



Workplace Wellness Plan Rules – Compliance for 2019

Presented by: Insure NW



Agenda

- Wellness Plan Overview
- HIPAA Nondiscrimination
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- Tax Rules for Incentives
- Compliance with Other Federal Laws (ERISA, COBRA, HIPAA Privacy)

Overview 

Wellness Plan Design



Educational programs



Health-related activities



Health risk assessment (HRA) or medical tests

Wellness plans come in a wide variety of forms

- Overall goal is to improve employee health and decrease health-related costs
- Plan's design determines which federal laws apply

➤ Three Main Federal Laws

HIPAA

- Cannot discriminate against individuals based on health factors
- Special rules for wellness plans that **provide medical care or are related to group health plans**

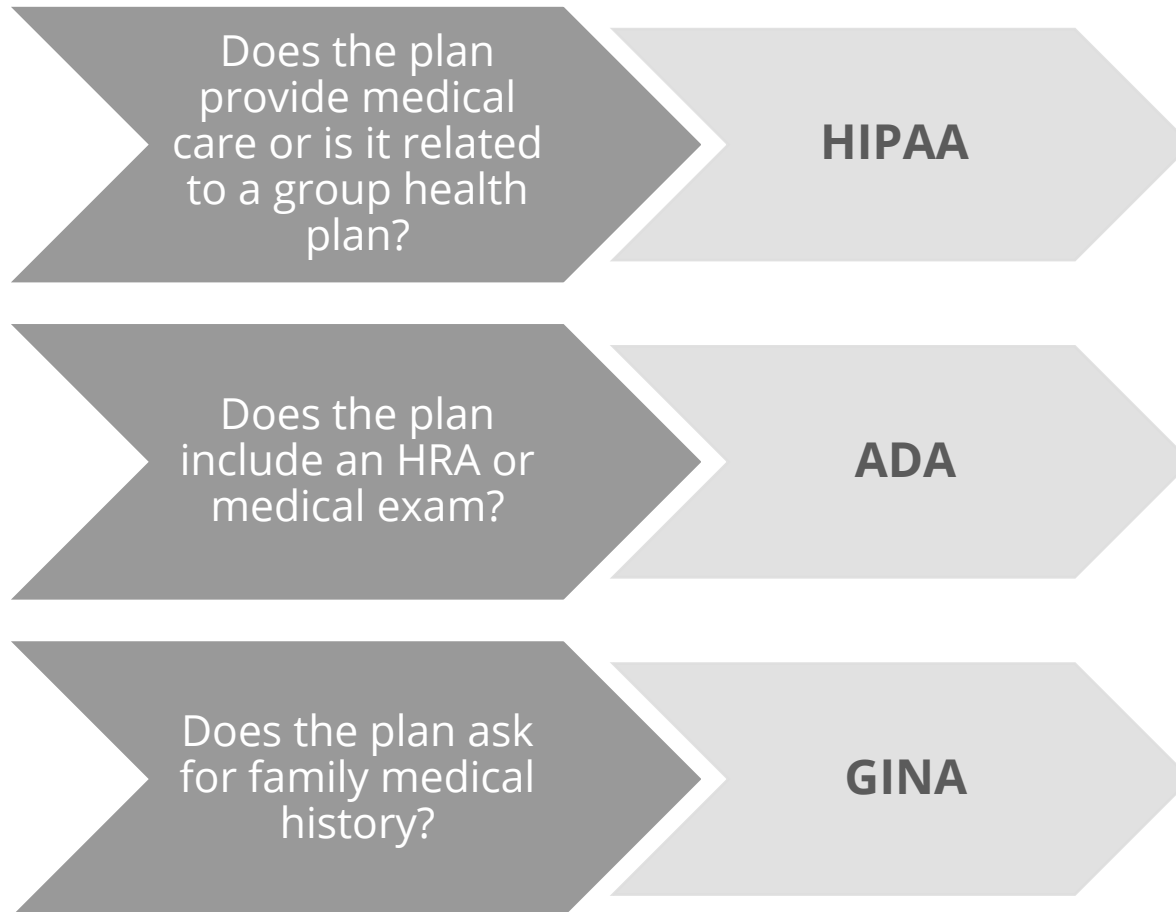
ADA

- Cannot discriminate against individuals with disabilities
- Special rules for wellness programs that **include medical exams or ask for health information**

GINA

- Cannot discriminate based on genetic information
- Restrictions apply to wellness programs that request genetic information – for example, **family medical history**

➤ Looking at Plan Design



HIPAA Nondiscrimination >

➤ Key Concepts

HIPAA Compliance

- Wellness plans must follow certain rules to comply with HIPAA
- Two types of wellness plans – **participatory** and **health- contingent plans**
- Rules that apply depend on type of plan
- Enforced by the Department of Labor (DOL)

REMINDER: HIPAA only applies to wellness programs that provide medical care or are connected with group health plans

Types of Wellness Plans

Participatory Plans

- Do not require individuals to meet a standard related to a health factor to receive reward (or do not provide reward)
- *Example:* Employees who attend an online nutrition class receive a discount for health plan premiums

Health-contingent Plans

- Require individuals to satisfy a standard related to a health factor to receive a reward
- *Example:* Employees who do not use tobacco receive a discount on health plan premiums
- Two different types (activity-only and outcome-based)

➤ Participatory Plans

- To comply with HIPAA, program must be available to all similarly situated individuals (regardless of health factor)



- No limit on financial incentives (under HIPAA)
- Other laws (ADA and GINA) may limit incentives, depending on plan design

➤ Health-contingent Plans

These wellness plans require individuals to **satisfy a health standard** to receive a reward

Activity-only

- Complete a health-related activity to obtain a reward
- Does not require specific health outcomes
- *Example:* Participate in exercise program

Outcome-based

- Attain a certain health outcome to obtain a reward
- *Examples :* Do not use tobacco, meet exercise goals or attain certain biometric test results

➤ Health-contingent Plans

Must meet **five standards** under HIPAA

#1 – Frequency

- Must provide eligible individuals with an opportunity to qualify for the reward **at least once per year**

#2 – Reasonable design

- Must be **reasonably designed** to promote health or prevent disease

➤ Health-contingent Plans

#3 – Size of Reward

- Total reward cannot exceed **30 percent** of the total cost of employee-only coverage under the plan
- Maximum reward for plans designed to prevent or reduce tobacco use is **50 percent** of plan cost
- Total cost includes both employee and employer contributions
- Non-financial incentives (for example, gift cards) are subject to these incentive limits

➤ Health-contingent Plans

#4 – Reasonable Alternative Standard

- The full reward must be available to all similarly situated individuals
- The plan must provide a **reasonable alternative standard** to qualify for the full reward (or waive the initial standard) in certain situations
- Employers have flexibility in designing alternative standard
- *Examples:* Attend smoking cessation class or nicotine counseling program
- Not required to establish an alternative standard unless an individual requests one (but must disclose availability)



Reasonable Alternative Standard

Must provide a reasonable alternative standard upon request to an individual when:

Activity-only
plans

- It would be unreasonably difficult (or inadvisable) due to a medical condition to satisfy the plan's standard
- May request verification

Outcome-
based plans

- Individual does not meet the initial standard based on the measurement, test or screening
- Cannot request verification

» Compliance Focus – 2019

The DOL is **actively enforcing** HIPAA's wellness requirements. Failing to provide a reasonable alternative is a common problem.

ChemStation International, Inc.

- Wellness plan offered lower premiums to participants who met certain health outcomes (body mass index, no tobacco use, blood pressure, etc.)
- No reasonable alternative standard for receiving premium discounts
- Employer settled lawsuit with DOL in October 2018. Agreed to pay \$59,189 to participants who did not receive discounts

Dorel Juvenile Group

- Wellness plan imposed a health plan premium surcharge on participants who used tobacco
- No reasonable alternative standard for avoiding surcharge
- Employer settled lawsuit with DOL in November 2018. Agreed to pay \$14,563 penalty and \$145,635 to plan participants for tobacco surcharges
-

➤ Health-contingent Plans

#5 – Employee Notice

- Must disclose the availability of a reasonable alternative standard (or waiver of plan's standard)
- Notice must be included in all materials that describe the terms of the wellness plan
- Notice must include:
 - Contact information for obtaining alternative standard
 - Statement that physician recommendations will be accommodated

Sample employee notice

The DOL maintains a sample employee wellness notice. This sample should be customized for a specific wellness program.

Sample Notice

You 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, your doctor) to find a wellness program with the same reward that is right for you in light of your health status.

ADA 

Key Concepts

Americans with Disabilities Act (ADA)

- Applies to employers with 15 or more employees
- Prohibits employers from discriminating based on disability
- Special rules apply to wellness programs
- Enforced by the Equal Employment Opportunity Commission (EEOC)

➤ General Requirements

ADA Protections

Must ensure that qualified individuals with disabilities:

- Have **equal access** to the wellness plan's benefits
- Are not required to complete additional requirements to obtain **equal benefits** under the plan
- Are provided with **reasonable accommodations** to allow them to fully participate in the plan and earn any rewards



Medical Exams or Health Inquiries

ADA Restrictions

- After employment begins, medical exams and health inquiries are only permitted if they are job-related
- Exception for **voluntary wellness programs**
- Many wellness plans include a health risk assessment (HRA) or biometric testing

Voluntary Wellness Programs

- For a long time, no EEOC guidance on requirements for voluntary wellness plans
- Main issue – permissible level of incentives
- Final EEOC rule – effective Jan. 1, 2017

➤ Final Rule's Incentive Limits

- The final rule established a **30 percent limit** for permissible incentives
- Federal court vacated EEOC's incentive limit, effective for 2019
- Plaintiffs argued the 30 percent limit was too high and inconsistent with ADA's voluntary requirement
- Effective **Jan. 1, 2019**, that incentive limit was removed from final rule



➤ Removal of Incentive Limits

2019 Compliance

- Impacts wellness programs that ask for health information or include medical exams
- Can no longer rely on 30 percent incentive limit
- Must be careful about structuring wellness incentives – wellness program still must be considered voluntary
- EEOC may issue a new proposed rule (timing uncertain due to vacancies at EEOC)

➤ Design Options

Remove Reward

Remove rewards from wellness program

Lowest risk for employers

Difficult to encourage participation



No Change

Keep reward at 30 percent

Unlikely that the EEOC would challenge

May face employee lawsuits



Increase Reward

Reward that exceeds 30 percent

Riskiest option for employers

EEOC and employees may sue

➤ Final Rule's Requirements

A wellness program that asks for health information or includes medical exams must meet **four standards** under the ADA

#1 – Reasonable Design

- Must be reasonably designed to promote health or prevent disease
- A program that collects information without providing feedback to employees (or using the information to design health programs) is not reasonably designed

➤ Final Rule's Requirements

#2 – Confidentiality

- Medical information must be kept confidential
- In general, employers may only receive medical information in aggregate form (does not disclose identify of specific employees)

#3 Employee Notice

- Must provide a notice that explains the rules for collecting medical information, including who will receive it and the confidentiality rules
- Must be provided before employees provide health information
- EEOC has a sample notice for employers to use - <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>
-

➤ Final Rule's Requirements

#4 – Voluntary

- Employees cannot be required to participate in the program
- Employers cannot deny access to health coverage or limit benefits for employees who do not participate
- Employers cannot take any other adverse employment action or retaliate against employee who choose not to provide health information
- Unclear what level of incentives are permissible

➤ Tobacco Cessation Programs

- **Asking employees** about tobacco use
 - Not subject to ADA's rules for voluntary wellness plans
 - Subject to 50 percent reward under HIPAA (plus reasonable alternative)
- **Medical test** for tobacco use
 - Medical exam = subject to the ADA's rules for voluntary wellness plans
 - Uncertainty about permissible reward (beginning in 2019)



GINA 

➤ Key Concepts

Prohibits discrimination based on genetic information.

Genetic Information

- An individual's genetic tests
- The genetic tests of the individual's family members
- Family medical history
- An individual's receipt of genetic services (including genetic counseling)

Wellness plans that include **family medical history questions** (for example, as part of an HRA) must comply with GINA



Title I – Group Health Plans

Applies to
wellness
programs
offered
under
group
health
plans

Group health plans cannot collect genetic information in connection with enrollment or for underwriting purposes

Underwriting is broadly defined to include rules for benefit eligibility and premium or contribution amounts

Wellness plans that provide health plan rewards (e.g., premium reduction) for providing genetic information, such as family medical history, violate GINA



Title I – Group Health Plans

Permissible designs for HRAs that include family medical history

Do not provide a reward for an HRA that collects family medical history

Provide a reward but remove family medical history questions from the HRA

Offer separate HRAs – one that includes rewards but does not collect family medical history and one that does not include any rewards but collects this information

Title II – Employers

Wellness
plans
offered
outside
of group
health
plans

Employers with 15 or more employees cannot discriminate against employees based on genetic information

GINA also limits covered employers' ability to request genetic information

Special exception for wellness plans

➤ Special Exception

Employers may request family medical history under a wellness plan if:

- The employee voluntarily provides the information;
- The employee gives written authorization;
- Individually identifiable genetic information is not disclosed to the employer, except in aggregate form

Rules for rewards

- Cannot reward employees for providing family medical history
- Must clearly state that reward is available even if individual does not provide genetic information

➤ Spouse's Health Information

- Wellness plans can ask family members to complete HRA
- This information is genetic information for employee (family medical history)
- EEOC final rule – included 30 percent incentive limit for spouse's completion of HRA
- EEOC removed this incentive limit, effective Jan. 1, 2019



Tax Rules for Incentives

➤ General Tax Rules

- Incentives are subject to same tax rules as other employee rewards or prizes
- No special exemption
- **General rule**– Any wellness incentive that is not medical care is taxable, unless it qualifies as a nontaxable fringe benefit
- Cash and cash equivalents are always taxable



Common Incentives

Incentive	Tax Rule
Cash and gift cards	Taxable
Gym and health club memberships	Taxable (unless prescribed as medical care)
Health seminars or classes	May be excluded as a nontaxable fringe benefit, depending on value and frequency
Paid time off	Wages are taxable
Reduction of health plan cost-sharing	Nontaxable medical expenses
Employer contributions to HSA, HRA or health FSA	Nontaxable medical expenses (but need to consider nondiscrimination rules)

➤ Tax Mistakes

Common Employer Mistakes

- Assuming all incentives are nontaxable because wellness plans provide medical care
- Assuming wellness incentives are nontaxable because they are small
- Failing to communicate an incentive's taxability to employees

ERISA, COBRA and HIPAA Privacy

Key Points

Wellness programs that provide medical care are subject to:

- ERISA
- COBRA
- HIPAA Privacy and Security Rules

Examples of medical care:

- Biometric screenings
- Immunizations
- Physical exams
- Counseling services

Compliance Requirements

LAW	APPLICABILITY	REQUIREMENTS
ERISA	Private-sector employers (churches are exempt)	Sets minimum standards for employee benefit plans including: <ul style="list-style-type: none">• Plan document and summary plan description (SPD)• Form 5500 reporting• Fiduciary standards of conduct
COBRA	Employers with 20 or more employees (churches are exempt)	Requires group health plans to offer continuation coverage to qualified beneficiaries when coverage would otherwise be lost due to a qualifying event.
HIPAA Privacy and Security Rules	Group health plans	<ul style="list-style-type: none">• Health plans must protect individuals health information – called protected health information (PHI)• Wellness plans that are related to a group health plan are also subject to HIPAA Rules

Compliance Strategy

Compliance Tips

- To simplify compliance, employers often incorporate wellness plans into their group health plans (GHPs)
- Only individuals who participate in GHP are eligible for wellness plan
- Describe wellness plan in GHP's plan document/SPD (ERISA)
- Include wellness plan in GHP COBRA notices (only individuals who elect COBRA for GHP are eligible to continue wellness plan)
- Health information collected by wellness program is PHI and must be protected

Questions? 

Thank you

This presentation is current as of the date presented and is for informational purposes only. It is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Please contact legal counsel for legal advice on specific situations. © 2019 Zywave, Inc. All rights reserved.