



Compliance for Wellness Plans
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Today's Speaker



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Two Sets of Wellness Plan Rules

HIPAA

Nondiscrimination rule applies to any wellness incentive plan that is part of, or is itself, a group health plan.



ADA/GINA

Apply to any wellness incentive that requires a medical exam or disability related questions. Administered by EEOC.



Any incentive plan may be subject to one, both, or neither set of rules

Neither: steps program open to all employees w/ no incentive

HIPAA only: tobacco premium surcharge with affidavit

Both: outcome-based incentives based on biometric screening



HIPAA Rules

When is a wellness plan a group health plan?

When it provides “medical care”

- Amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease
- Amounts paid for the purpose of affecting any structure or function of the body
- Amounts paid for transportation primarily for and essential to medical care referred to in first two bullets
- Amounts paid for insurance covering medical care referred to in first two bullets
- Examples:
 - biometric screenings (including cholesterol screenings), physical examinations, flu shots, counseling by trained professionals, and other programs that are diagnostic or preventive, or coach individuals regarding specifically identified health risks



HIPAA General Rule

Group health plans prohibited from differentiating eligibility, cost of coverage or benefit levels based on health status, except:

- Wellness programs that either affect the group health plan (through reductions in cost or increased employer contributions) or create a group health plan, if requirements based on type of program are met.
- Participatory Program— not tied to achieving a particular outcome/result and not activity-related
- Health-Contingent Program— tied to a particular outcome/result or activity-related
 - Includes programs where health status may prevent participation (walking programs, vaccination clinics, requiring certain testing results, tobacco surcharges)



Requirements for Health-Contingent Plans

- Participants must be given an annual opportunity to qualify for the reward
- Max incentive/penalty cannot exceed 30% of total cost of coverage (50% for tobacco-related programs)
- Program must be reasonably designed to promote health or prevent disease, must not be overly burdensome or a subterfuge for violating discrimination laws
- Reward must be available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard (RAS)
- Program must disclose the availability of a RAS in all plan materials describing the terms of the wellness program



Incentive Limits

Limit is based on the total cost of coverage or premium (both ER and EE contribution)

- If only EE eligible for incentive, calculation based on total cost of single coverage
- If family members eligible for incentive, calculation based on tier of coverage EE enrolls in

Multiple incentives for meeting different program requirements are aggregated for incentive limit

- Mix of tobacco and non-tobacco incentives, the non-tobacco combined cannot exceed 30% and combination of all health-contingent incentives cannot exceed 50%



Reasonable Alternative Standard

Outcome-Based Programs

RAS must be available to anyone who cannot achieve the original standard

Activity-Based Programs

RAS must be available to anyone for whom it is unreasonably difficult due to health status or medically inadvisable

All Programs

RAS flexible
OK to ask for medical provider verification
“Reasonable” facts & circumstances test



Facts and Circumstances

- If RAS is the completion of an educational program, ER must make the program available or assist the employee in finding such a program and cover the cost.
- If RAS is a diet program, ER is not required to pay for the cost of food but must pay any membership or participation fee.
- Time commitment required must be reasonable.
- If EE's physician states that a plan standard is not medically appropriate for that individual, the plan must provide a RAS that accommodates the recommendations of the physician.
 - Plans may impose standard cost-sharing under the plan for medical items and services furnished pursuant to the physician's recommendations.



Notice of RAS

Availability of RAS must be communicated in all wellness-related materials

DOL sample language:

Your health plan is committed to helping you achieve your best health. 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 (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.



HIPAA and Disease Management Programs

Informal guidance

- Plan should follow requirements for health-contingent wellness program
- Participation likely satisfies RAS requirement if program requirements are reasonable and condition doesn't prevent individual from participating
- Incentive/penalty shouldn't exceed 30% of total cost of coverage



HIPAA and Tobacco Surcharges

Recent wave of litigation– defendants losing motions to dismiss

- Bokma v. Performance Food Grp.
- Mehlberg v. Compass Group
- U.S. Secretary of Labor v. Macy's

Tobacco surcharge for monthly medical plan premium is a health-contingent wellness program

- ER needs to provide adequate notice of RAS
- ER needs to provide the full incentive for the plan year for those who satisfy the RAS



HIPAA Wellness Plan Rules

	Participatory	Activity Only	Outcome Based
Available to similarly situated participants	✓	✓	✓
Annual Qualification	✗	✓	✓
Reward Limits	✗	✓	✓
Reasonable Alternative Standards (RAS)	✗	✓	✓
Notice Requirements	✗	✓	✓
Reasonably Designed	✗	✓	✓



Common Errors Regarding RAS

Employer offers a tobacco incentive without offering an RAS

How to avoid:

- All outcome-based incentives, including tobacco-use surcharges or rewards, require a RAS, regardless of medical necessity.
- RAS: An alternative means by which an employee can earn the full reward or avoid the surcharge
 - For tobacco related programs, most common RAS is completing a tobacco cessation program



Common Errors Regarding RAS

Availability of RAS not adequately disclosed

How to avoid:

- Written materials describing terms of outcome-based wellness program as well as any notice informing participant they did not meet the initial standard must include a notice that participant can earn the incentive by completing a RAS and who to contact for information on how to do so.
- Benefit guides, tobacco affidavits, OE presentations, etc.
- Notice not required in materials that merely mention the existence of an incentive program



Common Errors Regarding RAS

Not recognizing what constitutes completing the RAS

How to avoid:

- In the case of tobacco related incentives, employee merely needs to complete the tobacco-cessation program.
- Requiring the employee to successfully quit tobacco use in order to earn the reward or avoid the surcharge is not a “reasonable” alternative standard.
- Employee can be required to complete the cessation program every year to earn the reward or avoid the surcharge.



Common Errors Regarding RAS

Not providing full incentive if the employee completes the RAS

How to avoid:

- The employee must receive the full annual incentive if they successfully complete the RAS.
- If the employee does not complete RAS until after the start of the plan year and employer has been charging the surcharge in the interim, the employer must refund the surcharge paid to date as well as discontinue the surcharge going forward.
- Employer can set reasonable deadline for completing RAS.
 - With adequate planning and advance communication, employer can require cessation program be completed before the start of the plan year so there is no possibility of refunds.



ADA & GINA

ADA, GINA, and Wellness Programs

Both laws generally apply when wellness plan involves medical exams, disability-related questions, or the collection of the employee's genetic information

- Administered by EEOC
- Details of rules have been in flux for years → uncertainty



ADA and Wellness Programs

- ADA restricts when an employer may make disability-related inquiries or require medical examinations
 - Allowed so long as the program is considered voluntary
- Requires ER provide reasonable accommodations for those with a disability



GINA and Wellness Programs

- Defines “genetic information” broadly, to include information about the manifestation of a disease or disorder of a family member, including spouse or children
- Prohibits ER from conditioning eligibility or on providing financial incentives for the provision of EE’s genetic information
 - No incentives tied to EE providing genetic information
- Requires ER to obtain written authorization to solicit genetic information about EEs
 - Must describe the type of genetic information that will be obtained and the general purposes for which it will be used
 - Must describe the restrictions on disclosures of genetic information



EEOC Wellness Program Requirements

- EEs opting out cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation
- Program must be reasonably designed to promote health or prevent disease, must not be overly burdensome or a subterfuge for violating discrimination laws
- Information collected may be provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan.
- Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record.
- Reasonable accommodation required if a disability or medical condition prevents individual from participating or earning an incentive.
- Cannot require participants to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections in place under the ADA or GINA as a condition for participating or receiving an incentive.



Confidentiality Notice

- Required under EEOC rules
- Must include a description of the medical information collected, who will have access to it, and how it will be used and kept confidential
 - Signatures of acknowledgement are required for participating spouses
- EEOC sample notice:

<https://www.eeoc.gov/regulations/sample-notice-employer-sponsored-wellness-programs>



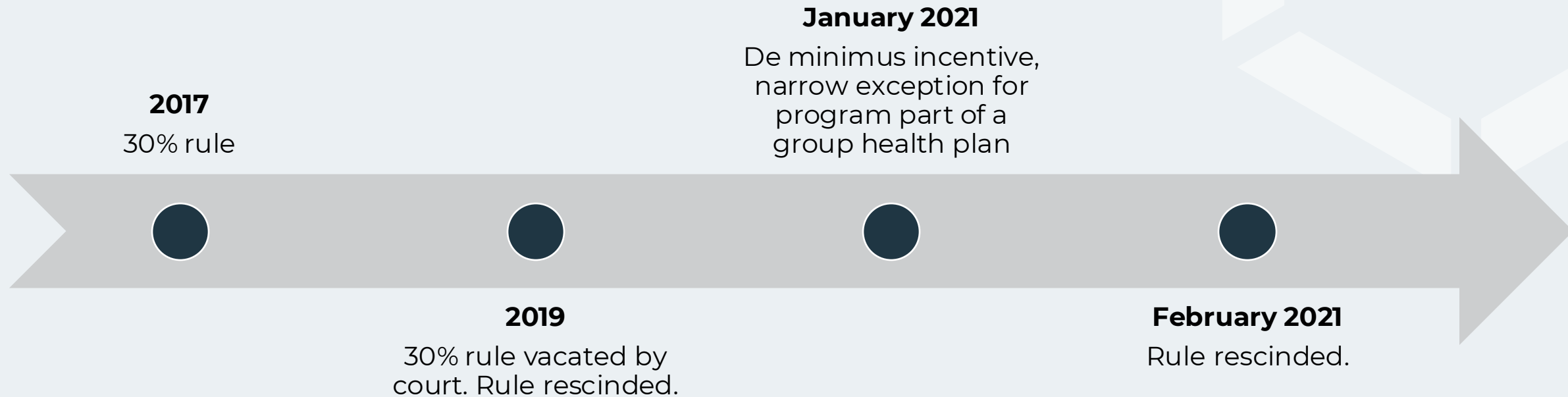
Incentive Limits?

There **are** limits on the incentive that can be offered in a wellness plan, based on the ADA and GINA

- Too much = coercive/not voluntary
- **No clear guidance** as to what level of incentive may be tied to a wellness program involving medical examinations, disability-related questions, or the collection of an employee's genetic information



Incentive Limits– Rulemaking Timeline



EEOC and Incentive Limits

What to do with uncertainty?

- Conservative approach is to offer little to no incentive tied to medical testing, disability-related questions or the collection of genetic information.
- Many employers are comfortable with an incentive limit up to 30%
- Could continue to offer incentives for participating in medical testing or answering disability-related questions, but to offer a menu of options or alternatives for earning the incentive that do not involve medical testing or disability-related questions



EEOC and Tobacco Surcharges

- Tobacco-related wellness program that merely asks whether an individual uses tobacco does not fall under the ADA
 - Max 50% incentive under HIPAA applies
- If program involves medical testing to verify presence of nicotine, EEOC rules would apply
 - Uncertain incentive limit



Taxation of Wellness Plan Incentives

Includable in Employee's Taxable Gross Income

- IRS Memorandum No. 201622031 issued May 27, 2015
- Employer-provided cash rewards (and cash equivalents) and nonmedical care benefits (like payment of gym membership fees) for participating in a wellness program.
 - No "de minimus" exception for cash and cash equivalents
 - De minimus trinkets ok
- Reimbursements of premiums for participating in a wellness program if the premiums were originally made by salary reduction through a Section 125 cafeteria plan.



"Fixed Indemnity" Wellness Plans

- IRS Chief Counsel Advice (CCA) 202323006 issued on May 9, 2023
- Plan had monthly premium paid entirely by employees through Section 125 plan
- Plan offered two types of benefit:
 - \$1000 if employee participates in specified health or wellness activity, capped at one payment per month
 - Payment for each day the employee is hospitalized
- Insurance company pays benefit payments to employer, which pays them to employees through payroll
- Payments to employees were taxable wages, subject to FICA and FUTA



Summary

5 Questions

1. Is wellness plan part of or itself a group health plan? --> HIPAA
2. Is group health plan activity or outcome-based? --> RAS
3. Is there an incentive? --> HIPAA
4. Is there an incentive based on medical exam or disability-related questions? --> EEOC rules (arising out of ADA and GINA)
5. Is the incentive cash or cash equivalent? --> IRC



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Thank you!