Requires an individual to either attain or maintain a specific health outcome
    - ▼ **Examples:** not smoking or achieving certain biometric screening results

# Five Requirements for Health-Contingent Wellness Programs

1.	Frequency of Opportunity to Qualify	Eligible individuals must be given an opportunity to qualify for the reward at least once per year
2.	Maximum Reward Size	May not exceed 30% of the total cost of employee-only coverage (50% in the case of programs designed to reduce or prevent tobacco use)
3.	Reasonable Design	<p>Reasonable chance of improving the health of or preventing disease in participating individuals</p> <p>It is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease</p>
4.	Uniform Availability	Must provide <u>reasonable alternative standards</u>
5.	Notice Requirements	Must disclose the options to qualify for the reward through reasonable alternative standards

# Health-Contingent Wellness Programs & Reasonable Alternative Standards

- ▼ **Universal Availability → Reasonable Alternative Standards (“RAS”)**
- ▼ **When are RAS required?**
  - ▼ *Activity-Only* → Must allow RAS (or waiver of standard) to an individual for whom the standard is (i) unreasonably difficult, or (ii) medically inadvisable
  - ▼ *Outcome-Based* → Must always allow RAS for individuals who fail to satisfy initial standard
- ▼ **Reasonableness based on facts and circumstances**
- ▼ **Must satisfy the following:**
  - ▼ Time commitment required must be reasonable
  - ▼ Educational program: plan must make educational program available or assist employee in finding such a program and may not require an individual to pay for the cost of the program
  - ▼ Diet program: plan is not required to pay for the cost of food but must pay any membership or participation fee
  - ▼ Accommodate requests of individual’s physician

# When is a Reasonable Alternative Standard *Reasonable*?

- ▼ **Outcome-Based RAS Requirements** → If RAS for outcome-based wellness program is, itself, outcome-based, that “second-level” wellness program must ensure that:
  - ▼ The alternative standard cannot be a requirement to meet a different level of the same standard without additional time to comply
  - ▼ If the individual’s physician joins in the individual’s request for an alternative standard, the physician can be involved in setting (and adjusting) a second alternative standard, consistent with medical appropriateness
- ▼ **When can plan require verification from physician?**
  - ▼ *Activity-Only* → A wellness program may require verification from a physician that an individual’s health factor makes it unreasonably difficult or medically inadvisable to attempt to satisfy the regular standard
  - ▼ *Outcome-Based* → Not for the original applicable standard
    - ▼ May require verification at “second level” if second RAS would be an activity-only wellness program

# Notice of Reasonable Alternative Standards

- ▼ **Wellness rules require that the plan provide notice of the availability of RAS (or waiver of the standard, if applicable)**
- ▼ **Notice must be in all plan materials that describe the health-contingent wellness plan**
- ▼ **Must include contact information for obtaining the RAS**
- ▼ **Must also include a statement that a recommendation of an individual's personal physician will be accommodated**
- ▼ **For outcome-based wellness programs, notice also must be included in any disclosure that an individual did not satisfy an initial outcome-based standard**
- ▼ **ADA and GINA may require additional notices**

# EEOC Regulations (ADA & GINA)

- ▼ ADA & GINA include an exception related to voluntary employee health programs, including wellness programs
- ▼ Includes HIPAA-like confidentiality requirements and safeguard requirements
- ▼ Status of Regulations?
  - ▼ Originally effective for first day of the first plan year that begins on or after January 1, 2017
  - ▼ In 2017, court ordered EEOC to reconsider rules and incentive limits. Effective January 1, 2019, EEOC vacated the incentive sections from its final wellness regulations

# EEOC Regulations (ADA & GINA)

## What is an “employee health program” covered by the regulations?

- ▼ Wellness plan is covered if it includes any **“disability-related inquiries”** or **“medical examinations”**
  - ▼ Including biometric screenings, health risk assessments, and blood tests
- ▼ If no such inquiry/examination, the program is still subject to HIPAA nondiscrimination rules and general ADA/GINA standards
  - ▼ Reasonable accommodation, reasonable alternative standards, HIPAA privacy rules apply if wellness program is a group health plan

# EEOC Regulations – ADA

- ▼ Two relevant rules under the Americans with Disabilities Act (ADA):
  1. No employment discrimination against disabled individuals
  2. Limited circumstances under which employer may make disability-related inquiries or require medical examinations
- ▼ Exception → *Voluntary* medical exams and disability-related inquiries
- ▼ What does it mean for participation to be voluntary?
  - ▼ Pre-2016 guidance: Wellness program is voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate”
  - ▼ Is a program voluntary if the employer provides financial incentives to participate (e.g. lower health plan premiums for those participating in the wellness program)?

# EEOC Regulations – ADA

- ▼ **Voluntary → Must include notice, may not deny access to plan or plan options or otherwise retaliate for not participating, and must comply with the incentive limits described in the rule**
- ▼ **Reasonably Designed → Must be reasonably designed to promote health or prevent disease**
  - ▼ **Not reasonably designed if it collects health information but does not use it to provide follow-up information or advice to individual participants or to design a program that addresses at least some conditions identified in the responses (e.g., a program to help manage diabetes if aggregate information shows that a significant number of employees in the employer's workforce have diabetes)**
- ▼ **Limit on Incentives – Generally, limited to 30% of total cost of self-only coverage (NOT family coverage like other HIPAA rules)**
  - ▼ **Smoking-cessation programs still can go to 50%, but not if it involves a “medical inquiry” (e.g., testing for nicotine)**

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# EEOC Regulations – ADA

- ▼ **Notice Requirement → Employers must provide notice including the following:**
  - ▼ **What medical information will be obtained**
  - ▼ **How the medical information will be used**
  - ▼ **Who will receive the medical information**
  - ▼ **The restrictions on disclosure of the medical information**
  - ▼ **The "methods" the employer will use to prevent improper disclosure of medical information**

# EEOC Regulations – ADA

- ▼ EEOC Sample Notice for Employer-Sponsored Wellness Programs
- ▼ Wellness vendor may issue notice, but employer is liable for any errors
- ▼ Not required to use exact language of sample notice, but notice used must generally include same message/content.
  - ▼ Focus on info that is collected, how it is used, who receives it, and how it is kept confidential
- ▼ Employee must receive notice before providing any health information and timing must provide employee with sufficient time to decide whether to participate in the program

# EEOC Regulations – GINA

- ▼ **Inducements**
  - ▼ Employer may not offer an inducement as part of a wellness program in exchange for genetic information about the employee or children
  - ▼ Okay to offer limited inducement to an employee whose spouse provides current or past health status information as part of a wellness program
  - ▼ Inducements may be financial or in-kind (e.g., premium reduction, time-off awards, prizes, and other items of value)
  - ▼ Same 30% limit as ADA regulations
- ▼ **Authorization** → Employer must obtain prior, knowing, written, and voluntary authorization from the spouse

# EEOC Regulations – GINA

## ▼ Inducements

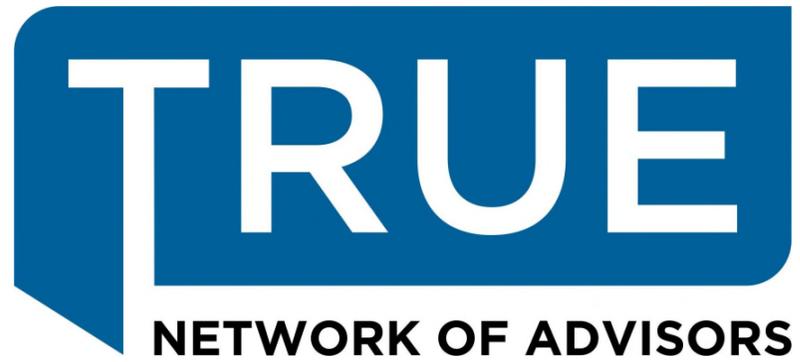
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# **Additional Compliance Considerations for Wellness Programs (and EAPs)**

- ▼ ERISA Considerations**
- ▼ Group Health Plan Requirements**
- ▼ COBRA Considerations**
- ▼ HIPAA Privacy and Security Requirements**



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