



# Wellness Program Compliance

Benefit Advisors Network

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Stacy Barrow

[sbarrow@marbarlaw.com](mailto:sbarrow@marbarlaw.com)

(617) 830-5457

# Agenda

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## **Wellness Programs under HIPAA and the Affordable Care Act**

- HIPAA Nondiscrimination Rules
- Wellness Program Basics
- Participation-Based Plans
- Health-Contingent Plans
  - Activity-Only
  - Outcome-Based
- Reasonable Alternative Standard Requirements

## **EEOC Regulations on Wellness Programs**

- Americans with Disabilities Act
- Genetic Information Nondiscrimination Act

# Wellness Programs: *Background*

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- 1996:** HIPAA adds Part 7 of ERISA to counter certain discriminatory practices by plans and carriers
- 2001:** DOL, IRS and HHS jointly issue interim final nondiscrimination rules and proposed regulations for wellness programs
- 2006:** DOL, IRS and HHS jointly issue final regulations on group health plan nondiscrimination provisions and wellness programs
- 2009:** EEOC issues two informal discussion letters on “voluntary” incentives
- 2010:** ACA codifies the wellness regulations
- 2012:** As required by the ACA, the DOL, IRS and HHS jointly release proposed regulations expanding wellness programs
- 2013:** Final regulations released increase the 20% cap on rewards to 30% (50% if the wellness program includes tobacco cessation)
- 2015:** EEOC releases Proposed Regulations on wellness programs
- 2016:** EEOC releases Final Regulations on wellness programs under ADA and GINA
- 2017:** Federal court in Washington, DC vacates EEOC’s wellness incentive regulations 1/1/2019

# HIPAA Nondiscrimination: *General Rules*

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**Individuals cannot be denied eligibility for benefits or charged more for coverage because of any “health factor,” including:**

- Health status
- Medical condition (both physical and mental)
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Evidence of insurability
- Disability

# HIPAA Nondiscrimination: *General Rules*

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## Source of Injury

- Plan may exclude/limit coverage for high-risk activities (e.g., bungee jumping) – BUT may not exclude an individual from enrollment for coverage due to individual's participation in such high-risk activities
- If injury results from medical condition or act of domestic violence, a plan may not deny benefits for the injury (if plan otherwise covers such injury)
  - Example: Plan that covers medically necessary hospital stays but excludes self-inflicted injuries must cover injuries from a suicide attempt resulting from depression because the injuries arose from a medical condition (depression)

# HIPAA Nondiscrimination: *General Rules*

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## Uniform Application

- Plans can exclude/limit benefits as long as applied on a uniform basis for all “similarly situated individuals” and not directed at individual participants based on a health factor
- Plan amendments that apply to all individuals in a group of similarly situated individuals and that are effective no earlier than the first day of the next plan year after the amendment is adopted is not considered to be directed at individual participants

# HIPAA Nondiscrimination: *General Rules*

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## Similarly Situated Determinations

- Distinctions among groups must be based on bona fide employment-based classifications consistent with employer's usual practice – NOT health factors:
  - Part-time and full-time
  - Geographical location
  - Dates of hire and length of service
  - Different groups can have different eligibility, benefits and cost provisions
  - Participants and their beneficiaries may be in different groups

# HIPAA Nondiscrimination: *General Rules*

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## Permitted Reverse Discrimination

- Nothing prevents a plan from establishing more favorable rules for eligibility for benefits for individuals with adverse health factors
- Example: Plan may waive cost sharing (e.g., copay) for prenatal doctor visits
- A plan may charge higher premiums for individuals with adverse health factors only if such individuals would not otherwise be eligible for coverage were it not for the adverse health factor



# Wellness Programs: *Basics*

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- Wellness programs are designed to promote health and prevent disease, and provide group health plans an exception to HIPAA's nondiscrimination rules
- Examples of common wellness programs include:
  - Blood pressure and cholesterol screenings
  - Smoking cessation programs
  - Weight-loss programs
- A typical disease management program might target individuals who have or are at risk for developing diabetes and make case managers available to them to monitor compliance with medication protocols
- Both wellness and disease management programs are often structured to provide a financial reward for participating

# Wellness Programs: *Basics*

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- “Rewards” can be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), ***the absence of a surcharge,*** or the value of a benefit that would otherwise not be provided under the plan

# Wellness Programs: *Basics*

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- Are all employment-based wellness programs subject to the HIPAA nondiscrimination rules?
- **No** – many employers offer a wide range of programs to promote health and prevent disease
  - Some employers provide or subsidize healthier food choices in the employee cafeteria, provide pedometers to encourage employee walking and exercise, pay for gym memberships, or ban smoking on employer facilities and campuses
- A wellness program is subject to ERISA (and therefore the HIPAA nondiscrimination rules) only if it is, or is part of, a group health plan
  - For example, rewards are in the form of premium reductions
- Wellness programs operated as an employment policy may be covered by other Federal or State nondiscrimination laws (like the ADA and GINA), but they are not subject to ERISA

# Wellness Programs: *Subject to HIPAA*

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- When a wellness program is, or is part of, a group health plan, it will fall into one of three categories under final DOL regulations:
  - Participation-based
  - Health-contingent (activity-only)
  - Health-contingent (outcome-based)

# Wellness Programs: *Participation-Based*

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- **Participation-based** programs do not condition a reward upon satisfaction of a standard related to a health factor
- They are **NOT** subject to any additional requirements (other than that they must be offered to all similarly situated employees):
  - Program that reimburses costs of fitness center membership
  - Diagnostic testing program that provides reward for participation
  - Program that encourages preventive care through waiver of co-payment/deductible for certain activities
  - Program that reimburses employees for the costs of smoking cessation programs without regard to whether employees quit
  - Program that provides reward for attending monthly health education seminar
  - Completion of an HRA without any further action (educational or otherwise) required by employees as a result of issues identified by the HRA

# Wellness Programs: Health-Contingent

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- Health-contingent wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward (or require an individual with a health factor to undertake more than an individual without a health factor to obtain the same reward)
- A health-contingent wellness program may be an **activity-only** wellness program or an **outcome-based** wellness program
- Health-contingent wellness programs must satisfy the following:
  1. Participants must have opportunity to qualify at least once per year
  2. Reward must not exceed **30%** of cost of single coverage (or family coverage, if dependents may participate in the program)
    - **50%** for tobacco use prevention or reduction programs
  3. Be reasonably designed to promote health or prevent disease
  4. Reward must be available to all similarly situated individuals
  5. Availability of a reasonable alternative standard must be disclosed

# Wellness Programs: *Activity-Only*

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- An **activity-only** wellness program is a type of health-contingent wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome
- Examples include walking, diet, or exercise programs, which some individuals may be unable to participate in or complete (or have difficulty participating in or completing) due to a health factor, such as severe asthma, pregnancy, or a recent surgery

# Reasonable Alternative Standard

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When is an activity-only wellness program available to all similarly situated individuals?

- When it allows a “reasonable alternative standard” (or waiver of otherwise applicable standard) to qualify for the reward, if:
  - It is unreasonably difficult for an individual to satisfy the applicable standard because of a medical condition, or
  - It is medically inadvisable for an individual to attempt to satisfy the standard
- An **activity-only** wellness program may seek verification from the individual’s physician that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the standard, **if it is reasonable to do so**



# Wellness Programs: *Outcome-Based*

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An outcome-based wellness program is a type of health-contingent wellness program that requires an individual to attain a specific outcome (such as not smoking or attaining certain results on biometric screenings) to obtain a reward

- For example, a biometric screening tests for high cholesterol, high blood pressure, abnormal BMI, or high glucose level
- Plan rewards those within a normal or healthy range for these medical conditions or risk factors, while those who are “at risk” must take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan, complying with a walking or exercise program, or complying with a health care provider's plan of care) to obtain the same reward
- This program is an outcome-based wellness program

# Reasonable Alternative Standard

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- When is an **outcome-based** wellness program available to all similarly situated individuals?
  - When it allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test, or screening
- An **outcome-based** wellness program **may not seek verification** from the individual's physician that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the applicable standard **as a condition of providing a reasonable alternative standard**
  - It may seek verification that an **activity-based** alternative standard is unreasonably difficult or medically inadvisable, if it is reasonable to do so

# Reasonable Alternative Standard

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**All facts are considered when determining whether a plan has furnished a reasonable alternative standard (RAS), including:**

- If RAS is completion of an educational program, plan must provide (or assist the employee in finding) the program, and must pay for its cost
- Time commitment required must be reasonable (e.g., requiring attendance nightly at a 1-hour class would be unreasonable)
- If RAS is a diet program, the plan is not required to pay for the cost of food but must pay any membership or participation fee
- If an individual's physician states that standard is not medically appropriate, plan must provide a reasonable alternative standard that accommodates the physician's recommendations
  - Plan may impose standard cost sharing for medical items and services furnished pursuant to the physician's recommendations

# Reasonable Alternative Standard

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Special rules apply if the RAS itself is an outcome-based wellness program:

- The RAS cannot be a requirement to meet a different level of the same standard without additional time to comply
  - For example, if the standard is to achieve a BMI less than 30, the alternative cannot be to achieve a BMI less than 31 on that same date
- Plan must permit an individual opportunity to comply with the recommendations of his/her personal physician as a second alternative to meeting the plan's alternative
  - The individual may obtain a personal physician's recommendations at any time

# Revised Notices of Availability

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- Final regulations provide new model disclosure language that is easier to understand and increases the likelihood that those who qualify for a different means of obtaining the reward will contact the plan
- Must be included in all plan materials referencing the wellness program
- DOL has been focusing on the disclosure of the reasonable alternative standard language when required

# Revised Notices of Availability

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- Final regulations effective provide new model disclosure language that is easier to understand and increases the likelihood that those who qualify for a different means of obtaining the reward will contact the plan
  - “Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.”

# Revised Notices of Availability

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- Additional model disclosures are included in the final regulations
  - “Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you to find a Health Smart program that is right for you.”
  - “Fitness is Easy! Start Walking! Your health plan cares about your health. If you are overweight, our Start Walking program will help you lose weight and feel better. We will help you enroll. (\*\*If your doctor says that walking isn’t right for you, that’s okay too. We will develop a wellness program that is.)”
  - “Stop smoking today! We can help! If you are a smoker, we offer a smoking cessation program. If you complete the program, you can avoid this surcharge.”

# Wellness Programs: *EEOC Regulations*

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- On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) released final regulations under the ADA and GINA
  - Rules generally allowed a 30% incentive for participation in wellness
  - ADA rules cover an employer’s requests for health information on employees; GINA rules cover requests for health information on family members
- Final regulations were effective for plan years beginning on or after January 1, 2017, and they apply to all workplace wellness programs, even if they don’t require participation in a particular health plan
  - The 30% incentive limits established under these regulations were vacated effective 1/1/19; however, the rest of the regulations remain in effect



# Wellness Programs: *EEOC Regulations*

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## Tobacco Cessation Programs

- Rules confirm that tobacco cessation programs that do not request any medical information from employees are not covered by the ADA
- For example, a wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program) is not a wellness program that asks disability-related questions
  - Would generally be covered by the DOL's 50% limit for outcome-based wellness programs
  - If the program includes a medical exam or inquiry, such as biometric screening or cotinine testing, then it will be subject to the EEOC limit as well

# Wellness Programs: *EEOC Regulations*

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## Incentives for Spouses and Children

- Final GINA regulations limit incentives for spouses to provide health information to a wellness program to 30% of the cost of self-only coverage
  - GINA incentive limits were also vacated effective 1/1/19
- GINA prohibits an employer from providing any incentives for an employee's children (minor or adult, natural or adopted) to provide information to a wellness program
- Employers cannot provide incentives for spouses to undergo genetic testing
  - only information about a spouse's "manifestation of disease or disorder" may be obtained
    - For example, spouses may be induced to answer questions related to weight or blood pressure, or whether they have diabetes

# Wellness Programs: *EEOC Regulations*

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## HRAs and Biometric Screening

- Wellness is an important component of the ACA; however, someone neglected to tell the EEOC
- Under DOL rules, employers may require employees to complete an HRA and biometric screening in order to be eligible to enroll in benefits, as long as the results are not used to delay or deny eligibility
- EEOC rules specifically prohibit an employer from denying access to the plan or a particular benefit option if an employee or spouse declines to participate in a wellness program that includes a medical exam or inquiry

# Wellness Programs: *EEOC Regulations*

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## Tips for a GINA-Compliant Spousal HRA

- GINA does not prohibit employers from offering spouses an incentive to complete an HRA; however, spouses must be informed that they will receive the incentive whether or not they answer questions about the manifestation of disease or disorder
  - HRA must be reasonably designed to promote health or prevent disease
  - Spouses must provide prior, knowing, voluntary, and written authorization
  - HRA must be administered in connection with the spouse's receipt of healthcare offered by the employer (including wellness program);
- Vendor cannot share individually identifiable information with the employer (other than to administer the program) except in aggregate

# Wellness Programs: *EEOC Notice Rule*

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## **EEOC Model Notice for ADA Disclosure**

- Notice requirement under ADA for employers that collect employee health information under a wellness program
- Notice must inform employees regarding:
  - What information will be collected;
  - How it will be used;
  - Who will receive it; and
  - What will be done to keep it confidential
- Employers do not have to use the precise wording in the model
  - EEOC notice is written in a way that enables employers to tailor it to the specific features of their wellness programs

# EEOC and the Courts

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## *EEOC v. Flambeau Inc., and Seff v. Broward County, FL*

- Courts in *Flambeau* and *Seff* held that the ADA’s “insurance safe harbor” provision applies to wellness programs in a way that allows employers to penalize employees who do not answer disability-related questions or undergo medical examinations (e.g., employees who refuse to complete an HRA and/or biometric screening)
- EEOC believes both cases were wrongly decided
- EEOC rejects the idea that the safe harbor could apply to employer wellness programs, since employers are not using information in a manner required by the safe harbor
  - Final rules explicitly state that the safe harbor provision does not apply to wellness programs even if they are part of an employer’s health plan

# EEOC and the Courts

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## *EEOC v. Orion Energy Systems*

- Employees had to complete HRA and use Range of Motion machine
- Employee refused to participate and was required to pay 100% cost of medical coverage
  - If employee had participated, employer would have paid 100% of premium of coverage
  - Employee was later terminated
- In September 2016, the court in Orion agreed with the EEOC that the ADA's safe harbor did not apply to Orion's wellness program, but concluded that it was still voluntary
  - EEOC hadn't yet drafted regulations specifying 30% limits

# EEOC and the Courts

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## *AARP v. EEOC*

- August 2017 – Federal court orders EEOC to reconsider its limits placed on wellness incentives under the ADA and GINA
  - Court agreed with the AARP that the EEOC failed to substantiate how the 30% limits ensured the plan remained “voluntary” as required under ADA & GINA
- September 2017 – EEOC advised the court that anticipated effective date of further rulemaking would be 2021
- December 2017 – Court vacated 30% incentive limits effective 1/1/19
  - In October 2018, EEOC anticipated June 2019 for proposed regulations



# EEOC and the Courts

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## *Kwesell, Turecek, and Schwartz, et. al., v. Yale University*

- Class action filed July 16, 2019, brought by individual employees of Yale U. along with the AARP Foundation
- Alleges that Yale's wellness program requires approximately 5,000 union employees and their spouses to submit to medical tests and to allow release of their insurance claims data to wellness vendors
  - Employees who don't participate are penalized \$1,300 per year (\$25/paycheck)
  - Is it voluntary, or voluntary in theory?

# What to do in the Meantime?

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- Design wellness plans that don't tie incentives to medical exams or disability-related inquiries?
  - Employers could avoid potential exposure by tying incentives to activities such as tobacco user surcharges with no medical testing, participatory programs such as health seminars or gym use, and activity-based programs such as walking challenges
- Wellness programs designed to comply with existing rules, specifically the 30% cap, are unlikely to be challenged by the EEOC
  - Previous EEOC enforcement action targeted very aggressive plans with incentives far outside of the 30% limit
- Continue to monitor developments



# Questions?

Stacy Barrow

[sbarrow@marbarlaw.com](mailto:sbarrow@marbarlaw.com)

(617) 830-5457

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