



EMPLOYEE WELLNESS PROGRAMS – THE LEGAL LIMITS

John L. Senft
Senft Law Firm, LLC
105 Leader Heights Road
York, PA 17403
(717) 747-9048



Today's Discussion

- What is a Wellness Program
- Legal Compliance
 - HIPAA
 - ADA
 - GINA
 - Internal Revenue Code
 - ERISA
 - Health Care Reform Act



Wellness Programs

- No specific legal definition
- Employer-sponsored program to lower health plan costs and improve employee health by:
 - Promoting health
 - Preventing disease
 - Encouraging healthy lifestyle changes
 - Testing for disease
 - Assessing health risks



Wellness Program Goals

- Quitting smoking
- Achieving normal weight
- Lowering blood pressure
- Exercise
- Lowering cholesterol
- Managing stress



Wellness Program Incentives

Incentives may include:

- Cash
- Free day off
- Waived deductibles/co-pays
- Lower premiums
- Health Coaches



Legal Conflicts

Federal laws have conflicting goals

- Some encourage wellness programs and healthy lifestyles
 - HIPAA, HCRA
- Others prevent discrimination based on health status or disability
 - HIPAA, GINA, ADA




Is the Wellness Program a Health Plan?

Definitions of “health plan” under Federal laws like HIPAA, COBRA, ERISA, GINA and ADA are similar.

Generally, a wellness program will be a health plan regulated by Federal laws if it provides:

- Medical benefits, through reimbursement or payment to participant or provider
- Actual testing or screening



Examples of “Health Plans”

- Blood pressure testing
- Flu shots
- Cholesterol screening
- Professional counseling
- Smoking cessation programs



Examples of Non-“Health Plans”

- Health fairs
- Weight watchers
- Gym memberships
- Health information sessions



HIPAA Applies to Health Plans

HIPAA prohibits discrimination in health plan eligibility, contributions or cost-sharing based on any health factor

- Health status
- Medical condition or history
- Claims experience
- Genetic information
- Evidence of Insurability
- Disability



Exception for Wellness Programs

- HIPAA allows a wellness program that discriminates:
 - On the benefits provided to a participant
 - On the contributions required from a participant
- HIPAA does not allow discrimination in eligibility
 - Example – refusing to enroll someone with high blood pressure



Types of Wellness Programs

- Participation-based programs
 - Rewards participation regardless of the result or any standard related to a health factor
- Examples
 - Reimbursement of smoking cessation classes regardless of smoking status
 - Waiver of co-payments for well baby visits
 - Flu shots
 - Payment for health club membership
 - Gift card to attend health fair
- Legal requirement – Program must be available to all similarly situated individuals



Types of Wellness Programs

- Standard-based programs
 - Provides a reward or surcharge only upon satisfaction of a standard related to a health factor
- Examples
 - Waiver of deductible for employees with acceptable cholesterol
 - Reduced contributions for employees with acceptable weight or BMI
 - Gift certificate for walking 30 miles a month
 - Lower premiums for non-smokers
- Legal requirements – Five Conditions



Standard-Based Programs – Five Conditions

1. Rewards must be limited
2. Program must promote health or prevent disease
3. Annual qualification
4. Rewards must be available to all similarly situated individuals
5. Disclosure of alternative standards and waivers



Condition No. 1 – Limit on Rewards

- The reward cannot exceed 20% of the total cost of coverage (employer and employee coverage)
- If employee-only wellness program, base off the cost of employee-only coverage
- If family members can participate in the program, base off the total cost for family coverage



Condition No. 2 – Promote Health or Prevent Disease

- Program must be designed to have a reasonable chance of improving health or preventing disease
- Not overly burdensome – does not have to be medically proven to actually produce results



Condition No. 3 – Annual Certification

- Individuals must be provided an opportunity to qualify for the reward/avoid the surcharge at least once per year
- Employer may offer more frequent qualification



Condition No. 4 – Availability to All Similarly Situated Individuals

- All individuals within a class of beneficiaries must have equal access to the reward
- Permits distinct groups
- Program must allow alternative ways to obtain the reward for certain individuals if
 - Standard is unreasonably difficult for the participant due to medical condition
 - It is medically inadvisable for participant to satisfy standard
- Plan may require medical verification
- Plan must waive requirement if there is no reasonable alternative standard



Condition No. 5 – Full Disclosure

- All program materials that describe the terms of the wellness program must disclose:
 - that it is possible to satisfy the standard with reasonable alternative; and
 - that it is possible to have the standard waived if there is no reasonable alternative standard



Examples of Reasonable Alternatives

- Bonus or discount for acceptable cholesterol
 - Attend cholesterol training program
- Bonus or discount for acceptable BMI
 - Participate in walking program
- Surcharge for smokers
 - Participate in cessation program, even if individual continues to smoke
- Bonus or discount for acceptable blood pressure
 - Adherence to low fat and low salt diet



Americans With Disabilities Act

- Prohibits employment discrimination against disabled individuals
- Requires employers to provide reasonable accommodation to disabled employees
- Prohibits an employer from inquiring about an employee's medical condition unless the inquiries are job related and consistent with business necessity



Medical Examinations under the ADA

- Health risk assessments are usually medical examinations
- Health risk assessments or other medical examinations permissible under ADA if:
 - Participation is voluntary
 - Medical information is kept confidential
 - Information is not used to discriminate



What is Voluntary Participation?

- Employer does not require participation
- Employer does not penalize individuals who do not participate
- EEOC Guidance – compliance with HIPAA is not a safe harbor



Genetic Information Nondiscrimination Act

- GINA prohibits employment discrimination against individuals based on “genetic information”:
 - Information about the individual’s genetic tests or the genetic tests of family members
 - Family medical history
 - Request for or receipt of genetic services
- Health risk assessments often ask medical history of family members, which is genetic information



Genetic Information Nondiscrimination Act

- Compliance with GINA:
 - Do not request genetic information prior to enrollment
 - Do not request genetic information for underwriting purposes (eligibility or computing premiums)
 - No incentive or reward for completing health risk assessment
 - Alternatively, provide reward for completing health risk assessment but do not collect genetic information



Federal Tax Laws

- Non-Taxable
 - Lower deductibles or premiums
 - Screening tests
 - Flu shots
 - Paid time off
- Taxable
 - Cash
 - Gift cards
 - Gym memberships
- Taxable benefits are subject to income and employment taxes and are reportable on W-2's



Employee Retirement Income Security Act (ERISA)

- Wellness programs that go beyond the mere promotion of general health and offer medical care are subject to ERISA
- Medical care may include
 - Conducting health risk assessments
 - Making specific recommendations to participants to engage in disease management programs
- Summary Plan Descriptions
- COBRA obligations



HIPAA Privacy Rules

- Confidentiality of protected health information
 - Health status, medical condition, history, etc.
 - Personnel record protection
 - Outsource administration of the wellness program
 - Business associate agreement with vendors



Other Laws for Consideration

- Age Discrimination in Employment Act
- National Labor Relations Act
- State Laws
- Health Care Reform Act
 - Grants for small employers (2011)
 - Certain plans – incentive increase to 30% in 2014



QUESTIONS??
