Q&A from Assurex Global Webinar "Wellness Regulations & the EEOC Lawsuits"	February 26, 2015
Question	**Answer**
Q: As an incentive, if an ER makes contribution 1st to an EE's HSA account, if none available, then to the EE's FSA account, if none available then as cash, is the FSA contribution a discriminatory incentive because it is a use it or lose it, whereas the others are not?	A: No - as long as the funds deposited in the FSA are treated properly (i.e. use it or lose it), then the fact that the employer contribution is made in this way does not, by itself, make the plan discriminatory under 105(h).
Q: Can you give example of reward for tobacco? are you saying reduction in premium?	A: The most common tobacco-related incentive or reward is to allow a lower contribution to participate in the employer's health plan for employees who do not use tobacco. However, some employers also offer other wellness related incentives (gift cards, rewards, etc.) to employees who are tobacco free.
Q: Currently on our self insured plan we do a 90/10 split on premiums, can we go with 80/20 for smokers and as we move forward go with 80/20 for people not participating in our bio screenings?	A: The total incentive (or penalty) for health-contingent wellness related programs is 30% of the applicable premium, but incentives/penalties for tobacco-related programs can go up to 50% of the premium. However, if you are offering incentives/penalties for both health-contingent and tobacco-related programs, the combined total cannot exceed 50% of the premium.
Q: I have a question about outcome based wellness plans. According to ACA the maximum reward or penalty is 50% if there is a tobacco component based on the cost of employee only coverage. Is cost of coverage limited to how much the insurance company is charging the employer for the employee's coverage? Can the employer impose additional charges or fees to raise the cost of coverage and effectively raise the 50% reward limit?	A: The answer depends a bit on whether the plan is fully-insured or self-funded... - If the plan is fully-insured, the wellness incentive should be set according to the billing rate from the carrier (and not inflated). - If the plan is self-funded, there is a little more flexibility; however, whatever rate is being used for COBRA (based on actuarial estimating and consideration of claims experience) should be used for purposes of setting the wellness incentive as well. The employer should not arbitrarily inflate the rates solely for purposes of setting the wellness incentive.
Q: I have heard about other companies requiring participation in a biometric screening program in order to gain medical benefits for the following year. Does the ADA now restrict this, or entirely disallow it, if it isn't a requirement of the job?	A: The answer isn't clear…however, not allowing participation in the medical plan unless the employee participates in the wellness program does seem less likely to be considered "voluntary"; and if not considered voluntary, would violate the ADA. The EEOC is expected to issue guidance on this subject very soon.

Q: If the program gives a multitude of activity options to received an incentive, some activity, some coaching/lunch learns, but no requirement as to which ones someone does, is it sill health contingent?

A: Not necessarily. A "combined" program may consist of both health-contingent and participatory elements. The limits on incentives will depend on how this is structured. If the employee can earn incentives tied to different elements of the program, then it would be possible to separate the maximum allowed between the health-contingent and participatory elements. However, if there is no way for the employee to earn incentives directly tied to the different parts, then the program should limit its incentives to the maximum allowed for health-contingent wellness programs.

Q: If we have a certain percentage of health participants getting to silver status within our wellness program (taking the bio-metric testing, health assessment, physical activity tracking, etc...) then we get a premium discount for our group plan. We want to offer a fitness device if they reach this status...can we do this?

A: As long as total incentives directly attributable to the health-contingent portion of the program do not exceed the maximum allowed, there is no reason why the employer could not also offer a fitness device bonus. Note that the value of the device should probably be treated as taxable income to the employee.

Q: If you use gift cards or cash considered a taxable benefit that needs to be taxed with payroll?

A: Such incentive would not need to comply with HIPAA requirements as it does not affect the group health plan, but any such incentive would be taxable.

Q: If your health assessment is administered by a TPA, is there an issue with asking family history?

A: Who administers the health assessment does not fundamentally change the rules. Asking certain types of family history questions can still pose a problem with GINA rules regardless of who is administering the HRA.

Q: In your premium example the percentage is based on employer/employee total premium a month. Correct?

A: Correct. When determining 30% (or 50% for tobacco) of the premium for purposes of the maximum wellness incentive allowed for a health-contingent wellness program, the total premium (both the employer and employee contribution) is considered.

Q: Is a health baseline (physical) for voluntary participants permissible?

A: Generally, yes. Assuming an incentive affecting the group health plan is provided in exchange for having a physical done, it would fall under the HIPAA rules for a participatory wellness program. Such programs must be considered "voluntary", but otherwise are generally okay so long as they are made available to all similarly situated individuals.

Q: Is the 30% and 50% cost limitation for wellness incentives based on employee premium, or employee + employer premium?

A: The incentive limit is based on Employee + Employer contributions (the total premium amount).

Q: Our Wellness Plan's incentives are not heath insurance based the incentives are gift cards, hrs. off work, money, or gifts for reaching a goal are we required to not exceed the 30% or 50% of the employee cost of health insurance	A: No. Such incentives do not affect the group health plan and therefore are not subject to the various HIPAA requirements.
Q: The difference between participatory vs health contingent...where is this difference relevant?	A: Participatory wellness programs generally meet HIPAA requirements so long as the program is available to all similarly situated individuals, while health-contingent wellness programs must meet additional requirements (i.e. subject to incentive limitations (30% for non-tobacco-related and 50% for tobacco-related), required to provide a reasonable alternative standard).
Q: What about a $50 per month penalty (surcharge) on premium for smoking?	A: A wellness incentive related to tobacco use may be up to 50% of the regular premium (including both the employer and employee contribution). In other words, if the monthly premium is $100, a tobacco user could be charged up to $150.
Q: What about being rewarded (reimbursement for a fitness device) for reaching a certain status based on participation.	A: This is a common type of reward. However, generally the value of the device must be treated as taxable income to the employee.
Q: What about completes wellness requirements in 2015, to get a $125 reduction on their deductible for 2016 year (complete wellness program in 2015 to earn an incentive for the following year (2016)?	A: This is also a common wellness approach.
Q: When using the surcharge for tobacco use, can that surcharge be used to offset the coverage cost of non-tobacco users?	A: This is a very complex ERISA issue related to use of participant contributions, which are a form of plan assets; so before an employer attempts to directly link participant contributions to anything, they should seek the advice of ERISA counsel. However, for most employer-sponsored group health plans, this is a moot point. Most employers do not hold plan assets in trust. Rather, employee contributions are simply deposited into the employer's general assets and then the employer pays for the cost of the plan from those general assets. Under this typical arrangement, there is no direct link between one participant's contributions and another's.

Q: Our wellness program offers free health insurance to our employees (employee pays no premiums, only deductible) if they meet quarterly requirements (points based system). We require participants in our wellness program to complete an annual HRA and biometric screening in order to participate, but the company does not receive the individual results or require employees to provide those results to us. Would this be considered a violation? Is our wellness program at risk?

A: Without more information on the details of the plan, it is impossible to state if there is any risk in a particular arrangement. However, based on recent EEOC enforcement efforts, any plan that requires completion of various wellness programs to allow participation in the employer's health plan may be at risk of being considered involuntary. The EEOC is expected to release regulations on this issue very soon.

Q: Being that our voluntary wellness program offers free health insurance to employees, we also provide a reduced rate for spouses who participate in our program. Would this be considered as having gone over the 30% program incentive? We are a fully insured company. Individuals that choose not to participate in our wellness program must pay the full premium costs.

A: The 30% incentive limit may be based on the family premium if family members are required to participate in the wellness plan. And remember the 30% limit only applies to the health-contingent elements of the program. Without more details on the specifics of the incentive we cannot comment on this particular program.