

COMPLIANCE OVERVIEW

Provided by Clarke & Company Benefits, LLC

HIPAA Nondiscrimination Rules— Workplace Wellness Incentives

Workplace wellness programs often incorporate incentives or rewards to promote healthy lifestyle choices and discourage behaviors that are detrimental to employees' good health. A workplace wellness program that relates to a group health plan must comply with HIPAA's nondiscrimination rules. These rules allow employers to provide incentives or rewards as part of a wellness program, provided the program follows certain guidelines.

In addition, beginning in 2014, the Affordable Care Act (ACA) adopted the existing HIPAA nondiscrimination requirements for wellness programs with some modifications, while also increasing the maximum reward that can be offered under these programs.

This Compliance Overview provides an overview of the types of workplace wellness programs and HIPAA's rules on the incentives or rewards that can be offered under the programs.

LINKS AND RESOURCES

- On May 29, 2013, the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury (Departments) released [final regulations](#) implementing HIPAA's nondiscrimination rules for wellness programs, as modified by the ACA.
- The final regulations are intended to ensure that every individual participating in a wellness program can receive the full amount of any reward or incentive, regardless of any health factor.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

MAXIMUM REWARDS

- HIPAA does not impose a maximum reward on participatory wellness programs.
- For health-contingent wellness programs, the maximum reward is 30 percent of the cost of health coverage.
- For health-contingent wellness programs that are designed to prevent or reduce tobacco use, the maximum reward is 50 percent of the cost of health coverage.

ADA LIMITS

- The ADA is another federal law that limits the maximum reward under wellness programs.
- The ADA's limits are similar (but not identical) to the limits imposed under HIPAA.



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CATEGORIES OF WELLNESS PROGRAMS

Under HIPAA, workplace wellness programs are divided into two categories: **participatory wellness programs** and **health-contingent wellness programs**. This distinction is important because participatory wellness programs are not subject to the same restrictions on incentives or rewards that apply to health-contingent wellness programs.

Participatory Wellness Programs

Participatory wellness programs either do not require an individual to meet a health-related standard to obtain a reward or do not offer a reward at all. Also, these programs generally do not require an individual to complete a physical activity. For example, participatory wellness programs include:

- Reimbursement for the cost of smoking cessation programs (not based on whether the employee quits smoking);
- Subsidized fitness center memberships;
- Reward for participating in diagnostic testing, such as biometric screenings (not based on outcomes); and
- Reward for completing a health risk assessment (not based on outcomes).

Participatory wellness programs comply with the nondiscrimination requirements without having to satisfy any additional standards, as long as participation is made available to all similarly-situated individuals, regardless of health status. There is **no limit on financial incentives or rewards** for participatory wellness programs.

Health-contingent Wellness Programs

Health-contingent wellness programs require individuals to satisfy a standard related to a health factor in order to obtain a reward.

Types of Health-contingent Wellness Programs

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| Activity-only wellness programs | This type of wellness program requires an individual to perform or complete an activity related to a health factor in order to obtain a reward (for example, walking, diet or exercise programs). Activity-only wellness programs do not require an individual to attain or maintain a specific health outcome. |
| Outcome-based wellness programs | This type of wellness program requires an individual to attain or maintain a certain health outcome in order to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets). Generally, these programs have two tiers: <ul style="list-style-type: none"> • A measurement, test or screening as part of an initial standard; and • A larger program that then targets individuals who do not meet the initial standard with wellness activities. |

To protect consumers from unfair practices, health-contingent wellness programs must follow certain standards related to nondiscrimination, including one that limits the maximum reward offered.

Maximum Reward

The total reward offered to an individual under an employer's health-contingent wellness programs (both activity-only and outcome-based) cannot exceed a specified percentage of the total cost of employee-only coverage under the plan. The total cost includes both employer and employee contributions towards the cost of coverage. If, in addition to employees, any class of dependents (such as spouses and dependent children) may participate in the health contingent wellness program, the reward cannot exceed the specified percentage of the total cost of the coverage in which the employee and any dependents are enrolled (such as family coverage or employee-plus-one coverage).

Effective for 2014 plan years, the ACA increased the maximum permissible reward from 20 percent to **30 percent of the cost of health coverage** for health-contingent wellness programs. In addition, the final regulations increased the maximum permissible reward to **50 percent of the cost of health coverage** for health-contingent wellness programs designed to prevent or reduce **tobacco use**.

Rewards offered under participatory wellness programs do not count toward the limit for health-contingent wellness programs. Thus, any reward for participatory programs (such as attending health education seminars) are not included in the applicable percentage for health-contingent programs.

IMPACT OF AMERICANS WITH DISABILITIES ACT (ADA)

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) issued a [final rule](#) describing how the ADA applies to employee wellness programs that include questions about employees' health or medical examinations. Although the ADA limits when employers may inquire about employees' health or require them to undergo medical examinations, these inquiries and exams are allowed if they are part of a voluntary wellness program.

The EEOC's final rule differs from HIPAA's final wellness program regulations in some significant ways. The final ADA rule provides that wellness programs that ask questions about employee health or include medical examinations may offer incentives of **up to 30 percent** of the total cost of employee-only coverage. This incentive limit applies to participatory and health-contingent wellness programs that include disability-related inquiries (for example, a health risk assessment) or medical examinations. However, participatory wellness programs that do not include disability-related inquiries or medical examinations, such as those that reimburse gym memberships or provide education programs, remain exempt from these incentive limits.

Also, the EEOC's final rule does not include a higher incentive limit for wellness programs designed to prevent or reduce tobacco use. According to the EEOC, a smoking cessation program that merely asks employees whether they use tobacco (or whether they stopped using tobacco upon completion of the program) is not a wellness program that includes disability-related inquiries or medical examinations. Thus, the EEOC's final rule would allow an employer to offer incentives as high as 50 percent of the cost of employee coverage for that smoking cessation program, consistent with the ACA's requirements.

However, an incentive tied to a biometric screening or medical examination that tests for the presence of tobacco would be limited to 30 percent under the final ADA rule.

UPDATE: On Aug. 22, 2017, a federal district court [ruled](#) against the EEOC in a lawsuit challenging its final wellness program rule. According to the court, the EEOC failed to provide a reasoned explanation for adopting the final rule's 30-percent incentive limit. Rather than vacating the final rule, the court sent the rule back to the EEOC for reconsideration. However, on Dec. 20, 2017, the court [vacated](#) the final rule's incentive limit, stating that the EEOC's unhurried approach for issuing new wellness rules is unacceptable. To avoid disruption to employers, the court stayed its ruling until **Jan. 1, 2019**. Due to these court rulings and the possibility for employee lawsuits, employers should carefully consider the level of incentives they use with their wellness programs.