Bloomberg LAW

Benefits Guide: Basics, Welfare and Fringe Benefits, Wellness Programs

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Wellness Programs

In This Chapter:

(10) WELLNESS PROGRAMS

(10) The Basics —

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What are wellness and health programs? Wellness and health programs are employer-sponsored activities or practices designed to promote employee health or prevent disease. Generally, employers have wide latitude to design wellness programs. These programs must comply with various rules, however, including the provisions of the Affordable Care Act (ACA),[1] that prohibit group health plans from discriminating based upon a health factor, the prohibition on discrimination based upon disability in the Americans with Disabilities Act (ADA),[2] and the restrictions on the use of genetic information in the Genetic Information Nondiscrimination Act (GINA).[3]

[1] References to the Affordable Care Act refer to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act, Pub L. No. 111-152.

[2] Pub. L. No. 101-336.

[3] Pub. L. No. 110-233.

Benefits to Employers: Properly designed wellness programs may improve employee morale and productivity and reduce the

amount the employer pays to provide group health coverage. Employees who maintain healthy lifestyle habits, such as regular exercise and a balanced diet, are likely to become ill less frequently, experience less workplace stress, and have more energy and stamina. Also, healthier employees generally are more productive, have lower absenteeism rates and access costly health-care services less often than employees who don't maintain healthy lifestyle habits.

Components of Wellness Programs: The components of wellness programs can be divided into three categories - screening activities, preventive interventions to encourage employees to improve their health-related behavior, and health promotion activities.

• Screening activities most commonly involve health risk assessments - questionnaires that ask an employee for information about characteristics such weight and blood pressure and about behavior such as nutrition, physical activity, and smoking - or biometric screenings. Biometric screenings generally include assessments of one or more basic health indicators, such as blood pressure, body mass index, cholesterol and blood glucose levels, and can include screening results and recommendations for follow-up counseling.

• Preventive interventions can be divided into lifestyle management programs, which are designed to reduce the risk of disease, and disease management.

o Lifestyle management programs often include making information available to employees, through brochures, websites or lectures, on ways to improve health such as proper diet, exercise, or smoking cessation. Some employers also provide individual counseling on these issues. Employers may also implement programs such as step-counting to increase the amount that employees exercise.

o Disease management programs are programs targeting individuals with chronic diseases, such as heart disease, asthma or diabetes. These programs are individually targeted and developed in coordination with the employee's personal physician.

• Health promotion activities may include such items as free or subsidized gym memberships, on-site vaccinations, and making healthy food available. [4]

[4] *Alan Tawshunsky, Reasonable Alternatives in Outcome-Based Employer Wellness Programs Under the Tri-Department and EEOC Regulations,* 2016 NYU Review of Employee Benefits and Executive Compensation, Chapter 15.

Regulation of Wellness Programs: The Departments of Health and Human Services (HHS), Labor, and Treasury jointly interpret and administer the provisions of the ACA that prohibit discrimination based upon a health factor. The Equal Employment Opportunity Commission (EEOC) interprets and administers the ADA and GINA.

Additional Resources: Portfolio 330: Tax and ERISA Implications of Employer-Provided Medical and Disability Benefits; Health Care Reform Adviser.

(20) WELLNESS PROGRAMS: ADMINISTRATION

(10) Designing Wellness Programs: Important Considerations —

Key considerations in wellness program design are:

• employer objectives;

• the organization's culture;

• employees' needs and preferences;

• the prevalence of specific types of occupational risks;

- available resources; and
- limits on, and tax treatment of, various types of incentives.

(20) Wellness Programs: Goals —

Wellness Program Goals: Most employers intend their wellness programs to accomplish some or all of the following objectives:

- reduce group health-care plan expenditures;
- increase employee participation and engagement;
- create and foster a culture of health;
- encourage behavior modification, such as improvements in eating habits, weight control, regular exercise and fitness practice and reduction in tobacco use;
- improve employee morale and productivity; and
- reduce employee stress levels, injuries, and absenteeism rates.

(30) Wellness Programs: Types of Incentives —

Employers are permitted, but not required, to provide incentives for employees to participate in a wellness program or to meet goals established as part of the program. For example, the group health plans of some employers provide significantly lower premiums or deductibles for employees who participate or meet goals under the wellness program.

Incentives under a wellness program may be described by the employer either as positive incentives for participation or achieving goals or negative incentives for failing to do so. For example, if a group health plan provides lower premiums for employees who participate in a wellness program, it may describe the incentive as either a discount for employees who participate (positive incentive) or a surcharge for employees who fail to participate (negative incentive). As discussed below, the regulations under the Affordable Care Act impose limits on the incentives that may be provided under wellness programs and the limits apply in the same manner whether they are described by the employers as positive incentives for participation or achieving goals or negative incentives for failing to do so.

The ACA regulations refer to all incentives, whether described as positive or negative incentives, as “rewards” and this terminology will be used in this guide as well.

Some employers provide only minor rewards, such as t-shirts or small cash amounts. Others provide more valuable rewards, such as subsidized gym memberships, but don't penalize those who don't join the gym and don't otherwise participate in the wellness program.

(30) WELLNESS PROGRAMS: ACA REQUIREMENTS

(10) ACA Requirements —

The Affordable Care Act broadly prohibits group health plans from discriminating based on a “health factor” but provides special treatment for wellness programs that meet certain requirements. “Health factor” is a very broad term that includes any factor relating to an individual's health, including, for example, medical history, biometric information (such as blood pressure,

cholesterol, or body mass index), smoking, and genetic information. The requirements that a wellness program must meet to qualify for special treatment under the ACA nondiscrimination provisions depends on the type of wellness program.

The ACA regulations divide wellness programs into two broad categories – “participatory wellness programs” and “health-contingent wellness programs.” Under a participatory wellness program, either employees aren't required to satisfy a health-related standard in order to obtain a reward or the program doesn't offer a reward.

Under a health-contingent wellness program, employees must satisfy a health-related standard in order to receive a reward or, based on a health factor, some participating employees must undertake more than others in order to obtain a reward. As described below, the ACA regulations further subdivide health-contingent wellness programs into two categories – “activity-only wellness programs” and “outcome-based wellness programs.”

Participatory Wellness Programs: As noted, under a participatory wellness program, either employees aren't required to satisfy a health-related standard in order to obtain a reward or the program doesn't offer a reward.[5] For example, a wellness program that provides a reward for completing a health risk assessment but doesn't vary the reward based on the answers would be a participatory wellness program under the ACA regulations. Note, however, that such a wellness program could be subject to additional restrictions under the Americans with Disabilities Act, as discussed below. Other examples of participatory wellness programs include:

[5] 26 C.F.R. § 54.9802-1(f)(1)(ii); 26 C.F.R. § 54.9802-1(f)(2); 29 C.F.R. § 2590.702(f)(1)(ii), 29 C.F.R. § 2590.702(f)(2); 45 C.F.R. § 146.121(f)(1)(ii); 45 C.F.R. § 146.121(f)(2).

- attendance at periodic health education seminars;
- fitness center membership reimbursements;
- participation in physical examinations or other diagnostic tests that don't base incentives or rewards on examinations or test results; and
- reimbursements for smoking cessation aids, regardless of whether employees stop smoking.

Since participatory wellness programs don't condition a reward based on a health factor, they don't violate the ACA nondiscrimination requirements based on their treatment of employees eligible to participate in the program. The only additional requirement a participatory program must meet to satisfy the ACA nondiscrimination requirements is that the program be offered to all “similarly situated individuals” on a nondiscriminatory basis.

The regulations provide that groups of participants may be treated as not similarly situated if the distinction between the participants is “based on a bona fide employment-based classification consistent with the employer's usual business practice” and isn't targeted at individual participants and beneficiaries based upon a health factor.[6] Examples of generally permissible classifications are full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations. So, for example, an employer could offer different participatory wellness programs at different locations or could offer a participatory wellness program at one location but not the other.

[6] 26 C.F.R. § 54.9802-1(d)(1); 29 C.F.R. § 2590.702(d)(1); 45 C.F.R. § 146.121(d)(1).

Under the ACA, employers that integrate participatory wellness programs with their group health plans can offer and pay incentives or rewards to employees who take part in such programs, as long as the incentives or rewards are made available to all similarly situated employees.[7]

[7] 26 C.F.R. § 54.9802-1(f)(2); 29 C.F.R. § 2590.702(f)(2); 45 C.F.R. § 146.121(f)(2).

Health-Contingent Wellness Programs: These wellness programs require participating employees to satisfy a health-related standard in order to receive a reward or require, based on a health factor, some participating employees to undertake more than others in order to obtain a reward. Health-contingent wellness programs are further subdivided into two categories. The first category – referred to as "activity-only wellness programs" - consist of wellness programs that require an individual to engage in an activity related to a health factor in order to obtain a reward but don't require the individual to attain or maintain a specific health outcome. An example of this type of program would be a wellness program that requires all individuals to complete a specified amount of walking each week in order to obtain a reward. This activity is related to a health factor, even though the same standard applies to all similarly situated employees, because some employees with a health factor, such as employees confined to a wheelchair or those with severe asthma, may not be able to engage in the activity. [8]

[8] 26 C.F.R. § 54.9802-1(f)(1)(iv); 29 C.F.R. § 2590.702(f)(1)(iv); 45 C.F.R. § 146.121(f)(1)(iv).

The second type of health-contingent wellness program – an "outcome-based wellness program" - requires employees to attain a specific health outcome to obtain a reward. [9] For example, all individuals with a blood pressure reading at the beginning of the year above a certain level might be required to reduce their blood pressure by a specified amount by the end of the year to qualify for the reward, while all individuals whose blood pressure was at or below the specified level would receive the reward without anything further being required of them.

[9] 26 C.F.R. § 54.9802-1(f)(1)(v); 29 C.F.R. § 2590.702(f)(1)(v); 45 C.F.R. § 146.121(f)(1)(v).

(40) REQUIREMENTS THAT HEALTH-CONTINGENT WELLNESS PROGRAMS MUST SATISFY TO COMPLY WITH THE ACA NONDISCRIMINATION REQUIREMENT

(10) Nondiscrimination Requirements: Under the ACA —

Under the ACA, employers that integrate health-contingent wellness programs into their group health plans must comply with five requirements:

- opportunity to qualify at least annually;
- limits on rewards;
- reasonable design;
- uniform availability and reasonable alternatives; and
- notice. [10]

[10] 26 C.F.R. § 54.9802–1(f)(3); 26 C.F.R.§ 54.9802–1(f)(4); 29 C.F.R. § 2590.702(f)(3); 29 C.F.R. § 2590.702(f)(4); 45 C.F.R. § 146.121(f)(3); 45 C.F.R. § 146.121(f)(4).

(20) ACA Nondiscrimination Requirements: Opportunity to Qualify at Least Annually —

Health-contingent wellness programs must provide employees the opportunity to qualify for rewards at least once per year. However, employers can design programs that offer employees more frequent opportunities to qualify. [11]

[11] 26 C.F.R. § 54.9802-1(f)(3)(i); 26 C.F.R. § 54.9802-1(f)(4)(i); 29 C.F.R. § 2590.702(f)(3)(i); 29 C.F.R. § 2590.702(f)(4)(i); 45 C.F.R. § 146.121(f)(3)(i); 45 C.F.R. § 146.121(f)(4)(i).

Example: An employer's group health plan assesses a premium surcharge on plan participants who use tobacco. The plan also provides tobacco users an opportunity to avoid the surcharge if, at the time of enrollment or annual re-enrollment, they agree to complete a tobacco cessation program. A plan participant who is a tobacco user declines to participate in a tobacco cessation program during annual open enrollment, but later joins a tobacco cessation program in the middle of the plan year. The employer isn't required to waive the plan's tobacco surcharge or provide another reward to plan participant during that plan year.

(30) ACA Nondiscrimination Requirements Under: Limit on Rewards —

Health-contingent wellness programs can't provide employees with rewards that exceed 30 percent of the total group health plan premium cost of coverage. This percentage is applied to the total cost of coverage, including both the employer's and the employee's share.

In addition to the general 30 percent limit on rewards, wellness programs can provide additional rewards of no greater than 20 percent of the total premium cost of coverage, for a maximum reward of 50 percent of the total cost of coverage, if the additional percentage is in connection with programs designed to prevent or reduce tobacco use. [12]

[12] 26 C.F.R. § 54.9802-1(f)(5); 29 C.F.R. § 2590.702(f)(5); 45 C.F.R. § 146.121(f)(5).

If only the employee (and not his or her spouse or dependents) is eligible to participate in the wellness program, the percentage is applied to the cost of single coverage under the plan. If the employee's spouse or other dependents are permitted to participate in the wellness program, the percentage is applied to the cost of coverage in which the employee and dependents are actually enrolled (such as family coverage).

Example: An employer's group health plan sets the annual premium for employee-only coverage at $3,600. Under the plan, the employer pays $2,700 of the premium per year and plan participants pay $900 ($2,700 + $900 = $3,600). The employer's wellness program provides a $600 premium discount to plan participants who have a cholesterol level below 200 at the beginning of the year or who participate in a cholesterol-lowering program. Only employees, and not their spouses or dependents, are eligible to participate in the wellness program. The value of the wellness program incentive ($600) is less than 30 percent of the premium cost for employee-only coverage and satisfies the reward limit requirement ($3,600 x .30 = $1,080). Note that the 30% limit is satisfied even though employees who don't achieve the cholesterol level and don't participate in the cholesterol-lowering program pay three times the premium ($900) of employees who meet the cholesterol level or participate in the cholesterol-lowering program ($300).

(40) ACA Nondiscrimination Requirements: Reasonable Design —

Health-contingent wellness programs must be reasonably designed to promote good health or prevent disease for participating employees. Programs must not be overly burdensome, a subterfuge for discrimination based on health or highly suspect in the methods used to promote health or prevent disease. [13]

[13] 26 C.F.R. § 54.9802-1(f)(3)(iii); 26 C.F.R. § 54.9802-1(f)(4)(iii); 29 C.F.R. § 2590.702(f)(3)(iii); 29 C.F.R. § 2590.702(f)(4)(iii); 45 C.F.R. § 146.121(f)(3)(iii); 45 C.F.R. § 146.121(f)(4)(iii).

Example: An employer establishes a wellness program that rewards employees who exercise for at least two hours every day. The employer's wellness program doesn't satisfy the reasonable design requirement because it is overly burdensome.

(50) ACA Nondiscrimination Requirements: Uniform Availability and Reasonable Alternatives —

Uniform Availability: Health-contingent wellness program rewards must be available to all similarly situated employees. [14] However, employers can restrict wellness program eligibility using legitimate employment-based distinctions, so long as the distinction isn't targeted at individual participants and beneficiaries based upon a health factor. Examples of generally permissible classifications are full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations. [15]

[14] 26 C.F.R. § 54.9802-1(f)(3)(iv); 26 C.F.R. § 54.9802-1(f)(4)(iv); 29 C.F.R. § 2590.702(f)(3)(iv); 29 C.F.R. § 2590.702(f)(4)(iv); 45 C.F.R. § 146.121(f)(3)(iv); 45 C.F.R. § 146.121(f)(4)(iv).

[15] 26 C.F.R. § 54.9802-1(d)(1); 29 C.F.R. § 2590.702(d)(1); 45 C.F.R. § 146.121(d)(1).

Example: An employer establishes a health-contingent wellness program for all employees who work at the employer's headquarters location, but excludes participation for employees working at satellite offices. The distinction between headquarters employees and employees at satellite offices isn't targeted at individual participants and beneficiaries based on a health factor. The employer's wellness program is uniformly available to all similarly situated employees because the exclusion of all employees who don't work at the headquarters location is a legitimate employment-based distinction.

Reasonable Alternatives: If wellness programs include standards or other measurable achievement targets, employers must offer reasonable alternatives for employees for whom meeting the program standards would be unreasonably difficult or inadvisable due to employees' medical conditions. All facts and circumstances are taken into account to determine whether reasonable alternatives are available under health-contingent wellness programs. For example:

- if a program includes a dietary regimen as a reasonable alternative standard, employers and health plan issuers aren't required to pay for the cost of food but must pay membership or participation fees;

- if a program includes completion of an educational program as a reasonable alternative standard, employers and health plan issuers must either make the educational program available or assist employees in finding such programs;

- if an individual's personal physician states that a plan standard (including, if applicable, the recommendations of the plan's medical professional) isn't medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness; and

- the time commitment required for performing alternative activities must be reasonable. [16]

[16] 26 C.F.R. § 54.9802-1(f)(3)(iv)(C); 26 C.F.R. § 54.9802-1(f)(4)(iv)(C); 29 C.F.R. § 2590.702(f)(3)(iv)(C); 29 C.F.R. § 2590.702(f)(4)(iv)(C); 45 C.F.R. § 146.121(f)(3)(iv)(C); 45 C.F.R. § 146.121(f)(4)(iv)(C).

Activity-only Wellness program - Reasonable Alternative. Rewards under an activity-only wellness program are considered to be available to all similarly situated employees only if the program provides a reasonable alternative standard, or waiver of the standard, for obtaining rewards for employees for whom it is:

- unreasonably difficult to satisfy the standard due to medical conditions, or

- medically inadvisable to attempt to satisfy the standard. [17]

[17] 26 C.F.R. § 54.9802-1(f)(3)(iv)(A)); 29 C.F.R. § 2590.702(f)(3)(iv)(A); 45 C.F.R. § 146.121(f)(3)(iv)(A).

If a plan or issuer reasonably determines that medical judgment is necessary to evaluate an employee's request for a reasonable alternative standard, the plan or issuer can request that the employee submit verification, such as a statement from the employee's personal physician, stating that the employee's health factors make it unreasonably difficult for the employee to satisfy applicable standards or that it is medically inadvisable to do so. [18]

[18] 26 C.F.R. § 54.9802-1(f)(3)(iv)(E); 29 C.F.R. § 2590.702(f)(3)(iv)(E); 45 C.F.R. § 146.121(f)(3)(iv)(E).

Outcome-based Wellness Program - Reasonable Alternative. Rewards under an outcome-based wellness program are considered to be available to all similarly situated employees if the program provides reasonable alternative standards for obtaining rewards for employees who can't achieve program standards that are based on measurements, tests, or screenings. Employers may, but aren't required to, determine reasonable alternative standards in advance. However, employers must provide reasonable alternative standards if requested by employees or must waive the conditions for obtaining rewards. [19]

[19] 26 C.F.R. § 54.9802-1(f)(4)(iv)(A); 26 C.F.R. § 54.9802-1(f)(4)(iv)(B); 29 C.F.R. § 2590.702(f)(4)(iv)(A); 29 C.F.R. § 2590.702(f)(4)(iv)(B); 45 C.F.R. § 146.121(f)(4)(iv)(A); 45 C.F.R. § 146.121(f)(4)(iv)(B).

Employers, health plans, and health insurance issuers can't require verification that employees' health factors make it unreasonably difficult for them to satisfy or attempt to satisfy outcome-only wellness program standards as a condition of providing a reasonable alternative standard. If the initial reasonable alternative standard offered by the employer is itself an activity-only wellness program, it must comply with the requirements for activity-only wellness programs, including the

requirement to offer a further reasonable alternative if it is unreasonably difficult to satisfy the standard due to medical conditions, or medically inadvisable to attempt to satisfy the standard. [20]

[20] 26 C.F.R. § 54.9802-1(f)(4)(iv)(E) 29 C.F.R. § 2590.702(f)(4)(iv)(E); 45 C.F.R. § 146.121(f)(4)(iv)(E).

For example, if an outcome-based wellness program requires employees to maintain a certain healthy weight, and a diet and exercise program is provided as the alternative standard for employees who don't meet their targeted weight, the plan or issuer can require verification that a second, different reasonable alternative standard must be established because it is unreasonably difficult for certain employees to comply with the diet and exercise program due to employees' medical conditions. In this case, the initial reasonable alternative standard offered by the employer is itself an activity-only wellness program and must comply with the requirements for activity-only wellness programs, including the requirement to offer a further reasonable alternative if it is unreasonably difficult to satisfy the standard due to medical conditions, or medically inadvisable to attempt to satisfy the standard. [21]

[21] 26 C.F.R. § 54.9802-1(f)(4)(iv)(E); 26 C.F.R. § 54.9802-1(f)(4)(iv)(E); 29 C.F.R. § 2590.702(f)(4)(iv)(E); 45 C.F.R. § 146.121(f)(4)(iv)(E).

(60) ACA Nondiscrimination Requirements: Notice —

In all materials describing the terms of a health-contingent wellness program, whether activity-only or outcome-based, the plan or issuer must disclose 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. Outcome-based wellness programs must provide the same information in any disclosure that an individual didn't satisfy an initial outcome-based standard. If plan materials merely mention that a wellness program is available, without describing its terms, this disclosure isn't required. [22]

[22] 26 C.F.R. § 54.9802-1(f)(3)(v); 26 C.F.R. § 54.9802-1(f)(4)(v); 29 C.F.R. § 2590.702(f)(3)(v); 29 C.F.R. § 2590.702(f)(4)(v); 45 C.F.R. § 146.121(f)(3)(v); 45 C.F.R. § 146.121(f)(4)(v).

Sample Notice. Employers can prepare their own general notice of reasonable alternative standards or use the following sample language from the ACA regulations:

> *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.* [23]

[23] 26 C.F.R. § 54.9802-1(f)(6); 29 C.F.R. § 2590.702(f)(6); 45 C.F.R. § 146.121(f)(6).

For more information, see Reporting and Disclosure Tables for Health Benefits.

(50) HEALTH RISK ASSESSMENTS AND HEALTH SCREENINGS

(10) Health Risk Assessments, Biometric and Medical Screenings —

Health risk assessments are health-related questionnaires that employees are asked to complete. Employers that permit employees' dependents, such as spouses and children, to enroll in employer-sponsored group health plans may also offer the dependents the opportunity to complete an HRA.

Biometric screenings generally include assessments of one or more basic health indicators, such as blood pressure, body mass index, cholesterol and blood glucose levels, and can include screening results and recommendations for follow-up counseling. Wellness programs may include biometric screenings and other health-care related screenings to detect and prevent diseases

and other adverse mental and physical conditions.

On-site medical screenings usually are performed by licensed health-care practitioners to assist in detection of specific health conditions and indicators such as:

- breast cancer;
- colorectal cancer;
- diabetes;
- hearing loss;
- high blood pressure; and
- high cholesterol.

Some employers offer employees incentives to complete an HRA or to submit to biometric or medical screening tests. The incentives vary widely. For example, some employers offer a cash payment for completing the HRA or submitting to the tests, where the payment doesn't vary based on the responses to the HRA or the results of the tests. By contrast, other employers condition substantial rewards, such as lower premiums or deductibles under the employer's group health plan, on the results of the test. For example, the employer might provide that all employees with cholesterol below 200 pay a lower premium than those with cholesterol at or above 200. As explained above, the ACA regulations require that a reasonable alternative be provided for employees who don't meet the standard.

HRA Guide. The Centers for Disease Control and Prevention's Healthier Worksite Initiative has prepared a guide to assist employers in their HRA preparation. The CDC guide, *Health Risk Appraisals at the Worksite: Basics for HRA Decision Making*, includes a checklist of points employers should consider in designing their HRA questionnaire forms and information on making sure the HRA is complete.[24]

[24] Centers for Disease Control and Prevention's Healthier Worksite Initiative, *Health Risk Appraisals at the Worksite: Basics for HRA Decision Making* (Oct. 3, 2006).

(60) WELLNESS PROGRAMS UNDER THE ADA

(10) Wellness Programs: Definition of "Voluntary" Under the ADA —

Employer wellness programs must conform to the requirements of the Americans With Disabilities Act. The ADA generally prohibits covered employers from making disability-related inquiries[25] or requiring medical examinations, unless the examination or inquiry is shown to be job-related and consistent with business necessity, but provides an exception to this prohibition for "voluntary employee health programs", a term that includes wellness programs that meet the requirements of the statute and regulations.

[25] 42 U.S.C. § 12101 through 42 U.S.C. § 2117; 42 U.S.C. § 12201 through 42 U.S.C. 12213.

Note that wellness programs that don't involve disability-related inquiries or medical examinations aren't subject to the ADA. Depending on its terms, a wellness program may be required to comply with the requirements of both the ACA and ADA regulations, one but not the other, or neither. For example, if a wellness program provides a cash payment to all employees who fill out an HRA, and the payment doesn't vary based upon the answers, the program must comply with the ADA (because it is making disability-related inquiries) but isn't subject to the requirements of the ACA nondiscrimination regulations (because it doesn't discriminate based on a health factor). If, however, the plan varied the incentives based upon the health factors disclosed in the responses to the HRA, it would be required to comply with both the ADA and ACA regulations. To take another example, if a wellness program provides a lower premium under its group health plan to employees who participate in a walking program, the program isn't subject to the ADA, but must comply with the requirements for activity-only programs under the ACA regulations.

Under final regulations issued by the Equal Employment Opportunity Commission in May 2016, a wellness program operated in conjunction with a group health plan that includes disability-related inquiries or medical examinations is considered to be voluntary if the incentives offered under the program didn't exceed the limits discussed in the next section and if the employer didn't:

- require employees to participate in health risk assessments or provide medical information;
- deny group health plan coverage or limit plan benefits to employees who decline to participate in HRAs or provide medical information; or
- take any adverse employment actions or retaliate against employees. [26]

[26] 29 CFR § 1630.14(d)(2)(ii).

To ensure a wellness program is voluntary under the ADA, employers must provide employees with a notice that clearly explains what medical information will be obtained, how that information will be used and restrictions on disclosure.

(20) Wellness Programs: Insurance Safe Harbor Under the ADA —

The insurance safe harbor, a statutory provision of the ADA, provides that an insurer or any entity that administers benefit plans isn't prohibited from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law." In its May 2016 final ADA regulations, the EEOC stated that the insurance safe harbor provision doesn't apply to wellness programs, even if such programs are part of an employer's group health plan. [27] Various employers, however, have argued that the insurance safe harbor should apply to wellness programs, with mixed results that are discussed below.

[27] 29 C.F.R. § 630.14(d)(6); 81 Fed. Reg. 31126, 31,131 (May 17, 2016).

(40) Wellness Programs: Incentives and Rewards Under the ADA —

Many wellness programs provide rewards for competing an HRA or undergoing a medical examination. Whether the ADA sets limits on those incentives and, if so, what those limits should be, has been a controversial area and there is currently no final resolution of the issue.

The EEOC's May 2016 ADA final regulations allowed employers to offer incentives of up to 30 percent of the total costs of self-only insurance coverage. Under the regulations, any incentive greater than the allowable amount would render the wellness program involuntary and therefore ineligible for the statutory exception for wellness program in the ADA. [28]

[28] Former 29 C.F.R. §1630.14(d)(3), vacated by Removal of Final ADA Wellness Rule Vacated by Court, 83 Fed. Reg. 65296 (Dec. 20, 2018).

AARP challenged the validity of this limit. AARP agreed with the EEOC that the insurance safe harbor doesn't apply to wellness programs, but argued that the 30 percent limit in the EEOC regulations was too high.

The district court held that the EEOC had failed to provide a reasoned explanation for its 30 percent limit. The court initially declined to invalidate the limit and instead sent the regulation back to the EEOC for reconsideration. [29] However, after further proceedings, the court invalidated the provision of the regulations that imposed the 30 percent limit, effective January 1, 2019. In conformity with the court's ruling, the EEOC has withdrawn that provision of the regulations. [30]

[29] AARP v. EEOC, 267 F. Supp. 3d 14, 2017 BL 293605, (D.D.C. 2017).

[30] AARP v. EEOC, 292 F. Supp. 3d 238 (D.D.C. 2017); Removal of Final ADA Wellness Rule Vacated by

Court, 83 Fed. Reg. 65296 (Dec. 20, 2018); Removal of Final GINA Wellness Rule Vacated by Court, 83 Fed. Reg. 65296-65297 (Dec. 20, 2018).

Although the court invalidated the provision of the EEOC regulations that imposed the 30 percent limit on incentives, the remainder of the EEOC regulations weren't invalidated and remain in effect.

The statutory requirement of the ADA that a wellness program be "voluntary" also remains in effect. In several lawsuits, however, employers have argued that the insurance safe harbor should apply, and therefore the EEOC doesn't have the authority to regulate incentives, and that, in any case, large incentives shouldn't render a program involuntary, because the employee still has the option to decline the incentive.

The first two courts to rule on the issue – in the *Seff* and *Flambeau* decisions - held that providing a large incentive didn't render the wellness programs involuntary, because the insurance safe harbor applied. [31] In these cases, however, the EEOC didn't have final regulations in place at the time of the alleged violation of the ADA.

[31] Seff v. Broward Cnty., 691 F.3d 1221, 2012 BL 209791, 26 AD Cases 1153 (11th Cir. 2012); EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849 (W.D. Wis. 2015), aff'd on other grounds, 846 F.3d 941, 2017 BL 20633, 33 AD Cases 394 (7th Cir. 2017).

In its May 2016 final regulations, the EEOC strongly disagreed with the decisions in *Seff* and *Flambeau.* The EEOC specifically provided in the regulations that the insurance safe harbor isn't applicable and made that provision of the regulation effective retroactively.

In EEOC v. Orion Energy Sys., Inc., a third case involving a large incentive provided under a wellness program, the district court gave Chevron deference to the EEOC's interpretation in the regulations and held that the insurance safe harbor doesn't apply to wellness programs. At the time of the alleged violation of the ADA at issue in Orion, the provision of the EEOC regulations that limited the size of the incentive wasn't yet effective. The district court concluded that, notwithstanding the size of the incentive, the wellness program was voluntary (and thus permitted by the ADA) because the employee had the option to decline the incentive. [32]

[32] EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989 (E.D. Wis. 2016).

Thus, all three of these courts – *Seff, Flambeau,* and *Orion* – have concluded that providing large incentives to employees to participate in a wellness program doesn't cause the program to violate the ADA, either because the insurance safe harbor applies or because the programs are considered voluntary as long as the employee has the option to decline to participate. It should be noted, however, that the two cases that decided that the insurance safe harbor applied were decided prior to the effective date of the EEOC final regulations. The one case that arose after the EEOC final regulations on the insurance safe harbor became effective – *Orion* – gave Chevron deference to the regulations and concluded that the insurance safe harbor didn't apply. While the *Orion* court went on to conclude that the size of the incentive doesn't matter so long as the employee has the option to decline to participate in the wellness program, it remains to be seen if other courts will agree. Caution is therefore advised in determining the size of incentives. Moreover, if a wellness program is a health-contingent wellness program under the ACA regulations, it must comply with the limits on incentives in those regulations.

(50) Wellness Programs: Privacy Requirements —

The EEOC final regulations for wellness programs under the ADA require employers to maintain the confidentiality of the medical information and history collected and, except as specifically permitted, to disclose such information only in aggregate terms that aren't reasonably likely to disclose the identity of any employee. Exceptions to the requirement to disclose information only in aggregate form are provided for disclosures to supervisors and managers who need the information to determine necessary restrictions on the work or duties of the employee and necessary accommodations, disclosures to first aid and safety personnel if the disability might require emergency treatment and disclosures to government officials investigating compliance with the ADA. The regulations prohibit the employer from requiring the employee to agree to disclosure of the medical information and history or to waive confidentiality. [33]

[33] 29 C.F.R. § 1630.14(d)(4).

Under the EEOC final regulations, written notice must be provided to employees so those who participate in HRAs or provide medical information can reasonably understand:

• what information is being obtained and the specific purposes for which such information is being used, including who receives the information; and

• restrictions on disclosure of employees' medical information and methods used to ensure that information isn't disclosed improperly, including compliance with HIPAA privacy rules, if applicable. [34]

[34] 29 C.F.R. § 1630.14(d)(2)(iv).

The EEOC published on its website a sample notice that complies with the requirements of the ADA regulations. A single notice to employees can be used to satisfy the notice requirements of the EEOC and ACA regulations, as long as the notice complies with both sets of regulations.

For more information, see Health Information Privacy, and Health Insurance Availability and Portability.

(70) WELLNESS PROGRAMS: UNDER GINA

(10) Incentives and Rewards: Under the GINA —

GINA prohibits the use of genetic information in making employment decisions and strictly limits the disclosure of genetic information. It also restricts employers from requesting, requiring, or purchasing genetic information, unless an exception applies.

One exception permits an employer that offers health or genetic services as part of a voluntary wellness program to request genetic information if certain requirements are satisfied. The regulations under GINA issued by the EEOC make it clear that an employer-sponsored wellness program can't condition inducements to employees on the provision of genetic information.

The employer may offer inducements for completion of health risk assessments that include questions about family medical history or other genetic information, however, but only if 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 the questions regarding genetic information. So, for example, if the HRA contains 50 questions, and ten of those questions request genetic information, the employee must receive the full reward for completing the HRA even if the employee doesn't answer the questions about genetic information.

The final regulations on wellness programs under GINA, which were issued by the EEOC at the same time as the final ADA wellness regulations, contained limits on incentives for family members to participate in wellness programs that collect genetic information. The limits on incentives in the GINA final regulations, like those in the ADA final regulations, were invalidated by the AARP court, effective January 1, 2019, and have been withdrawn by the EEOC.

The EEOC regulations under GINA continue to impose significant restrictions on the collection of genetic information as part of a wellness program. The health or genetic services included in the wellness program, including any acquisition of genetic information must:

• have a reasonable chance of improving the health of, or preventing disease in, participating individuals;

• not be overly burdensome;

• not be a subterfuge for violating GINA or other laws prohibiting employment discrimination;

• not be highly suspect in the method chosen to promote health or prevent disease; and

• not impose a penalty or disadvantage on an individual because a spouse's manifestation of disease or disorder prevents or inhibits the spouse from participating or from achieving a certain health outcome. [35]

[35] 29 C.F.R. § 1635.8(b)(2).

If the program consists of a measurement, test, screening, or collection of health-related information, it must provide participants with results, follow-up information, or advice designed to improve the participant's health or the collected information actually must be used to design a program that addresses at least a subset of the conditions identified. [36]

[36] 29 C.F.R. § 1635.8(b)(2)(i)(A).

The provision of genetic information by the individual must be voluntary, meaning that the employer neither requires the individual to provide genetic information nor penalizes those who choose not to provide it. In addition, the individual must provide prior knowing, voluntary, and written authorization, which may include authorization in electronic format. This requirement is only met if the authorization form:

• is written so that the individual from whom the genetic information is being obtained is reasonably likely to understand it;

• describes the type of genetic information that will be obtained and the general purposes for which it will be used; and

• describes the restrictions on disclosure of genetic information. [37]

[37] 29 C.F.R. § 1635.8(b)(2)(C).

Individually identifiable genetic information must be provided only to the individual (or family member if the family member is receiving genetic services) and the licensed health care professionals or board certified genetic counselors involved in providing such services, and must not be accessible to managers, supervisors, or others who make employment decisions, or to anyone else in the workplace.

Employers can't impose conditions or offer inducements to employees, their spouses or dependents in exchange for selling, exchanging, sharing, transferring or disclosing their genetic information. In addition, employers can't deny health insurance benefits to employees, their spouses or dependents or retaliate against employees if their spouses refuse to provide information about diseases and disorders in connection with wellness programs.

(95) WELLNESS PROGRAMS: TAXABILITY TO EMPLOYEE

(10) Taxability —

In Chief Counsel Memorandum 201622031, issued May 2016, the IRS explained the tax treatment for employees of three types of incentives that are provided under wellness programs:

• Benefits that qualify as ‘‘medical care’’ under the Internal Revenue Code, such as health screenings and fees to attend a smoking cessation program, are excludable from income by the employee. (The cost of prescription drugs that alleviate nicotine withdrawal can also be deducted as a medical expense). [38]

Payments the employer makes that don't qualify as ‘‘medical care’’ are generally taxable to employees, and the employer must report these amounts on Form W-2 and withhold for employment taxes just as it does for other compensation it pays to its employees. Examples of these types of payments include direct cash payments to employees and payments by the employer of the cost of gym memberships. If the incentive qualifies as a ‘‘de minimis fringe benefit,’’ however, such as a T-

shirt given to employees who participate in a wellness activity, it is excludable from income by the employee even though it isn't a medical care expense. Cash payments, however, even if small, are generally not considered de minimis fringe benefits.

• If employees who participate in a wellness program receive a refund from the employer of part of the premium they paid under the employer's group health plan, and the premiums had been paid by the employees on a pre-tax basis under the employer's cafeteria plan, the refund of part of the premiums by the employer is taxable to the employees. [39]

[38] Revenue Ruling 99-28.

[39] Chief Counsel Memorandum 201622031.

(30) Weight-Loss Programs: Tax Deductibility —

IRS announced in Revenue Ruling 2002-19 that obesity is a disease and that taxpayers can deduct the cost of weight-loss programs as a medical expense, if the taxpayer is diagnosed as obese or is directed by a doctor to lose weight as treatment for a specific disease, including hypertension. Deductible costs include initial fees to join a weight-loss program, and additional fees to attend periodic meetings. [40]

[40] Revenue Ruling 2002-19.

(40) Athletic Facilities: Tax Exclusion —

Under the I.R.C. fringe benefit rules, the value of the availability or use of a gym or other athletic facility can be excluded from income by employees, so long as:

• the facility is located on employer's premises;

• the facility is operated by the employer; and

• substantially all the usage of the facility is by employees, their spouses and dependent children. [41]

[41] I.R.C. § 132(j)(4); Prop. 26 C.F.R. § 1.132-1(e).