

Wellness Programs Under Attack: Is Yours Legal?

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Wellness Under Attack

- ❖ The EEOC, through its Chicago Regional Office, has filed three lawsuits since August 2014 challenging employers' wellness plans
 - The EEOC has, in these lawsuits, alleged violations of the Americans With Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”)
 - Two of the lawsuits have involved arrangements alleged to involve unusually harsh consequences for not fully participating in the wellness program
 - The third lawsuit, however, brought against Honeywell, involves a not unusual wellness design
 - The lawsuits do not allege violations of the HIPAA health factor nondiscrimination rules, as modified by the Affordable Care Act (“ACA”)

Wellness Under Attack

- ❖ The first two lawsuits, against Orion Energy Systems, Inc. and Flambeau, Inc., were filed in October and September of 2014, respectively
 - These lawsuits focused on the ADA, not GINA or the HIPAA/ACA rules
 - In *Flambeau*, the EEOC alleged that the employer violated the ADA by requiring an employee to submit to medical testing and assessment in connection with a wellness program or face “dire” consequences

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- Specifically, the EEOC alleged the following:
 - The employer, through its wellness program, required employees to complete biometric testing and a health risk assessment
 - The biometric testing involved blood work and measurements, and the health risk assessment required employees to self-disclose their medical history
 - When a particular employee did not timely complete the biometric testing and health risk assessment (because he was on medical leave and in the hospital), the employee's health insurance was cancelled, though he was told he could apply for COBRA coverage
 - If the employee had completed the biometric testing and health risk assessment, the company would have covered roughly 3/4 of the employee's health insurance premiums

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- The biometric testing and health risk assessment included disability-related inquiries and medical examinations within the meaning of the ADA, and the wellness program thereby violated the ADA's prohibition on non-voluntary medical examinations and disability-related inquiries
 - The ADA includes a general prohibition on employers requiring a medical examination, or making inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of an employee's disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity
 - The EEOC has, however, in enforcement guidance indicated that employees may be asked disability-related questions, and may be given medical examinations, pursuant to "voluntary" wellness programs

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- The medical examinations and inquiries were not voluntary, and were therefore impermissible, because (a) the employee was subjected to termination of his health insurance and a financial penalty of having to pay the entire premium cost under COBRA to obtain reinstated coverage as a result of not completing the examinations and inquiries, (b) the company told the employee (and other employees) that participation in the examinations and inquiries was “mandatory” to be on the company’s medical insurance, (c) the company told employees that failing to attend testing at their scheduled time would result in “disciplinary action,” and (d) the company did not provide health insurance to new employees unless they submitted to the examinations and inquiries and did not offer coverage to existing employees without the COBRA premium “penalty” unless they submitted to the examinations and inquiries

Wellness Under Attack

- If, in fact, the employer made biometric testing and health risk assessments a condition of coverage under the company's health plan (rather than merely offering an incentive for those activities), this would be quite an unusual arrangement

Wellness Under Attack

- ❖ In the second lawsuit, against Orion Energy Systems, Inc., the EEOC again alleged that a wellness program violated the ADA
 - The EEOC alleged the following:
 - The employer's wellness program required employees to complete health risk assessments, under which the employees were required to self-disclose their medical history and have blood work performed
 - The wellness program included a fitness component, under which employees were required to use a Range of Motion machine in the company's physical fitness room, and in order to use that machine, employees had to fill out a medical history form

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- A particular employee who chose not to participate in the wellness program, and in particular who refused to complete the health risk assessment, was required to pay the entire cost for single health coverage, while the company would have covered the entire amount of her cost of coverage had she participated in the wellness program. (Although the company admitted the employee was required to pay the entire cost for coverage, it denied it would have covered her entire cost had she participated in the wellness program.)
- The employee who chose not to participate in the wellness program was assessed a penalty of \$50 a month for failure to participate in the fitness component of the program

Wellness Under Attack

- These features of the wellness program included disability-related inquiries and medical examinations within the meaning of the ADA, and were not job-related or consistent with business necessity and were not part of a voluntary wellness program, so were impermissible under the ADA
- The arrangement was not “voluntary” because the employee was subjected to a financial penalty (and subsequently fired) for not participating in the program

Wellness Under Attack

- If the EEOC's allegations that the company would pay the entire cost of health coverage for those participating in the wellness program, but none of the cost of that coverage for those not participating in the wellness program, were true, the program would be highly unusual

Wellness Under Attack

- ❖ The third case, against Honeywell, is more concerning because it involves a more typical wellness program
 - In the case against Honeywell, the EEOC made the following allegations:
 - Starting with 2015 coverage, employees (and their spouses, if they had family coverage) must undergo biometric testing, which would include a blood draw
 - Employees' and their spouses' biometric testing results would be screened for blood pressure (systolic and diastolic), HDL and total cholesterol, glucose, and height, weight and waist circumference (BMI)

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- The biometric screening would also check for nicotine and cotinine
- Employees would be “penalized” if they or their spouses did not take the biometric test, in the following ways:
 - The employee would lose HSA contributions from the company, which could be as much as \$1,500 for the year (the amount would depend on the employee’s annual base wage and type of coverage)
 - The employee would be charged a \$500 surcharge that would be applied to his or her 2015 medical plan costs
 - The employee would be charged a \$1,000 “tobacco surcharge,” even if the employee chooses to not go through the biometric testing for reasons other than smoking

Wellness Under Attack

- The employee would be charged another \$1,000 “tobacco surcharge” if his or her spouse did not submit to the testing, even if the spouse declined to participate for reasons other than smoking
- The total of the charges above could result in a “penalty” of up to \$4,000
- The biometric testing is a medical examination within the meaning of the ADA and is not intended to determine whether the employees can perform the essential functions of their jobs or pose a direct threat to the health or safety of themselves or others
- The biometric testing is not job-related or consistent with business necessity, and is not voluntary, and is therefore an unlawful medical examination of current employees under the ADA

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- Where employees' spouses are covered under the plan, the company requires spouses to undergo the biometric testing or employees will incur penalties or lose incentives
 - The company is, as a consequence, offering an inducement within the meaning of GINA to obtain medical information about its employees' spouses, including information that can show hypertension, diabetes, and potentially other conditions
 - Medical information related to manifested conditions of a spouse is family medical history of the related employee, which constitutes genetic information of the employee under GINA
 - Honeywell is therefore offering an inducement to its employees to acquire genetic information of its employees in violation of GINA

Wellness Under Attack

- Honeywell is violating Title II of GINA through its requirement that employees' spouses undergo medical testing to avoid employees' losing inducements and incurring surcharges
- Though not ruling on the legality of the Honeywell wellness program, the federal trial court hearing the matter refused to issue a temporary restraining order and preliminary injunction preventing Honeywell from instituting its wellness program for 2015

ADA Background

- ❖ Here are some important points to consider in connection with the three lawsuits recently brought by the EEOC
 - Under the ADA, an employer is prohibited from requiring medical examinations or making disability-related inquiries of current employees, unless they are job-related and consistent with business necessity
 - A “medical examination” under the ADA is a procedure or test that seeks information about an individual’s physical or mental impairments or health
 - An examination is job-related and consistent with business necessity when it is used to determine whether the employee can perform the essential functions of the job or can do so without posing a direct threat (to the health or safety of the employee or others) due to a medical condition

ADA Background

- There are two important exceptions to the ADA's prohibition on medical examinations and disability-related inquiries relevant to wellness programs
 - The first of these exceptions permits medical examinations pursuant to voluntary wellness programs
 - There is inadequate guidance on what it means for a program to be “voluntary,” and the EEOC in its enforcement guidance says testing is voluntary only “as long as an employer neither requires participation nor penalizes employees who do not participate”
 - The EEOC argues that the Honeywell examinations were not voluntary because Honeywell sought to compel employees to have them by imposing large financial “penalties” on those failing to do so, saying the cost to an employee or his or her spouse of not undergoing the medical examination is “so substantial that costs cannot be said to be a mere nominal incentive”

ADA Background

- In oral arguments in a hearing in which the EEOC sought a temporary restraining order against Honeywell, the judge is purported to have asked the EEOC’s attorneys a number of times at what point a monetary penalty results in a compulsion, but the EEOC attorneys reportedly said they could not draw a clear line, though Honeywell had crossed the line
- The second important exception from the prohibition on medical examinations and disability-related inquiries of employees is under an exemption permitting an employer to establish and administer the terms of a “bona fide benefit plan” that are based on “underwriting risks, classifying risks, or administering such risks” that are based on or not inconsistent with state law, though this exemption may not be used as a “subterfuge” to evade the purposes of the ADA

ADA Background

- In an earlier court decision, *Seff v. Broward County*, a federal appeals court applied this exemption to reject an EEOC ADA challenge to a wellness program
 - In the Broward County case, participation in the wellness program was not a condition for enrollment in the County's group health plan, but the County imposed a \$20 charge on each bi-weekly paycheck for employees who enrolled in the health plan but refused to participate in a wellness program requiring biometric screening and a health risk assessment (intended to identify employees with one of five particular "disease states," who would have the opportunity to participate in a free disease management coaching program and could be eligible to receive certain disease maintenance medications without any co-pay requirement)

ADA Background

- In the Broward County case, the court concluded that the wellness program was a “term[] of a bona fide benefit plan” (the County’s health plan), even though it does not appear that the wellness program had been described as a part of the formal health plan document or that the County’s acting benefits manager considered it to be a term of the County’s actual health insurance plan
- The appeals court concluded that the ADA prohibition on medical examinations and disability-related inquiries was inapplicable because the wellness program enjoyed the bona fide benefit plan exemption

GINA Background

- ❖ GINA consists of two titles
 - Title I prohibits discrimination based on genetic information by group health plans and health issuers, and is enforced by the DOL, HHS and IRS
 - Title II of GINA is enforced by the EEOC and prohibits discrimination based on genetic information in the employment context, including a prohibition on requesting, requiring, or purchasing “genetic information” of employees and their family members, and imposes on employers possessing genetic information limited disclosure and confidentiality standards

GINA Background

- Under GINA and applicable EEOC regulations, “genetic information” means, among other things, information about the “manifestation of disease or disorder in family members of the individual (family medical history),” as well as the individual’s genetic tests (meaning an analysis of human DNA, RNA, chromosomes, and so forth, and does not include, for example, blood counts or cholesterol tests)
 - “Family medical history” is defined as “information about the manifestation of disease or disorder in family members of the individual”

GINA Background

- “Family member” means, with respect to any individual, a person who is (1) a dependent of that individual as the result of marriage, birth, or adoption, or (2) a first-degree through fourth-degree relative of the individual (a first-degree relative includes an individual’s parents, siblings, and children)
- ❖ The EEOC’s claims in the Honeywell case concern Title II of GINA
 - One exception from the prohibition on an employer requesting or requiring “genetic information of an employee or family member of the employee” is where the employer offers health or genetic services, including such services offered as part of a voluntary wellness program

GINA Background

- Under the wellness program exception, not only must the provision of genetic information by the individual be voluntary, other requirements must be met, such as the individual providing prior knowing, voluntary, and written authorization regarding the request for genetic information
- “Voluntary” means the employer neither requires the individual to provide genetic information nor penalizes those who choose not to provide it
- Under this voluntary wellness exception, an employer may not offer a financial inducement for an individual to provide genetic information, but may offer a financial inducement for completing a health risk assessment that includes family medical history questions (or other genetic information) if the employer makes clear that the financial inducement will be available regardless of whether the participant answers the questions regarding genetic information

GINA Background

- ❖ Perhaps the most surprising thing about the GINA requirements is that because of the way in which the term a “family member” is defined, and in particular because it includes an individual’s dependent as a result of marriage or adoption, information about the “manifestation of disease or disorder” in non-blood relatives, such as a spouse or adopted child, may constitute “family medical history,” which in turn may constitute “genetic information” of the employee subject to the GINA restrictions
 - In the Honeywell context, this means asking for medical information about a spouse, such as through biometric testing or health risk assessment questions, may arguably be a request for genetic information of the employee

GINA Background

- Even if information about a spouse's health or medical history is genetic information of an employee for GINA purposes, remember that there is an exception from the prohibition on requesting genetic information of an employee (or family member) in the context of a voluntary wellness program
 - Notably, the EEOC regulations say the voluntary wellness program exception is not available where an employer offers a financial inducement for an individual to provide genetic information
 - An employer may, though, offer a financial inducement for completing a health risk assessment that includes family medical history questions (or other genetic information) if the employer makes clear the financial inducement will be available regardless of whether the participant answers questions regarding genetic information

GINA Background

- ❖ As an example of the rule permitting financial inducements for completion of health risk assessments, where the employer makes clear, in language reasonably likely to be understood by those completing the HRA, that the inducement will be made available whether or not the participant answers questions regarding genetic information, an employer may, without violating the GINA Title II rules applicable to employers:
 - Offer \$150 to employees who complete a health risk assessment with 100 questions, the last 20 of which concern family medical history and other genetic information, if the instructions for completing the health risk assessment make clear that the \$150 payment will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history and other genetic information are answered.

GINA Background

- In contrast, if the instructions do not indicate which questions request genetic information, and the assessment does not otherwise make clear which questions must be answered in order to obtain the inducement, the EEOC's position is that the health risk assessment would violate GINA

GINA Background

- ❖ As an aside, an employer may, without violating GINA, offer financial inducements to encourage individuals who have voluntarily provided genetic information (such as family medical history) that indicates that they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs that promote healthy lifestyles, or to meet particular health goals as part of a health or genetic service.
 - However, to comply with GINA, these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition.

GINA Background

- For example, employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment that is permissible under the GINA rules and employees who have a current diagnosis of one or more of these conditions may be offered \$150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle without the employer running afoul of the GINA rules

GINA Background

- ❖ In addition to Title II of GINA, which is enforced by the EEOC and which is the portion of GINA at issue in the Honeywell case, there are also GINA Title I rules that apply to health plans (as opposed to employers).
 - Under Title I of GINA, a health plan may not collect genetic information for underwriting purposes, such as for determining one's eligibility for benefits.
 - A plan may, however, limit eligibility for a benefit to circumstances where the benefit is "medically appropriate." Where the medical appropriateness of a benefit depends on genetic information, the plan may then condition the benefit on genetic information. In that circumstance, the plan may request the minimum (but only the minimum) amount of genetic information necessary to determine medical appropriateness.



Health Factor Nondiscrimination

- ❖ HIPAA included health factor nondiscrimination rules affecting health plans
- ❖ The Affordable Care Act (“ACA”) modified these rules
- ❖ Government regulations were issued in June 2013 providing additional guidance on the ACA’s modifications to the HIPAA health factor nondiscrimination rules

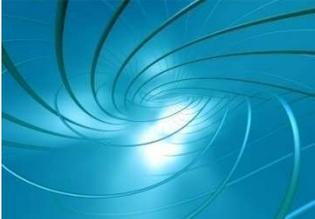


Health Factor Nondiscrimination

- ❖ HIPAA, as modified by the ACA, generally prohibits group health plans (and group health insurers) from discriminating against individual participants and beneficiaries in eligibility, benefits, or premiums based on a “health factor”

Health Factor Nondiscrimination

- ❖ There are eight health factors, as follows:
 - Health status
 - Medical condition (including both physical and mental illnesses)
 - Claims experience
 - Receipt of health care
 - Medical history
 - Genetic information
 - Evidence of insurability (including conditions arising out of acts of domestic violence)
 - Disability



Health Factor Nondiscrimination

- ❖ There is an exception to the general prohibition on health factor discrimination that allows premium discounts or rebates or modifications to otherwise applicable cost sharing (including co-payments, deductibles, or co-insurance) in return for adherence to certain programs of health promotion and disease prevention (that is, wellness programs)

Health Factor Nondiscrimination

- ❖ Under the HIPAA (and ACA) rules, wellness programs are divided into the following general categories:
 - Participatory wellness programs
 - Health-contingent wellness programs
 - Activity-only wellness programs
 - Outcome-based wellness programs

Health Factor Nondiscrimination

❖ Participatory wellness programs

- Participatory wellness programs do not provide a reward, or none of the conditions for obtaining a reward are based on an individual satisfying a standard that is related to a health factor
 - The term “reward” includes both obtaining a reward (such as a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as a deductible, co-payment, or co-insurance), an additional benefit, or any financial or other incentive) and avoiding a penalty (such as the absence of a surcharge or other financial or nonfinancial disincentives)

Health Factor Nondiscrimination

- ❖ Here are some examples of participatory wellness programs:
 - A program that reimburses employees for all or part of the cost for membership in a fitness center
 - A diagnostic testing program that provides a reward for participation in the program and does not base any part of the reward on outcomes
 - A program that encourages preventive care through the waiver of the co-payment or deductible requirements under a group health plan for the costs of, for example, prenatal care or well-baby visits

Health Factor Nondiscrimination

- A program that reimburses employees for the costs of participating in, or that otherwise provides a reward for participating in, a smoking cessation program without regard to whether the employee quits smoking
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar
- A program that provides a reward to employees who complete a health risk assessment regarding current health status without any further action (educational or otherwise) required by the employee with regard to the health issues identified as part of the assessment

Health Factor Nondiscrimination

- ❖ Participatory wellness programs satisfy the HIPAA health factor nondiscrimination requirements if participation is made available to all similarly-situated individuals, regardless of health status
 - As to the “all similarly-situated individuals” requirement, if, for example, a plan were to make available a premium discount in return for attendance at an educational seminar, but only healthy individuals were provided the opportunity to attend, the program would discriminate impermissibly based on a health factor
 - In contrast, if all similarly-situated individuals were permitted to attend, but a particular individual could not attend because the seminar was held on a weekend day and the individual was unavailable to attend at that time, this would not cause the program to discriminate against that individual based on a health factor, because it would have been a scheduling limitation that interfered with the individual’s ability to take part in the program, not his or her health status

Health Factor Nondiscrimination

- ❖ Stiffer requirements apply to health-contingent wellness programs, which, recall, are of two types:
 - Activity-only wellness programs
 - Outcome-based wellness programs

Health Factor Nondiscrimination

- ❖ A health-contingent wellness program is one that requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly-situated individual based on a health factor to obtain the same reward)

Health Factor Nondiscrimination

- ❖ Activity-only wellness programs are a type of health-contingent program that require an individual to perform or complete an activity related to a health factor in order to obtain a reward, but do 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

Health Factor Nondiscrimination

- ❖ Outcome-based wellness programs are a type of health-contingent wellness program that require an individual to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward
 - To be permissible, outcome-based programs typically must have two tiers, the second of which is for individuals who do not attain or maintain the specific health outcome, and for whom compliance with an educational program or an activity may be offered as an alternative to achieve the same reward

Health Factor Nondiscrimination

- Example: An outcome-based wellness program might test individuals for specified medical conditions or risk factors (including utilizing biometric screening testing for high cholesterol, high blood pressure, abnormal body mass index, or high glucose level) and provide a reward to individuals identified as within a normal or healthy range for these medical conditions or risk factors, while requiring individuals who are identified as outside the normal or healthy range (or at risk) to 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

Health Factor Nondiscrimination

- ❖ Activity-only wellness programs must meet the following 5 requirements:
 1. At Least Once Per Year. Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year

Health Factor Nondiscrimination

2. Reward Not Too Big. The reward must not be too large. Specifically, the reward for an activity-only wellness program, together with the reward for other health-contingent wellness programs (whether activity-only or outcome-based) must not exceed the “applicable percentage” of the total cost of employee-only coverage under the plan
 - The applicable percentage is 30 percent, except it is increased by up to an additional 20 percentage points (up to 50 percent) to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use



Health Factor Nondiscrimination

- If, in addition to employees, any class of dependents (such as spouses or spouses and dependent children) may participate in the wellness program, the reward may not exceed the applicable percentage of the total cost of the coverage in which an employee and any dependents are enrolled
- The cost of coverage is determined for this purpose based on the total amount of employer and employee contributions toward the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage

Health Factor Nondiscrimination

- ❖ Example 1 (of Applicable Percentage for Rewards)
 - Annual premium for employee-only coverage of \$6,000 (employer pays \$4,500 per year and employee pays \$1,500 per year)
 - Health-contingent wellness program includes several components, focused on exercise, blood sugar, weight, cholesterol, and blood pressure
 - Reward for compliance is annual premium rebate of \$600
 - This does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage, which would be \$1,800 ($\$6,000 \times 30\% = \$1,800$)

Health Factor Nondiscrimination

❖ Example 2

- Tobacco prevention program only
- Employees who have used tobacco in the last 12 months and are not enrolled in plan's tobacco cessation program are charged annual \$1,000 premium surcharge (in addition to their employee contribution)
- Costs for plan coverage are otherwise as in Example 1
- The reward for the wellness program (the absence of a \$1,000 surcharge) does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage, which is \$3,000 ($\$6,000 \times 50\% = \$3,000$)

Health Factor Nondiscrimination

❖ Example 3

- Costs for coverage are as in Example 1
- Same health-contingent wellness program as in Example 1 (with the reward for compliance being an annual premium rebate of \$600)
- In addition, plan imposes an additional \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and are not enrolled in the plan's tobacco cessation program
- The total of all rewards (including the absence of a surcharge for participating in the tobacco program) is \$2,600 ($\$600 + \$2,000 = \$2,600$), which does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage (\$3,000) and, separately, the \$600 reward that is unrelated to tobacco use does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage (\$1,800)

Health Factor Nondiscrimination

❖ Example 4

- Total annual premium for employee-only coverage (including both employer and employee contributions) is \$5,000
- Plan provides \$250 reward to employees who complete a health risk assessment, without regard to the health issues identified as part of the assessment
- Plan also offers a “healthy heart” program, which is a health-contingent wellness program, with an opportunity to earn to a \$1,500 reward

Health Factor Nondiscrimination

❖ Example 4 (cont.)

- Even though the total reward for all wellness programs under the plan is \$1,750 (\$250 + \$1,500), which exceeds the applicable percentage of 30 percent of the cost of the annual premium for employee-only coverage ($\$5,000 \times 30\% = \$1,500$), only the reward offered for compliance with the health-contingent wellness program (\$1,500) is taken into account in determining whether the reward is too large. The \$250 reward is, in contrast, offered in connection with a participatory wellness program and therefore is not taken into account
- As a consequence, the health-contingent wellness program offers a reward that does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage

Health Factor Nondiscrimination

❖ Additional requirements for activity-only wellness programs

3. Designed to Promote Health or Prevent Disease. The program must be reasonably designed to promote health or prevent disease

- This will be the case if the program has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and 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

Health Factor Nondiscrimination

4. Similarly-Situated Individuals. The full reward must be available to all similarly-situated individuals, which requires that both of the following “Reasonable Alternative Standard” requirements be met:
- The program must allow a reasonable alternative standard (or a waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, and
 - The program must allow a reasonable alternative standard (or a waiver of the otherwise applicable standard) for obtaining the reward for any individual to whom, for that period, it is medically inadvisable to attempt to satisfy the otherwise applicable standard

Health Factor Nondiscrimination

❖ Reasonable alternative (cont.)

- A plan is not required to determine a particular reasonable alternative standard in advance of an individual's request for one, but must provide one upon the individual's request (or the condition for obtaining the reward must be waived)
- Factors considered in determining whether a reasonable alternative standard has been offered include the following:
 - If the alternative is the completion of an educational program, the plan must make the educational program available or assist the employee in finding such a program (instead of requiring an individual to find such a program unassisted), and may not require an individual to pay for the cost of the program

Health Factor Nondiscrimination

❖ Reasonable alternative (cont.)

- The time commitment required must be reasonable (and, for example, requiring attendance nightly at a one-hour class would be unreasonable)
- If the alternative is a diet program, the plan is not required to pay for the cost of food, but must pay any membership or participation fee
- Physician Recommendations. If an individual's personal physician states that a plan standard (including any recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness
 - » The plan may impose standard cost-sharing under the plan or coverage for medical items and services furnished pursuant to the physician's recommendations

Health Factor Nondiscrimination

❖ Reasonable alternative (cont.)

- If an alternative is itself an activity-only wellness program, it must meet the requirements for such programs, so that, for example, if a plan provides a walking program as an alternative to a running program, individuals for whom it is unreasonably difficult due to a medical condition to complete the walking program (or for whom it is medically inadvisable to attempt to complete the walking program) must be provided a reasonable alternative to the walking program
 - Similarly, to the extent an alternative under an activity-only wellness program is, itself, an outcome-based wellness program, it must comply with the requirements for those programs, as described later

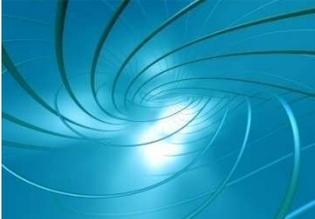
Health Factor Nondiscrimination

❖ Reasonable alternative (cont.)

- Verification. If reasonable under the circumstances, a plan may seek verification, such as a statement from an individual's personal physician, that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard of an activity-only wellness program
 - Plans may seek verification with respect to requests for an alternative standard for which it is reasonable to determine that medical judgment is required to evaluate the validity of the request

Health Factor Nondiscrimination

- ❖ Another requirement for activity-only wellness programs:
 5. Disclosure. The plan must disclose in all plan materials describing the terms of the program the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated
 - If plan materials merely mention that such a program is available, without describing its terms (such as in a Summary of Benefits and Coverage), this additional disclosure is not required
 - The June 2013 regulations include sample language that may be used to provide this disclosure



Health Factor Nondiscrimination

- ❖ Recall, health-contingent wellness programs, which must meet special rules to avoid violating the HIPAA health nondiscrimination rules, may be either “activity-only” programs or “outcome-based” programs

Health Factor Nondiscrimination

- ❖ Outcome-based wellness programs must meet the following 5 requirements to avoid violating the HIPAA health factor nondiscrimination rules:
 1. At Least Once Per Year. As with activity-only programs, the program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year

Health Factor Nondiscrimination

2. Reward Not Too Big. As with activity-only programs, the reward for an outcome-based wellness program, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed the “applicable percentage” of the total cost of coverage under the plan, using rules similar to those described above for activity-only programs
3. Designed to Promote Health or Prevent Disease. As for the activity-only programs, the program must be reasonably designed to promote health or prevent disease

Health Factor Nondiscrimination

- Reasonable Alternative Standard. For an outcome-based program, to ensure that it is reasonably designed to improve health and not act as a subterfuge for underwriting or reducing benefits based on a health factor, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test, or screening that is related to a health factor

Health Factor Nondiscrimination

4. Similarly-Situated Individuals. As with activity-only programs, the full reward under an outcome-based program must be available to all similarly-situated individuals
 - Alternative that is Activity-Based. To the extent a reasonable alternative standard of an outcome-based program is, itself, an activity-only programs, it must comply with the requirements for those activity-only programs (described earlier)

Health Factor Nondiscrimination

- Alternative that is Outcome-Based. To the extent a reasonable alternative standard under an outcome-based wellness program is, itself, another outcome-based wellness program, it must meet the normal requirements for those programs, subject to the following special rules:
 - The alternative cannot be a requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances. For example, if the initial standard is to achieve a BMI less than 30, the reasonable alternative standard cannot be to achieve a BMI less than 31 on that same date. However, if the initial standard is to achieve a BMI less than 30, a reasonable alternative standard for the individual could be to reduce the individual's BMI by a small amount or small percentage over a realistic period of time, such as within a year

Health Factor Nondiscrimination

- Physician Recommendations. An individual must be given the opportunity to comply with the recommendations of the individual's personal physician as a second reasonable alternative standard to meeting the reasonable alternative standard defined by the plan, but only if the physician joins in the request. The individual can make a request to involve a personal physician's recommendations at any time and the personal physician can adjust the physician's recommendations at any time, consistent with medical appropriateness.
- Verification. It is not reasonable to seek verification, such as a statement from an individual's personal physician, under an outcome-based wellness program that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard as a condition of providing a reasonable alternative to the initial standard

Health Factor Nondiscrimination

- If, however, a plan provides an alternative standard to the otherwise applicable measurement, test, or screening that involves an activity that is related to a health factor, the activity-only rules apply to that component. The plan may, therefore, if reasonable under the circumstances, seek verification that it is unreasonably difficult due to a medical condition for an individual to perform or complete the activity (or it is medically inadvisable to attempt to perform or complete the activity).
- For example, if an outcome-based program requires participants to maintain a certain healthy weight and provides a diet and exercise program for individuals who do not meet the targeted weight, a plan may seek verification if reasonable under the circumstances that a second reasonable alternative standard is needed for certain individuals because, for those individuals, it would be unreasonably difficult due to a medical condition to comply, or medically inadvisable to attempt to comply, with the diet and exercise program, due to a medical condition

Health Factor Nondiscrimination

5. Disclosure. As with activity-based programs, the plan must disclose in all plan materials describing the terms of an outcome-based program, and in any disclosure that an individual did not satisfy an initial outcome-based standard, the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard)

What to do?

❖ Action Steps

- Make sure wellness design complies with the HIPAA/ACA rules
- Consider incorporating a wellness program into, or at least explicitly tying it to, your group health plan, both in the formal plan documents and in communications to participants such as summary plan descriptions and benefit highlights documents, to help with argument that it is a “bona fide benefit plan” exempt from the ADA’s prohibitions on medical examinations and disability-related inquiries
 - Note that the exemption is for bona fide benefit plans that are based on “underwriting risks, classifying risks, or administering such risks” that are based on or not inconsistent with state law, and may not be used as a “subterfuge” to evade the purposes of the ADA. As a consequence, any studies or data that can support the value of the wellness program, including quantifying any salutary economic impact on the group health plan, could help with the argument that the ADA prohibition is inapplicable.

What to do?

- In health risk assessments (HRAs), consider (a) not asking employees any family medical history questions (or requesting other genetic information), or (b) offering no financial inducement for answering those questions (and making clear that there is no financial inducement for answering those questions), to minimize the risk of a GINA violation
- Consider not asking family members of employees to complete health risk assessments or get biometric screening, to minimize the risk of a GINA Title II violation

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