COMPLIANCE ISSUES FOR WELLNESS PLANS

In an ongoing effort to focus on employee health, many employers are offering wellness and health promotion plans. Some employers would like to expand these wellness efforts and build a culture of health in their organizations. That culture must be driven from the top down. It recognizes these five facets of employee wellbeing:

- Career
- Social
- Financial
- Physical
- Community

Before introducing these programs, however, employers need to ensure their wellness program incentives comply with a myriad of federal and state law requirements.

This Benefit Advisor provides updates and clarifies the latest wellness plan issues:

- Latest benchmarks
- Compliance issues
  - Health Insurance Portability and Accountability Act (HIPAA) non-discrimination rules
  - Americans with Disabilities Act (ADA)
  - Genetic Information Non-discrimination Act (GINA)
  - State law

The EEOC just issued final regulations on both the ADA and GINA. This Advisor will summarize ADA and GINA. A detailed overview of these final rules will be provided in June’s Benefit Advisor.

LATEST BENCHMARKS ON EMPLOYER-SPONSORED WELLNESS PLANS

Wellness plans have become more and more popular over the last decade. These programs vary widely. Some employers offer “a la carte” programs that may include lunch and learn sessions, fitness challenges, health fairs and nutrition guidance. Other employers offer more extensive wellness programs including medical evaluations.

As employers move toward a culture of health, new wellness initiatives are taking hold. The table at the top of page 2 shows

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Employers often offer incentives or rewards to encourage employee participation in wellness programs. These incentives may include discounts to health plan contributions, gift cards, jeans days, or even a paid day off. For some activities, employees receive incentives just for participating. For other activities, employees receive incentives for achieving a specific health factor.

Because incentives do encourage employee participation in wellness programs, more employers are offering them. The Kaiser Family Foundation’s 2015 Annual Employer Health Benefits Survey shows percentage of employers offering incentives (see table at bottom of page 2).

Incentives can complicate the compliance picture.

### COMPLIANCE ISSUES TO CONSIDER WITH WELLNESS PLANS

Incentives encouraging employees to participate in these programs are important, but employers need to make sure their programs and incentives comply with HIPAA, ADA, and GINA regulations.

**HIPAA’s Non-Discrimination Rules**

HIPAA generally prohibits health plans and health insurance carriers from discriminating in terms of eligibility, benefits, premiums or employee contributions because of a health factor. However, many wellness plans do incorporate premium surcharges or sometimes even a lower level of benefits because of a health factor. This practice is permitted only because HIPAA excludes certain qualifying wellness plans from these nondiscrimination rules. To include premium surcharges or different benefit levels based on a health factor, the wellness plan must qualify under HIPAA rules.

HIPAA defines “health factors” broadly:

- Health status
- Medical condition
- Claims experience
- Current health care treatment
- Medical history
- Genetic information (added by GINA)
- Dangerous activities, such as skydiving, motorcycling and bungee jumping
- Disabilities
- Any other health-status related factor that the Secretary of Health and Human Services determines appropriate

HIPAA requirements differ depending on whether the wellness program is participatory or health contingent. Following is an explanation of both types of programs.

**Participatory Wellness Programs**

Participatory wellness programs either do not provide rewards or do not require employees to achieve a health standard in order to receive

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<table>
<thead>
<tr>
<th>Wellness Initiative</th>
<th>Large employers (500 or more employees)</th>
<th>Jumbo employers (20,000 or more employees)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Wearables&quot; to track physical activity</td>
<td>24%</td>
<td>38%</td>
</tr>
<tr>
<td>Health engagement mobile apps</td>
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<tr>
<td>Sleep disorder programs</td>
<td>39%</td>
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<td>Resiliency/stress management programs</td>
<td>42%</td>
<td>46%</td>
</tr>
<tr>
<td>Financial well-being programs</td>
<td>69%</td>
<td>86%</td>
</tr>
</tbody>
</table>

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rewards. Examples of participatory wellness programs include:

- Programs that reimburse employees for all or part of a gym membership.
- Diagnostic testing programs that reward employees for participating and do not base any of the reward on outcomes.
- Programs that reward employees for attending a monthly, no-cost health educational seminar.

HIPAA requires employers to make participatory wellness programs available to all similarly situated employees. Although HIPAA does not limit rewards for these programs, significant rewards may cause problems if other legislation affects the wellness plan.

Be careful; incentives offered under a participatory wellness program could affect affordability under the Affordable Care Act (ACA). The ACA requires large employers to either offer affordable, minimum value coverage to full-time employees or pay potential penalties. Minimum value means the plan provides at least a 60 percent level of coverage. Affordable means the cost for single coverage in 2016 is no more than 9.66 percent of the household income. For most wellness incentives tied to health insurance premiums, an employer needs to assume that an employee did not participate. The only exception is incentives tied to programs designed to reduce or prevent tobacco use. Employers can assume employees are non-tobacco users when testing contributions for affordability.

This example may help explain. Let’s say an employer offers a wellness program that provides annual biometric screenings and health assessments. Employees choosing to participate reduce their health insurance contributions by $75 a month. When testing affordability under the ACA, the employer must test the contribution assuming the employee did not participate.

**Health-Contingent Wellness Programs**

Health-contingent wellness programs require an employee to meet a health-related standard in order to receive a reward. A health-contingent wellness program could also require one employee to undertake more commitments than another similarly situated employee in order to obtain the reward. The health standard could require performing a specific activity or achieving and maintaining a specific health outcome.

Health-contingent wellness programs are divided into two types:

1. **Activity-only:** An employee must perform or complete a health-related activity to obtain a reward.
2. **Outcomes-based:** An employee must meet or maintain a specific health outcome in order to obtain a reward.

These programs have two steps.

- **Step 1:** The plan must first measure, test, or screen a participant to see whether the employee meets the initial standard. Plans can then use the results as a baseline to evaluate the outcome.

- **Step 2:** The plan must help employees who do not meet the desired outcome. A program is considered outcomes-based if a measurement, test or screening is used as part of the initial standard and those who meet the initial standard receive the reward. Those who don’t meet the standard will need another way to earn the reward.

HIPAA requires consumer protections for both types of health contingent wellness plans. While the consumer protections are similar for both, they are not exactly the same. The five consumer protections that a plan must meet are as follows:

1. Anyone eligible for the wellness program must be given the chance to qualify for the reward at least once a year.
2. The total reward for all health-contingent wellness activities cannot exceed 30 percent of the gross cost. This percentage is calculated against the coverage tier that applies. It is dependent upon who is offered the wellness activities. For example:
   - If only employees are eligible, the percentage would be calculated using the single employer gross cost.

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If employees and spouses are eligible, the percentage would be calculated using the employee plus one gross cost. If the employer has a two-tier rate structure, family rates can be used since no two-person rate is available.

HIPAA allows employers to offer up to a 50 percent incentive for programs that focus on reducing tobacco use.

3. The program must be reasonably designed to promote health or prevent disease. A wellness program is reasonably designed if it:
   - Has a reasonable chance to improve health.
   - Has a reasonable chance to prevent disease.
   - Is not overly burdensome.
   - Is not a subterfuge for discrimination based on a health factor.
   - Is not highly suspect in the method chosen to promote health or prevent disease.

Whether or not a wellness plan is considered reasonable depends on facts and circumstances.

4. The reward must be available to all similarly situated employees. In some cases, the plan will have to offer another way to achieve the reward.

   - For activity-based wellness programs, an alternative standard is necessary only if it is unreasonably difficult or medically inadvisable for the employee to achieve the original standard. Plans can require employees to have a physician verify that achieving the standard is medically inadvisable. If a plan won’t offer an alternative because it questions the physician's verification, the employee can appeal the decision through the health plan’s internal appeals and external review process.
   - For outcomes-based wellness plans, employers must offer an alternative standard to all employees that do not meet the initial standard upon request. Participants who complete the alternative standard earn the reward.

5. The program must notify employees that a reasonable alternative is available.

Employers need to consider many more details when they offer an alternative standard. The HIPAA rules include the following requirements:

   • If the alternative standard is completing an educational program, the plan must make the program available or help the employee locate a program. What's more, the employer cannot require employees to pay for the program.
     - The time commitment required must be reasonable.
     - If the alternative is a diet program, the plan must pay the membership or participation fee. It is not required to pay for food.
     - If the employee’s personal physician states that the plan’s alternative standard is not medically appropriate for the employee, the plan must provide an acceptable alternative. Employees may have to share the cost for their doctor’s visit under the plan’s cost-sharing requirements.

Employers can waive the alternative standard requirement for certain participants and simply provide the reward.

If it will take time for a participant to complete an alternative standard, the plan must provide the full reward once the employee meets that standard, even if it takes several months. For example, assume the reward is a premium discount after employees meet specific biometric targets. The alternative standard requires employees to complete several classes if they do not meet biometric targets. Let’s say an employee will complete the classes in April. Everyone who met the initial alternative standard received the discount on January 1. For employees that don’t meet the alternative standard until April, the employer must apply retroactive premium discounts for January, February,
March and part of April. Employers can determine how to award the discount. A plan could either refund the discounted amount retroactively or pro-rate the annual value of the discount over the months remaining in the plan year. However, if an employee meets the alternative standard at the end of the year, the employer must pay retroactive discounts for that year within a reasonable period of time. The employer cannot pro-rate payments over the following year.

Although HIPAA rules do not establish a time limit for completing an alternative standard, a subsequent FAQ indicates that employers can require reasonable time limits. Since the employer must provide the reward for the entire year, setting time limits for employees to request and complete the alternative makes sense.

An alternative standard, such as attending a series of classes, may be considered an activity-based wellness plan. Similarly, a walking program for employees who do not meet a body mass index (BMI) standard is also considered an activity-based wellness program. If the reasonable alternative is considered a wellness program, the program must also meet HIPAA requirements.

The final regulations recommend the wording below for the alternative standard:

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 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.

Health-contingent wellness plans must provide reasonable alternative standard annually for employees who do not meet the initial standard. For example, a smoker surcharge is considered an outcomes-based wellness program. Employers must offer non-smoker rates to employees that smoke if they complete the alternative standard. They can’t require them to quit smoking to receive the reward.

Another reasonable alternative may be requiring the employee to comply with the recommendations of a medical professional who is an agent or employee of the plan. If the employee’s personal physician says those recommendations are not medically advisable, however, the plan must provide a different standard.

Take care to include all incentives when you determine whether the plan meets the 30 percent or 50 percent allowance. For example, some plans have incentives built into the plan design. Employees that meet the health metrics or complete the alternative standard may be eligible for an enhanced level of benefits. Those that do not meet the target health metrics and do not complete an alternative standard get standard benefits. The incentive amount when incentives are built into plan design is the actuarial difference between the enhanced and standard plans. Employers need to be cautious when they add incentives. For example, assume an employer decides to add a smoker surcharge along with plan design incentives. The employer must add the smoker surcharge to the actuarial plan difference to determine whether the plan meets the 30 percent or 50 percent allowances.

The final HIPAA regulations include a number of examples of compliant and non-compliant wellness plan arrangements. These regulations can be found at https://www.federalregister.gov/articles/2013/06/03/2013-12916/incentives-for-nondiscriminatory-wellness-programs-in-group-health-plans.

ADA

The ADA limits medical information an employer can obtain from an employee. It also prohibits an employer from discriminating against an employee based on a disability.

The ADA can impact wellness plans in two ways. First, the ADA requires wellness plans meet certain conditions in order to collect medical information through health assessments and biometric screenings. Second, it prohibits employers from discriminating against employees based on a disability.
In April 2015, the EEOC released proposed regulations addressing the ADA’s impact on wellness plans. The proposed regulations differed from the HIPAA rules in several respects.

The EEOC just released final regulations related to wellness plans and the ADA. These final regulations will be discussed in detail in June’s Benefit Advisor.

**GINA**

GINA also impacts employer-sponsored wellness plans. GINA restricts acquiring and disclosing genetic information. It strictly prohibits employers from using genetic information in hiring.

The definition of genetic information is broad. It includes information about a disease or disorder in a person’s family. Wellness plans are impacted because health assessments and even biometric screenings provide information about family health history and genetically-influenced medical conditions.

At the end of 2015, the EEOC released new proposed regulations related to GINA and wellness plans. The primary focus of these regulations addressed how employers could provide incentives for spouses to complete health assessments and biometric screenings.

Final GINA regulations were just released related to wellness plans. These regulations will be discussed in detail in June’s Benefit Advisor.

**State Law Concerns**

Many state laws protect lifestyle choices of state residents. Employers should consider these laws when they structure wellness incentives.

If your organization operates in a multi-state environment, sorting through state laws can be a difficult. What’s more, because state laws tend to change over time, you also need to keep track of changes that could impact your wellness plan incentives. When you determine your approach to wellness plan incentives or penalties, check with a local employment law attorney to make sure your wellness plan does not violate any state lifestyle or employment laws.

**CONCLUDING THOUGHTS**

Most employers sponsor wellness and health management programs. Some make simple efforts, like sponsoring lunch and learns and fitness challenges. Others want to improve health. These employers often turn to outcomes-based wellness programs over time.

From simple efforts to more involved health improvement efforts, most employers tie incentives to participating in wellness programs or achieving specific health factors. Employers need to be certain that these wellness programs and incentives do not violate state or federal law.

Legislation regarding wellness programs is occasionally revised and changed. Final regulations were just released by the EEOC addressing the ADA and GINA rules. These regulations will apply to wellness plans the first day of first plan year on or after January 1, 2017. Our next Advisor will cover these final regulations in detail.

If you have any questions regarding your wellness plans, please contact your MMA-MI Account Director.